

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1997

### OPINION NO. 97-01 ATTORNEY GENERAL; BOARDS AND COMMISSIONS; TAXATION:

The Department of Taxation, through the executive director, has the authority under [NRS 360.245\(1\)](#) to act independently of the Nevada Tax Commission in instituting proceedings or actions in the administration and enforcement of the tax laws, as long as it acts consistently with the regulations and policies set by the commission. The legislature's acquiescence in the department's longstanding interpretation of its authority to so act suggests that such interpretation is consistent with legislative intent. Under Rule 157 of the Supreme Court Rules, the decision on whether the interests of clients are adverse or the representation of one client is adverse to that of another is left to the sound and reasonable belief of the particular lawyer. The mere fact that the Attorney General's office may represent numerous state agencies within the executive branch, in various roles, does not constitute an inherent conflict of interest for which disqualification is necessary.

Carson City, January 16, 1997

Barbara Smith Campbell, Chairperson, Nevada Tax Commission, 1550 East College Parkway,  
Carson City, Nevada 89706

Dear Chairperson Campbell:

On November 15, 1996, the Nevada Tax Commission (Commission) requested, by unanimous vote, an opinion from this office on various issues in light of the Department of Taxation's (Department) appeals of the Commission's decisions in the contested tax cases of Newmont Gold Company (Newmont) and Kassbohrer, Inc., (Kassbohrer) to state district court. As a result of these actions and the Department's subsequent appeal of Newmont to the Nevada Supreme Court, the Commission has raised several concerns about the Department's authority to act independently of the Commission in such contested proceedings, as well as the ability of this office to effectively represent both the Department and the Commission under such circumstances. Furthermore, the Commission believes that a conflict of interest may have arisen in this office's dual role as lawyer to both the Department and the Commission, and, as such, it has sought the advice of the Legislative Counsel Bureau (Bureau) as well as Frank W. Daykin, Esquire, former Legislative Counsel, on the issue of disqualification and appointment of independent legal counsel.

Each of the questions presented by the Commission is separately addressed below:

#### QUESTION ONE

Who is the head of the Department?

#### ANALYSIS & CONCLUSION TO QUESTION ONE

In 1975, the legislature made rather substantial, if not historical, changes to the structure of the state agency responsible for enforcing most of Nevada's tax and revenue laws. *See* Act of May 27, 1975, ch. 748, 1975 Nev. Stat. 1643. These sweeping revisions, which could certainly be viewed as ushering in this state's modern tax administration era, included creation of the Department, with an executive director in charge, to exercise day-to-day supervision and

control of the tax and revenue system. *See id.* §§ 11, 17, 1975 Nev. Stat. 1646, 1648 (now codified in [NRS 360.120](#), [360.200](#)). Moreover, this legislation specifically and unequivocally designated the Commission as "[t]he head of the [D]epartment . . . ." *Id.* § 11, 1975 Nev. Stat. 1647; [NRS 360.120\(2\)](#).

## QUESTION TWO

When the Commission as a body, perceives that the Attorney General's office has developed a conflict of interest in its representation of the Commission and the Department, pursuant to Rule 157 of the Supreme Court Rules, does the Commission have the right to request independent counsel or is the issue of disqualification to be determined solely by the Attorney General?

## ANALYSIS TO QUESTION TWO

In 1986 the Nevada Supreme Court adopted "[t]he Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, with certain amendments . . . as the rules of professional conduct for lawyers who practice in Nevada . . . ." S.C.R. 150(1) (1996). These standards governing practice of law in our state are codified in Rules 150-203.5 of the Supreme Court Rules which are entitled "Rules of Professional Conduct." *Id.*

Pursuant to S.C.R. 157 (1996), once a lawyer identifies a potential conflict in his or her legal representation of multiple clients, the lawyer is ethically required to determine if the representation of that client will adversely affect another client. *See* S.C.R. 157(1)(a), (2)(a) (1996). If so, the lawyer shall not undertake such representation. *See* S.C.R. 157(1), (2) (1996). If, on the other hand, "the lawyer *reasonably believes* the representation" will not adversely affect another client, the representation may proceed, but only with the consent of each client who has been consulted. S.C.R. 157(1)(a), (2)(b) (1996) (emphasis added). Clearly, the Rules of Professional Conduct apply to lawyers, both public and private practitioners, but do not apply to their clients or, in this instance, administrative agencies or bodies.

In addition, [NRS 228.110](#), which appoints the Attorney General to represent all executive branch agencies, states as follows:

1. *The attorney general and his duly appointed deputies shall be the legal advisers on all state matters arising in the executive department of the state government.*

2. *No officer, commissioner or appointee of the executive department of the government of the State of Nevada shall employ any attorney at law or counselor at law to represent the State of Nevada within the state, or to be compensated by state funds, directly or indirectly, as an attorney acting within the state for the State of Nevada or any agency in the executive department thereof unless the attorney general and his deputies are disqualified to act in such matter or unless an act of the legislature specifically authorizes the employment of other attorneys or counselors at law.*

3. All claims for legal services rendered in violation of this section shall be void. [Emphasis added.]

Nowhere in chapter 360 of NRS has the legislature specifically authorized either the Commission or the Department to employ independent legal counsel.<sup>1</sup> Therefore, the question presented is

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<sup>1</sup> Contrary to what the Legislative Counsel Bureau has opined, NRS 360.140(2) is not a specific authorization to the Department or the executive director thereof to retain independent legal representation. NRS 360.140(2) states "[t]he executive director may employ such clerical or expert assistance as may be required." Moreover, when the legislature has authorized an executive branch agency to employ an independent lawyer it has done so with clear and unambiguous language that expresses such intent. *See* NRS 624.115(1) (State Contractor's Board ". . . may employ attorneys . . . necessary to the discharge of its duties"); NRS 625.135 (State Board of Professional Engineers and Land Surveyors "may employ and fix the

simply whether the Commission has authority to disqualify the Attorney General as its statutorily designated lawyer. The answer is clearly no.

All lawyers, including those within the Attorney General's office, are ethically obligated to refrain from representation of clients whose legal interests are adverse. *See* S.C.R. 157 (1996). The decision on whether interests of multiple clients are adverse or not is left to the sound and reasonable belief of the particular lawyer. *See* S.C.R. 157(1)(a), (2)(a) (1996).

Furthermore, the mere fact that a government lawyer exercises dual roles in representing clients does not necessarily equate a conflict from which the lawyer is disqualified from further representation. *See* Charles W. Wolfram, *Modern Legal Ethics*, Hornbook Series, 1986, p. 452. The Nevada Supreme Court has long recognized the dual functions served by the Attorney General's office in contested administrative matters.

In *Laman v. Nevada Real Estate Advisory Comm'n*, [95 Nev. 50](#), 56, 589 P.2d 166, 170 (1979), the facts concerned a deputy attorney general advising the Real Estate Advisory Commission on evidentiary matters while another deputy attorney general prosecuted a disciplinary complaint against the appellant, a licensed realtor, on behalf of the Real Estate Division. The court, relying upon its decision in *Rudin v. Nevada Real Estate Advisory Comm'n*,<sup>2</sup> held there was "no improper commingling of judicial and prosecutorial functions . . ."<sup>3</sup> *Laman*, 95 Nev. at 57.

Those courts which conclude that a conflict exists as a result of the dual functions that government lawyers sometimes assume, utilize a separation of powers theory to support their rationale. *See* WOLFRAM, MODERN LEGAL ETHICS, at 452-53. Similarly, in *Whitehead v. Nevada Comm'n on Jud. Discipline*, [110 Nev. 874](#), 879-81, 878 P.2d 913, 916-18 (1994), our Supreme Court based its decision to disqualify the Attorney General's office from further representation of the Judicial Discipline Commission in disciplinary proceedings upon a separation of powers argument.<sup>4</sup> In *Whitehead*, the court reasoned that it was an impermissible exercise of power by the executive branch over the judicial branch for the Attorney General, an executive branch agency,<sup>5</sup> to act as a prosecutor in disciplinary matters before the Judicial Discipline Commission, a body of the judicial branch.<sup>6</sup> *Whitehead*, 110 Nev. at 879-80.

Here, unlike the Judicial Discipline Commission in *Whitehead*, the Department and the Commission are agencies entirely within the executive branch.<sup>7</sup> Even though on occasion the Commission acts in a quasi-judicial manner in contested tax matters, much like the Real Estate

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compensation to be paid to attorneys . . . necessary to the discharge of its duties . . ."); NRS 631.190(2) (State Board of Dental Examiner's may "[a]ppoint such . . . attorneys . . . and define their duties and incur such expenses as it may deem proper or necessary to carry out the functions of this chapter, the expense to be paid as provided in this chapter"); NRS 638.070(3)(a) (Nevada State Board of Veterinary Medical Examiners may "employ attorneys . . . necessary to the discharge of its duties").

<sup>2</sup> 86 Nev. 562, 471 P.2d 658 (1970).

<sup>3</sup> In *Laman* the issue was whether the appellant's due process rights had been abridged or the Administrative Procedures Act had been violated as a result of the dual roles served by the deputy attorneys general. *Laman*, 95 Nev. at 56.

<sup>4</sup> *See* Nev. Const. art. 3, § 1.

<sup>5</sup> *See* Nev. Const. art. 5, § 19.

<sup>6</sup> *See* Nev. Const. art. 6, § 21.

<sup>7</sup> Pursuant to article 5, § 1 of the Nevada State Constitution, "[t]he supreme executive power of this State . . ." is vested in the Governor. Nev. Const. art. 5, § 1. As such, the Governor appoints the members of the Commission, who are the head of the Department. *See* NRS 360.010(1), 360.120(2).

Advisory Commission in *Laman*, there is no improper commingling of prosecutorial and judicial functions for one deputy attorney general to advise the Commission on evidentiary matters while a second deputy attorney general prosecutes the matter before the Commission on behalf of the Department.

### CONCLUSION TO QUESTION TWO

Pursuant to S.C.R. 157 (1996) of the Supreme Court Rules, each lawyer in Nevada, including those in the Attorney General's office, are required to abstain from representation of a client to the detriment of another. Furthermore, it is the lawyer, not the client, who must decide whether the interests are adverse based upon his or her own reasonable beliefs. The mere fact that the Attorney General's office may represent numerous agencies within the executive branch in various capacities, does not constitute an inherent conflict of interest for which disqualification is necessary. Finally, in the absence of clear and specific authorization from the legislature, neither the Department nor the Commission may retain independent legal counsel.

### QUESTION THREE

Pursuant to [NRS 360.260](#), or any other applicable state statute, under what circumstances, if any, may the Department act independently of the Commission in any legal proceedings for enforcement of law?

### ANALYSIS TO QUESTION THREE

Pursuant to [NRS 360.260\(1\)](#), the Commission has "the power to direct what proceedings, actions or prosecutions shall be instituted to support the law." This statute has existed unchanged since 1919, well before creation of the Department in 1975. At first glance, this statute appears to grant the Commission ultimate authority to control litigation and related enforcement activities initiated by the Department. However, the Commission has never construed this statute to require its express assent to all the myriad enforcement actions undertaken by the Department in its daily administration and enforcement of tax and revenue laws, whether initiated at the administrative level or in district court.

Before creation of the Department and the position of executive director, the Commission was designated as the state agency in charge of administering and enforcing the state's tax laws. After legislation in 1975 created the Department and the position of executive director as chief administrative officer of the Department, the Commission became the head of the Department. *See* 1975 Nev. Stat. 1643-46, at §§ 1, 3, 4, 11. Although the 1975 legislation did attempt to define somewhat the differing roles of the Commission and the executive director, it nevertheless left a level of ambiguity in the authority of the executive director to operate independently of the Commission. It is important to note that the 1975 legislation removed the Commission's authority to hire or fire the executive director of the agency. *See Id.* at § 11.<sup>8</sup>

Commencing in 1975, the legislature enacted numerous statutes that authorize the Department to initiate all legal actions and proceedings in its enforcement of the tax and revenue laws.<sup>9</sup> As noted above, the Commission has never taken the position [NRS 360.260\(1\)](#) requires the

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<sup>8</sup> The executive director is appointed by the governor, rather than employed by the Commission.

<sup>9</sup> For example, NRS 360.300 authorizes the Department to make a determination that a taxpayer owes additional taxes to the Department, and to serve a deficiency determination on the taxpayer seeking to collect those additional taxes. If the taxpayer does not timely challenge the deficiency determination or pay it, then the Department has been authorized by the legislature to utilize various collection devices. *See*, NRS 360.4193 (initiate an action in district court to collect); NRS 360.420 (summary judgment action); NRS 360.473 (record a lien); NRS 360.483 (issue a warrant to seize property); NRS 360.490 (lock and seal a place of business); NRS 360.510 (issue a notice to withhold and transmit monies).

executive director to obtain prior consent of the Commission to initiate any of these actions in a specific case. Rather, the Commission has been content, under [NRS 360.245\(1\)](#), to review actions taken by the executive director or one of the hearing officers of the Department.<sup>10</sup> However, [NRS 360.245\(1\)](#) has normally been applied only to appeals from the findings of fact, conclusions of law, and decisions rendered by administrative hearing officers in "contested cases" commenced upon a taxpayer filing a petition for redetermination of a deficiency determination under [NRS 360.360](#).<sup>11</sup> This statute has also been cited as the authority for the Commission to review decisions made by the executive director on taxpayer applications for a reduction or waiver in penalties and interest assessments. See [NRS 360.410](#); 360.419.

[NRS 360.245\(3\)](#) states "[t]he Nevada tax commission, as head of the department, may review all other decisions made by the executive director and may reverse, affirm or modify them." It is not clear what the legislature intended by this provision. At its broadest possible meaning, it could be argued that the Commission may review every decision made by the executive director in administration of the Department. This construction does not seem reasonable, nor has the Commission ever construed it in this fashion. Furthermore, the language of the statute would require establishment of some procedure by which decisions are reviewed. Currently, there is no regulation that provides a procedure by which the Commission reviews decisions of the executive director under the authority of [NRS 360.245\(3\)](#), nor has the Commission ever identified the sort of decisions it wishes to review under this statute.

The interpretation of a statute by the agency charged with its administration carries substantial weight. *Imperial Palace, Inc. v. State, Dep't of Taxation*, [108 Nev. 1060](#), 1067, 843 P.2d 813, 818 (1992). This is particularly true where the legislature has acquiesced in the agency's interpretation for a long period of time. *Id.*, at 1068. Moreover, recent legislation points to the conclusion that the legislature views the Commission's primary role in enforcement of tax and revenue laws as adopting regulations and establishing enforcement policies to be followed by the Department, rather than become directly involved in making decisions about whether to initiate or pursue individual cases.

In 1993, the legislature enacted [NRS 360.095](#), which states in part: "In the adoption of regulations, policies of enforcement, and policies for auditing of taxpayers, with respect to all taxes and fees for whose administration the department is responsible, the Nevada tax commission shall apply the following principles. . . ."<sup>12</sup> The language of [NRS 360.260](#) fits within this broader policy-making role for the Commission. As the roles of the executive director and the Commission have evolved since 1975, the executive director has always acted independently of the Commission in initiating actions and proceedings for enforcement of the tax laws, consistent with the regulations and policies adopted by the Commission for such enforcement. Furthermore, the historical exercise of this authority by the executive director for more than two decades has received the implicit sanction of both the Commission and the legislature.<sup>13</sup>

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<sup>10</sup> NRS 360.245(1) states as follows:

All decisions of the executive director or other officer of the department made pursuant to subsection 2 of NRS 360.130 are final unless appealed to the tax commission as provided by law. Any natural person, partnership, corporation, association or other business or legal entity may so appeal by filing a notice of appeal with the department within 20 days after service of the decision upon that person or business or legal entity.

<sup>11</sup> See NAC 360.095-.185.

<sup>12</sup> See also NRS 360.090, stating that "[T]he members of the Nevada tax commission shall have power to prescribe regulations for carrying on the business of the tax commission and of the department." NRS 360.090.

<sup>13</sup> See, for example, NAC 360.175(1) which specifically grants the Department authority to appeal adverse decisions of a hearing officer in a contested tax case to the Commission. NAC 360.175(1).

This conclusion does not resolve the issue which is the genesis of the dispute between the Department and the Commission over the executive director's authority to appeal decisions rendered by the Commission in contested cases to district court. As a result of the *Newmont* litigation, the First Judicial District Court has ruled that the Department lacks standing as an "aggrieved party" to seek judicial review of an adverse decision rendered by the Commission in a contested matter under the Nevada Administrative Procedures Act (codified in chapter 233B of NRS). See *State, Dep't of Taxation v. Newmont Gold Co.*, Order, p. 3 (First Jud. Dist. Court, Case No. 96-00894A) (September 3, 1996). The Department, after consultation with this office, abandoned an appeal of the district court's decision to the Nevada Supreme Court. Even though good faith arguments can be made that the legislature intended the Department to have standing to appeal an adverse Commission decision in a contested case, and despite the fact that this decision carries little precedential weight, this office has determined at this time to abide by the district court's ruling until such time as the legislature sees fit to provide additional guidance on this issue.

The decision to initiate actions to enforce the tax laws does not rest solely or finally with either the Commission or the Department. As the Commission and the Department are by law represented by the office of the Attorney General, the chief law enforcement officer of the state, the decision to bring suit in state or federal court is left to the sound discretion of the Attorney General. Specifically, pursuant to [NRS 228.170](#), "when, *in the opinion of the attorney general*, to protect and secure the interest of the state it is necessary that a suit be commenced or defended in any federal or state court, *the attorney general shall commence the action or make the defense.*"<sup>14</sup> [Emphasis added.] Moreover, Rule 11 of the Nevada Rules of Civil Procedure require all attorneys to commence only those actions or theories in court that can be supported by "*existing law or a good faith argument for the extension, modification, or reversal of existing law*, and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Nev. R. Civ. P. 11 (1996) (emphasis added).

### CONCLUSION TO QUESTION THREE

The Department, through the executive director, has the statutory authority to act independently of the Commission in instituting proceedings or actions in administration and enforcement of the tax laws, as long as the Department acts consistently with the regulations and policies established by the Commission for such enforcement. In the case of an action brought in the courts of this or another state, the Attorney General has the independent authority to determine whether the action will be brought or defended on behalf of the state.

FRANKIE SUE DEL PAPA  
Attorney General

By: JEFFREY R. RODEFER  
Deputy Attorney General

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OPINION NO. 97-02COUNTIES; ROOM TAX; TAXATION: The Attorney General adhered to the previous opinion rendered on August 11, 1995, in concluding that the plain meaning of the term "lodging" does not include campgrounds and recreational vehicle parks. However, the Nevada Tax Commission had authority to adopt regulations defining "lodging" to include campgrounds and recreational vehicle parks for purposes of tax on rental of transient lodging imposed by [NRS 244.3352](#) and [268.096](#).

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<sup>14</sup> The dicta of *Ryan v. Eighth Jud. Dist. Court*, 88 Nev. 638, 641, 503 P.2d 842, 844 (1972), the Supreme Court determined that the legislature intended NRS 228.170 to encompass only civil matters and not criminal prosecutions. See *Ryan*, 88 Nev. at 641.

Carson City, February 4, 1997

Ms. Patricia A. Lynch, Reno City Attorney, Post Office Box 1900, Reno, Nevada 89505-1900; Ms. Madelyn Shipman, Assistant District Attorney, Washoe County, Post Office Box 11130, Reno, Nevada 89520

Dear Ms. Lynch and Ms. Shipman:

In your letter of October 28, 1996, you requested this office to revisit a specific opinion in consideration of additional legal analysis of this issue that you have supplied to this office.

#### QUESTION

Does the tax on transient lodging set forth in [NRS 244.3351](#)-3359, inclusive apply to the gross receipts from rental of spaces in campgrounds and recreational parks?

#### ANALYSIS

On August 11, 1996, this office issued an opinion to Leon Aberasturi, Deputy District Attorney for Lyon County. We have determined the conclusion in our previous opinion is correct and offer the following analysis by way of clarification.

A state's power to license occupations and privileges is derived both from its police power and its power to tax. *Clark County v. City of Los Angeles*, [70 Nev. 219](#), 221, 265 P.2d 216, 217 (1954). Subject to constitutional prohibition or restriction, its power in either respect may be delegated by legislative act to its political subdivisions. *Id.* The extent of the power so delegated is, however, wholly dependent upon and limited by the delegating statute. *Id.*

Prior to 1983, outside of special legislation applicable only to Douglas County, there was no legislation that required or authorized local governments (county or incorporated city) to impose a tax on rental of transient lodging (commonly called the "room tax"). Instead, [NRS 244.335](#)(1) authorized county governments to:

- (a) Regulate all character of lawful trades, callings, industries, occupations, professions and business conducted in its county outside of the limits of incorporated cities and towns.
- (b) . . . [F]ix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on such trades, callings, industries, occupations, professions and business.

See also [NRS 268.095](#)(1), granting similar authority to city governments.

Under this authority, prior to 1983 some counties and cities had been imposing a business license tax for the purpose of raising revenue on businesses that rent transient lodging within the jurisdiction of the particular county or city. This is reflected in the comments in the legislative history of the Act of May 4, 1983, ch. 207, 1983 Nev. Stat. 476, which you provided. The rate and measure of the business license tax and the definition of which types of lodging the tax would apply to were left to the local governments to define in their ordinances. As you noted, the local governments that imposed a business license tax on the business of renting transient lodging were not consistent in defining either the rate or the scope of the tax, although all imposed the tax on some percentage of gross receipts as the measure. Thus, some local governments adopted ordinances taxing gross receipts from rental of space in campgrounds and recreational vehicle parks, or variations on those terms, and some did not.

The Douglas County Lodgers Tax, enacted in 1969, was a special act of the legislature that permitted Douglas County to impose an "occupation tax for revenues" on lodging within the municipality. Act of April 28, 1969, ch. 639, 1969 Stat. Nev. 1250. The tax authorized by this statute is obviously different than the business license tax authorized at the time by [NRS 244.335](#). The reason for enactment of this special legislation was apparently because Douglas County did not otherwise (and still does not) impose a business license tax for revenue purposes on any businesses at the time, yet the county needed to raise revenue to support its airport and tourism business. Thus, the special legislation allowed the county to impose occupancy tax on persons in the business of providing transient lodging in the county, without the necessity to impose business license taxes on other businesses in the county. Accordingly, this legislation is not good authority to support an argument that the taxes on transient lodging imposed under [NRS 244.3351](#)-[.3359](#), inclusive, should be construed to apply to campgrounds and recreational vehicle parks.

In 1983 the legislature enacted [NRS 244.3352](#) imposing a mandatory 1 percent tax on the gross receipts from the rental of transient lodging. See Act of May 4, 1983, ch. 207, 1983 Nev. Stat. 476. The legislature did not define either "gross receipts" or what constituted "transient lodging" in this statute. The legislature did require all local governments to adopt an ordinance imposing the tax, and to include the language in subsection (4) of [NRS 244.3352](#) in the ordinance. [NRS 244.3352](#)(1). The legislature also directed that the mandatory tax imposed by subsection (1) be "collected and administered pursuant to [NRS 244.335](#)." See [NRS 244.3352](#)(2).

In 1991, the legislature enacted [NRS 244.3351](#) which grants authority to local governments to adopt (upon a vote of the people) an additional tax of 1 percent on the gross receipts from the rental of transient lodging. See Act of March 25, 1991, ch. 19, § 2, 1991 Nev. Stat. 25. The Washoe County Tax on Transient Lodging was enacted as part of that legislation. 1191, Nev. Stat. at 45. This optional tax, if adopted, was to be enforced and administered the same way as the mandatory tax imposed under [NRS 244.3352](#). See [NRS 244.3351](#)(3).

It is clear the legislature has not attempted to define the term "lodging" or otherwise identify the types of "lodging" that local governments are authorized to tax under chapters 244 or 268 of NRS. The local ordinances of which we are aware have done so. The opinion previously rendered by this office assumed that in addition to the authority to tax the gross receipts from rental of transient lodging granted by the legislature to local governments in [NRS 244.3351](#) and [244.3352](#), the legislature had the authority to define the rate and measure of the tax, as well as the types of businesses or business activities which were subject to it.

The fact that the legislature declined to define in [NRS 244.3352](#) or 268.096 what activities constitute "rental of transient lodging" does not necessarily lead to the conclusion that the legislature gave local governments the authority to carry out this task. This is made clearer by [NRS 364.125](#), in which the legislature directed the Nevada Tax Commission (Commission) to adopt regulations to provide for collection and enforcement of the tax imposed by [NRS 244.3352](#) and [268.096](#). See Act of May 10, 1983, ch. 241, 1983 Stat. Nev. 542. Obviously, as demonstrated by the legislative history, there was some legislative concern over whether and when the local governments would adopt ordinances imposing the 1 percent tax mandated by [NRS 244.3352](#) and [268.096](#). Thus, the legislature made the tax effective May 9, 1983, and gave the Commission authority to collect and enforce the tax, as well as to adopt regulations to administer the tax, even though the legislature intended for the tax to be collected and enforced ultimately by the local governments. Act of May 10, 1983, ch. 241, at § 2.

The Commission has not adopted substantive regulations to define operative terms of [NRS 244.3352](#) and [268.096](#). In the absence of such regulations, it is our opinion, as previously expressed, that the plain meaning of the term "lodging" should prevail absent compelling evidence



the legislature intended to include campgrounds and recreational vehicle parks.<sup>15</sup> However, we believe that under [NRS 364.125](#) the Commission has the authority to define these terms, and should at this point exercise that authority to adopt regulations that define the operative terms of the tax, in particular, what constitutes "gross receipts from rental of transient lodging," and what types of transient lodging are subject to the tax. We believe the term "transient lodging" could reasonably be interpreted to include campgrounds and recreational vehicle parks, but that this interpretation must first be codified in a regulation. Regulations defining the measure and scope of the tax would be beneficial by establishing a uniform statewide standard, while leaving decisions about the exact total rate of tax to be imposed on those in the business of renting transient lodging to each local government.

### CONCLUSION

Based on the foregoing analysis, we adhere to the conclusions in the opinion rendered by this office on August 11, 1996, but with the suggestion that regulations be presented to the Commission to define the operative terms of [NRS 244.3352](#) and [268.096](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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**OPINION NO. 97-03**LOANS; PAWNBROKERS; LICENSES: To qualify as a pawnbroker as defined by [NRS 646.010](#), a person must, as some part of his business, make loans that provide for the pledge of personal property or automatic passing of title to the collateral for the loan at the expiration of a period of redemption. Persons who do not, as any part of their business, make loans in this manner, are not acting as pawnbrokers but may be regulated pursuant to other applicable laws governing the business of lending.

Carson City, February 10, 1997

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division, 406 East Second Street, Carson City, Nevada 89710

Dear Mr. Walshaw:

In an opinion issued in 1995, this office concluded that persons who make loans secured by the title to motor vehicles are acting as pawnbrokers as defined in [NRS 646.010](#) and are therefore exempt from licensing as installment lenders pursuant to [NRS 675.040\(1\)](#). Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995). Prior to issuance of that opinion, the Financial Institutions Division (Division) interpreted [NRS 675.040\(1\)](#) as exempting "auto-pawn" activities only when the lender took physical possession of the vehicle providing security for the loan. Based on the prior interpretation, the Division issued an installment lender's license to a company that, for the most part, only makes loans secured by motor vehicles. The lender in question perfects a security

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<sup>15</sup> There is some evidence that the legislature did not contemplate extension of the tax on transient lodging imposed by NRS 244.3351-.3352 to campgrounds and recreational vehicle parks. In NRS 244.335(6), the legislature allowed county commissioners to delegate responsibility to collect the license taxes imposed for purposes of NRS 244A.597-.655, inclusive, to the county fair and recreation board. These boards are authorized to collect the license tax on rental of transient lodging by, among other remedies, revoking the business license of a delinquent business. NRS 244A.645(1)(a). The taxes collected by any "motel, hotel or gaming establishment" are held in trust for the city, county, or town levying the taxes or for use of the county fair and recreation board. NRS 244A.647. This statute says nothing about campgrounds and RV parks.

interest in the vehicle pursuant to the Uniform Commercial Code (U.C.C.) and obtains title that reflects its status as a secured party. A question has arisen whether this company is engaging in pawnbroker activities that require it to be regulated as a pawnbroker pursuant to [NRS chapter 646](#) instead of as an installment lender pursuant to [NRS chapter 675](#).

### QUESTION

Must a company licensed as an installment lender pursuant to [NRS chapter 675](#) that, for the most part, only makes loans secured by motor vehicles relinquish its installment lender's license and become regulated as a pawnbroker?

### ANALYSIS

In Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995), we recognized that pawnbrokers are authorized to engage in "other secured transactions in personal property" that do not involve taking physical possession of the collateral for the loan. See [NRS 646.010](#). Since the legislature has, in provisions relating to local government control of pawnbrokers, provided that a pawnbroker may make loans secured by a motor vehicle by taking the vehicle in pledge or "in any other manner" allowing the use of a motor vehicle as collateral for a loan, we concluded that a person making a loan secured by the title to a motor vehicle is engaging in an activity that falls within the definition of pawnbroker set forth in [NRS 646.010](#) and is therefore exempt from licensing as an installment lender pursuant to [NRS 675.040\(1\)](#). See [NRS 244.348](#), [268.0973](#), [269.182](#); Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995).

The Installment Lender's Act, in [NRS 675.040\(1\)](#), does not apply to "[a] person doing business under the authority of any law of this state or of the United States relating to banks, savings banks, trust companies, savings and loan associations, credit unions, development corporations, mortgage companies, thrift companies, pawnbrokers or insurance companies." This provision is apparently intended to exempt those companies that are already subject to licensing and regulation by other authorities from licensing and regulation under [NRS chapter 675](#). If the lender in question is doing business under the authority of [NRS chapter 646](#) relating to pawnbrokers, the Installment Lender's Act would not apply and it would appear the company is improperly licensed pursuant to that act. We must therefore determine whether the lender's activities subject it to regulation as a pawnbroker.

We understand that a pawnbroker will make a loan secured by the title to a motor vehicle in one of two ways. In most cases, the borrower will execute an agreement whereby the lender is automatically entitled to ownership of the vehicle if the borrower does not "redeem" it within a set period of time by paying all principal, interest, and fees due in connection with the loan. When the borrower fails to timely redeem the vehicle, the pawnbroker will request the issuance of a new title in his name only and obtain physical possession of the vehicle. The only significant difference between this and, for example, a transaction where a piece of jewelry is pledged, is that the jewelry is already in possession of the pawnbroker and there is usually no title document that must be processed to reflect a change in ownership of the property. For the purpose of our analysis, we shall refer to this type of transaction as a "Vehicle Title Pledge."

In some cases, a pawnbroker may make a loan secured by a motor vehicle by perfecting its interest as a secured party pursuant to the U.C.C. The pawnbroker will request the Department of Motor Vehicles and Public Safety to issue a new title that reflects its status as a secured party. See [NRS 482.428](#). When a lender perfects a security interest in a motor vehicle in this manner, he will usually be required upon default to repossess the vehicle and liquidate the

collateral by conducting a sale in a commercially reasonable manner<sup>16</sup>. [NRS 104.9503](#); 104.9504. For purpose of our analysis, we shall refer to this type of transaction as a "U.C.C. Secured Transaction."

Making loans secured by personal property is not within the exclusive province of pawnbrokers. For example, banks chartered in this state may make loans "on personal security or real and personal property." [NRS 662.015](#)(1)(a). Savings and loan associations chartered pursuant to [NRS chapter 673](#) are authorized to make loans secured by "personal property." [NRS 673.324](#)(1)(b). Thrift companies chartered pursuant to [NRS chapter 677](#) are authorized to make loans "secured by real or personal property, without regard to the location or nature of the security." [NRS 677.780](#)(1). Installment lenders licensed pursuant to [NRS chapter 675](#) are authorized to make secured loans provided such loans are not secured by interests in real property except as provided in [NRS 675.350](#)(4). Since all these entities, as well as pawnbrokers, are authorized to make loans secured by motor vehicles, we must attempt to ascertain how the legislature intended to regulate these activities.

Although a pawnbroker is authorized to make loans secured by motor vehicles, it does not follow, in our opinion, that all persons who make loans secured by personal property are engaged in the pawnbroker business. Unlike other entities authorized to make such loans, a pawnbroker is authorized to take personal property in pledge to secure the loan. Property taken in pledge must be held for at least 120 days during which the owner may "redeem" it, or retake possession, by paying all amounts owed for principal, interest, and other fees. [NRS 646.050](#)(2),(3), and (4). Unlike other lenders who must follow applicable U.C.C. provisions for the repossession and sale of collateral securing a loan, a pawn transaction typically involves automatic forfeiture of the owner's rights to the property after expiration of the redemption period.<sup>17</sup> Even where the pawnbroker does not take physical possession of a vehicle that is collateral for a loan, in most cases, the transaction is structured as a "Vehicle Title Pledge," where title to the vehicle automatically passes to the lender if the vehicle is not redeemed in a timely manner. Neither the lender which is the subject of your opinion request, nor any of the other regulated lenders referred to above, make loans in this manner.

In interpreting statutes, we must attempt to ascertain the legislature's intent in enacting the provision or provisions in question. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 38, 752 P.2d 221, 224 (1988). We must, if possible, construe these provisions so that they are compatible. *Bowyer v. Taack*, [107 Nev. 625](#), 627, 817 P.2d 1176, 1177 (1991). We should also attempt in our construction to avoid absurd or unreasonable results. *Alsensz v. Clark Co. School Dist.*, [109 Nev. 1062](#), 1065, 864 P.2d 285, 286 (1993).

A pawnbroker is required to provide a daily report of all its transactions to the sheriff or police chief. [NRS 646.030](#)(1), (2). He must also report any property coming into his possession that he reasonably believes is lost or stolen. [NRS 646.030](#)(3). His books and records are subject to inspection during ordinary business hours by the "prosecuting attorney or a peace officer." [NRS 646.060](#)(4). He is prohibited from receiving property from "a person under the age of 18 years, common drunkard, habitual user of controlled substances, habitual criminal, habitual felon, habitually fraudulent felon, person in an intoxicated condition, known thief or receiver of

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<sup>16</sup> We understand that the primary purpose of "perfecting" title to the vehicle in this manner, is to create a public record of the pawnbroker's interest to prevent the borrower from either obtaining a duplicate title or otherwise disposing of his interest in it to a bona fide purchaser. The pawnbroker may still retain the right, by agreement with the borrower, to automatically obtain title upon expiration of the redemption period. Although such a transaction would not be governed by U.C.C. provisions relating to secured transactions, we shall assume, for purpose of our analysis, that whenever a lender obtains a title that reflects its interest as a secured party, a U.C.C. secured transaction was intended.

<sup>17</sup> In some states, pawn transactions are actually viewed as sales, with the borrower given a certain period of time within which to "cancel" the sale. Colo. Rev. Stat. § 12-56-101(1) (1991).

stolen property, or known associate of a thief or receiver of stolen property, whether the person is acting in his own behalf or as the agent of another." [NRS 646.060](#)(8). Pawnbrokers are the only entities in this state who are subject to a limit on the rate of interest that may be charged. Compare [NRS 646.050](#)(1) with [NRS 99.050](#).

These provisions are clearly intended to address the evils that may arise from the traditional activities of pawnbrokers taking personal property in pledge for short-term loans. Pledging, depositing, or selling personal property is more likely to involve the risk of fencing stolen property than other types of loans. The legislature apparently believed that pawn transactions also create a higher risk of consumers being charged unreasonably high interest.

To interpret the definition of pawnbroker set forth in [NRS 646.010](#) as subjecting all persons who make loans secured by personal property to all the provisions of [NRS chapter 646](#) and any pawnbroker licensing and regulatory laws enacted by local governments would, in our opinion, produce the absurd result of subjecting all state-chartered banks, savings and loans institutions, thrift institutions, and other regulated entities authorized to make such loans to provisions intended to address only the activities of pawnbrokers who take personal property in pledge for the type of short term-loan described above. It would not further the legislative purpose of aiding local law enforcement officials in recovery of stolen property to require a bank to report all its loans to the sheriff or police chief on a daily basis. Although such loans do not involve taking property in pledge, the reporting requirement for pawnbrokers is not limited to pledge transactions. [NRS 646.030](#)(1), (2).

We believe these provisions may be harmoniously construed if the definition of pawnbroker set forth in [NRS 646.010](#) is limited to a person who, as some portion of his business, takes personal property in pledge to secure loans or makes loans that provide for automatic passing of title to the lender upon expiration of the period for redemption. Thus, even a company that engages exclusively in making loans secured by titles to motor vehicles will be considered a pawnbroker if any of the loans involve the borrower forfeiting ownership of the vehicle at the expiration of a period of redemption. A lender who only makes loans secured by motor vehicles taking a security interest in the vehicle and, in the event of default, following the U.C.C. provisions relating to repossession and sale of the vehicle, does not engage in the business of a pawnbroker as defined in [NRS 646.010](#). Since it does not make any loans that provide for automatic forfeiture to the lender of title to the collateral upon the expiration of a set period of redemption, the lender which is the subject of your opinion request, is not acting as a pawnbroker and is properly licensed as an installment lender pursuant to the provisions of [NRS chapter 675](#). To the extent it may be read as requiring regulation as a pawnbroker, a lender who does not make any loans secured by pledged property or by which title is automatically forfeited at the expiration of a period of redemption. Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995) is clarified as discussed herein.

#### CONCLUSION

Although a pawnbroker is authorized to make loans secured by motor vehicles and other personal property, all persons who make loans secured by personal property are not necessarily engaged in the pawnbroker business. To qualify as a pawnbroker as defined by [NRS 646.010](#), a person must, as some part of his business, make loans that provide for the pledge of personal property or automatic passing of title to the collateral for the loan at the expiration of a period of redemption. Persons who do not, as any part of their business, make loans in this manner, are not acting as pawnbrokers but may be regulated pursuant to other applicable laws governing the business of lending. Since it makes no loans in the manner described for pawnbrokers, the lender which is the subject of your opinion request is properly licensed as an installment lender pursuant to the provisions of [NRS chapter 675](#). Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995) is clarified as discussed herein.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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OPINION NO. 97-04FRANCHISES; ALCOHOL; TRADE MARKETUNFAIR COMPETITION:  
An entity that acquires a supplier, as defined in [NRS 597.140](#), which intends to continue to distribute alcoholic beverages in Nevada, becomes by definition a supplier. Neither a change in ownership of a supplier nor transfer of a brand from one supplier to another, constitutes good cause for a supplier to terminate a franchise with a Nevada wholesaler. Provisions of [NRS 597.120-.180](#) continue to apply to the successor supplier.

Carson City, February 10, 1997

Mr. Michael A. Pitlock, Executive Director, Nevada Department of Taxation, 1550 East College Parkway, Carson City, Nevada 89706

Dear Mr. Pitlock:

In your letter of January 13, 1997, you indicated that an issue has been presented to your agency concerning application of certain provisions of the Act of July 2, 1995, ch. 484, 1995 Nev. Stat. 1566 (Act) pertaining to regulation of the contractual relationship between suppliers of alcoholic beverages and Nevada licensed wholesalers. More specifically, you have been asked whether provisions of the Act apply when a specific brand of alcoholic beverage is sold or transferred by a supplier having an existing contractual relationship with a Nevada wholesaler to another supplier who does not. In that regard, you have requested an opinion from this office as to the following questions:

#### QUESTION ONE

Does "supplier" under [NRS 597.140](#) include a successor to the supplier that initially granted to the wholesaler the right to offer, sell, and distribute its brands within the state or any designated area thereof, including but not limited to a third party who is a successor to a supplier as a result of: (1) the third party's acquisition by sale, merger, or otherwise of ownership or control of the supplier; (2) the third party's purchase of the brand or purchase of assets generally from the supplier; or (3) in the case of a supplier that is not the trademark or brand owner, appointment of the third party in replacement of or following termination of the supplier by such owner?

#### ANALYSIS

A "supplier" is defined in [NRS 597.140](#) as:

[A]ny person, partnership, corporation or other form of business enterprise engaged in business as a manufacturer, distiller, rectifier, brewer, importer, vintner, broker or agent therefor, which distributes any or all of its brands of malt beverages, distilled spirits and wines, or all of them, through licensed wholesalers in this state.

Thus, if a person, partnership, or corporation, acquires an existing supplier in the business of distributing alcoholic beverages through wholesalers in this state and intends to and does continue this business, then by definition that successor entity is a "supplier" as defined by [NRS 597.140](#).

## CONCLUSION TO QUESTION ONE

It is the opinion of this office that an entity that acquires a supplier, as defined by [NRS 597.140](#), distributing alcoholic beverages through wholesalers in this state becomes by definition a "supplier."

## QUESTION TWO

Does "good cause" for purposes of [NRS 597.133](#) include a change in the supplier of brands for which a wholesaler has been previously granted the right to offer, sell, and distribute within the state or any designated area thereof, including but not limited to any change in the supplier as a result of: (1) a third party's acquisition by sale, merger, or otherwise of ownership or control of the supplier; (2) a third party's purchase of the brand or purchase of assets generally from the supplier; or (3) in the case of a supplier that is not the trademark or brand owner, replacement or termination of the supplier by such owner?

## ANALYSIS

[NRS 597.133](#) defines the term "good cause" as:

1. Failure by a wholesaler to comply substantially with essential and reasonable requirements imposed on him by a supplier, or sought to be imposed by a supplier, if the requirements are not discriminatory as compared with requirements imposed on other similarly suited wholesalers either by their terms or in the manner of their enforcement.
2. Bad faith by the wholesaler in carrying out the terms of the franchise agreement.

This definition relates only to actions or nonactions taken by or attributed to a wholesaler. It has no application to actions taken by or attributed to a supplier.

## CONCLUSION TO QUESTION TWO

The term "good cause" as defined in [NRS 597.133](#) does not include a change in the supplier of brands for which a wholesaler has been previously granted the right to offer, sell, and distribute within the state or any designated area thereof, including but not limited to any change in the supplier as a result of: (1) a third party's acquisition by sale, merger, or otherwise of ownership or control of the supplier; (2) a third party's purchase of the brand or purchase of assets generally from the supplier; or (3) in the case of a supplier that is not the trademark or brand owner, replacement or termination of the supplier by such owner?

## QUESTION THREE

Can a supplier terminate a franchise agreement for a particular brand pursuant to [NRS 597.160](#) merely because there is a change in composition or ownership of the supplier of the brand? Can a new manufacturer, importer, or agent thereof of a brand subject to a franchise agreement terminate the existing wholesaler's franchise agreement pursuant to [NRS 597.160](#) following the sale or transfer of such a brand to the new manufacturer, importer, or agent thereof?

## ANALYSIS

Subsection (2) of [NRS 597.160](#) states in pertinent part:

Except as otherwise provided in this subsection and notwithstanding the terms, provisions or conditions of any franchise, a supplier shall not unilaterally terminate or refuse to

continue any franchise with a wholesaler or cause a wholesaler to resign from that franchise unless the supplier has first established good cause for that termination, noncontinuance or causing of that resignation.

Thus, a supplier who has a franchise agreement with a wholesaler must first establish "good cause," as defined in [NRS 597.133](#), before unilaterally terminating that franchise. A franchise agreement is defined in [NRS 597.130](#) as:

[A] contract or agreement either expressed or implied, whether written or oral, between a supplier and wholesaler, wherein:

1. A commercial relationship of definite duration or continuing indefinite duration is involved; and
2. The wholesaler is granted the right to offer, sell and distribute within this state or any designated area thereof such of the supplier's brands of packaged malt beverages, distilled spirits and wines, or all of them, as may be specified.

A change in ownership or composition of the supplier would not alter contractual obligations of the supplier to the wholesaler, or the wholesaler to the supplier. A successor entity to the supplier that originally contracted with the wholesaler would assume all of the obligations of the original supplier, including the contractual obligations to the wholesalers holding franchises to purchase and distribute the supplier's products.

The purpose of the legislation found at [NRS 597.120](#)-.180, which was amended and enhanced by the Act, is to provide a measure of protection to the wholesale alcoholic beverage industry in Nevada from having their franchises terminated arbitrarily, irrationally, or unreasonably by suppliers. *See* Minutes of May 31, 1995, hearing on A.B. 594 before the Assembly Committee on Commerce at 9; *see also* [NRS 597.190](#) (describing the public policy behind the related three tiered structure on liquor distribution in this state). The provisions of the Act are clearly intended to strictly regulate the contractual relationship between suppliers and wholesalers, particularly as it relates to termination of the franchise agreement by the supplier. We do not believe provisions of [NRS 597.155](#) and [597.160\(2\)](#) can be avoided by the manipulation of the ownership of the supplier of the brand or through the simple transfer of the right to market a brand from one supplier to another. *See Wisconsin Truck Center, Inc. v. Volvo White Truck Corp.*, 692 F. Supp. 1010, 1013 (W.D. Wis. 1988), wherein the court applied the public policy behind Wisconsin's Motor Vehicle Dealership Law (similar in purpose to the Act), to suggest that the corporate parent of a liquidating subsidiary would be liable under that law for failure to continue the franchise for a product line transferred from the subsidiary to the parent. The court further made the observation that applying the prohibitions of the law against arbitrary or irrational termination of the franchise to a successor entity to the original supplier would carry out the purpose of the Act and prevent the "manipulation of entities within the control of the parent to avoid the statutes clearest prohibitions against unfair terminations." *Id.*

### CONCLUSION TO QUESTION THREE

It is the opinion of this office provisions of the Act cannot be evaded simply by a restructuring or change in ownership of the supplier or by the transfer of the right to distribute a brand of alcoholic beverage from one supplier to another. The wholesaler holding the franchise to sell and distribute the brand in Nevada would be able to enforce provisions of [NRS 597.120](#)-.180 against the new supplier of that brand, subject to the right of the new supplier to terminate the franchise for good cause, as defined in [NRS 597.133](#), and under the circumstances listed in [NRS 597.155](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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OPINION NO. 97-05WATER; PUBLIC LANDS; STATE ENGINEER; LEGISLATURE; FEDERAL GOVERNMENT; STATUTES: [NRS 533.503](#), amended in the 1995 legislature, restricts the State Engineer's authority to issue stockwatering permits and certificates of appropriation only to persons with Bureau of Land Management grazing permits.

Carson City, February 11, 1997

Mr. Peter G. Morros, Director, Department of Conservation and Natural Resources, 123 West Nye Lane, Carson City, Nevada 89710

Dear Mr. Morros:

In 1995 the Nevada Legislature added a new section to [NRS ch. 533](#) to forbid the State Engineer from issuing stockwatering permits and certificates of appropriation unless the applicant is "legally entitled to place the livestock on the public lands for which the permit is sought."<sup>18</sup> Subsection (1)(b) of the same statute, [NRS 533.503](#), uses similar wording to restrict issuance of a certificate of appropriation only to those who are "legally entitled to place on the land the livestock which have been watered pursuant to the permit." You have asked for an opinion clarifying the duties of the State Engineer under the amended statute, specifically you have asked for an opinion as to the meaning of the restrictions in the statute and their application to potential applicants including the federal government.

#### QUESTION ONE

Does the term "public lands" as used in [NRS 533.503](#) include all lands in Nevada owned or managed by any public agency whether federal or state?

#### ANALYSIS

Historically the public lands have meant those lands open to entry and settlement as opposed to "reserved" lands such as national parks and national forests.<sup>19</sup> The Nevada Revised

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<sup>18</sup> NRS 533.503 reads:

1. The state engineer shall not issue:
  - (a) A permit to appropriate water for the purpose of watering livestock on public lands unless the applicant for the permit is legally entitled to place the livestock on the public lands for which the permit is sought.
  - (b) A certificate of appropriation based upon a permit to appropriate water for the purpose of watering livestock on public lands unless the person who makes satisfactory proof that the water has been beneficially used is legally entitled to place on the land the livestock which have been watered pursuant to the permit.
2. This section must not be construed to impair the vested right of any person to the use of water for the purpose of watering livestock or to prevent any transfer of ownership of a water right for the purpose of watering livestock.

<sup>19</sup> Beginning with the Homestead Act in 1862 (Act of May 20, 1862, ch. 75, 12 Nev. Stat. 392), Congress shaped the nature of the "public lands" in response to custom and practice of grazing especially in the west. See also *Buford v. Houtz*, 133 U.S. 320, 326-28 (1890) (use of the "public lands" has grown out of implied license as a result of custom for the grazing of livestock); Desert Land Act (Act of March 3, 1877, ch. 107, 19 Nev. Stat. 377) (effected a severance of all waters on the public domain, not already appropriated, from the land itself, *California Oregon Power Co. v. Beaver Portland C. Co.*, 295 U.S. 142 (1934), and it allowed entry and settlement of 640 acres, later reduced by Congress to 320 acres in 1890); Mining Law of 1872, 30 U.S.C.A. §§ 22-39 (West 1995) (which severed minerals from the land while paramount title remained in the U.S., *Belk v. Meagher*, 104 U.S. 279, 283-84 (1881)); Unlawful Enclosures Act (Act of February 25, 1885, ch. 149, 23 Nev. Stat. 321 (1885), which prohibited fencing the public domain that was used for grazing in common with others unless under a claim or color of title made or acquired in good faith).



Statutes define "public lands" in several places; [NRS 321.655](#), a statute from the chapter on control and sale of state lands, defines "public lands" as all lands within the exterior boundaries of the state, but it specifically excludes those lands located within congressionally authorized national parks, monuments, national forests, or wildlife refuges. Other definitions in the NRS at 321.5963 and 408.078 also limit the meaning of "public lands" to Bureau of Land Management (BLM) lands.

Another phrase has also been historically associated with western grazing lands. The "public range" is defined in [NRS 533.485](#), a specific grazing statute, to mean "all lands belonging to the United States and to the State of Nevada on which livestock are permitted to graze, including lands set apart as national forests and lands reserved for other purposes." [NRS 533.485](#)(1) (emphasis added). [NRS 533.503](#) does not say "public range" to define the covered lands, instead it refers to "public lands," which as already mentioned above, is defined in other places to specifically exclude national forests and other "reserved" lands. This office, in an opinion from May 1982, determined the legislature intended to retain the distinction between "public range" and "public lands." There we said: "According to the common understanding of the word 'ranges' it is unlikely that in 1913 the Legislature intended 'public lands' and 'ranges' to be synonymous."<sup>20</sup>

As a matter of statutory construction the legislature is presumed to act with full knowledge of existing statutes relating to the same subject when enacting a statute. *City of Boulder v. General Sales Drivers*, [101 Nev. 117](#), 119, 694 P.2d 498, 500 (1985). The courts will construe a statute so as to accomplish the legislature's purpose. *NL Industries v. Eisenman Chemical Co.*, [98 Nev. 253](#), 645 P.2d 976 (1982).

Review of the legislative history of [NRS 533.503](#) makes it clear the legislature intended the statute to apply to the BLM and not the United States Forest Service (Forest Service).<sup>21</sup> The impetus behind the legislature's amendment to S.B. 96 (which had been prefiled by the Department of Conservation and Natural Resources in a completely different form) was Department of Interior's adoption of Rangeland Reform and its final rule on August 21, 1995.<sup>22</sup> In particular, the legislature objected to language in the final rule (43 C.F.R. § 4120.3-9) (1995) which seemed to initiate a new policy to acquire stockwater rights solely in its name. But nothing in the final rule and the accompanying commentary supports the conclusion that the BLM has been

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Prior to passage of the Desert Land Act in 1877, Congress passed several other acts governing mining, homestead, and preemption in an effort to aid settlers in the west to settle and develop "arid lands." *California Oregon Power Co.*, at 729. Finally, it appears that the context in which the words are used is important in defining their application. The United States Supreme Court has said "[w]e also reject the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549, n.15 (1987).

<sup>20</sup> Op. Nev. Att'y Gen. No. 82-9 (May 25, 1982) Public Lands; Wild Horses; Burros; Jurisdiction. (The opinion discussed the state's jurisdiction under the Wild Free-Roaming Horses and Burro Act, 16 U.S.C. § 1331-1340); Pub.L. 92-195, December 15, 1971.

<sup>21</sup> Early in the session Chairman Dean Rhoads, Senate Natural Resources Committee, commented that he understood the Forest Service had applied for 90 water rights in Ruby Valley for recreation purposes. Mike Turnipseed, State Engineer, said in response that actually it was the U.S. Fish and Wildlife Service that applied for the mentioned rights. (Minutes of February 22, 1995, hearing on S.B. 96 before the Senate Committee on Natural Resources at 4). Further mention of the Forest Service and its stockwater policy was made on June 27, 1995, when a comment was received by the Assembly Government Affairs Committee which reminded everyone that there had been no discussion about how S.B. 96 affects the Forest Service. (Minutes of June 27, 1995, hearing on S.B. 96 before the Assembly Committee on Government Affairs at 17.) The legislative history for June 27, 1995, does not disclose any discussion by committee members of the comment about the Forest Service nor does the legislative history for any other committee hearing on S.B. 96 disclose any indication that the Forest Service was considered to be covered by the bill should it apply for stockwater rights to the state engineer.

<sup>22</sup> Excerpts from BLM regulations as published in the Federal Register, February 22, 1995, 43 C.F.R. § 4120.3-9:

Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any such water right shall be acquired, perfected, maintained and administered in the name of the United States.

directed to acquire stockwater rights as part of a new policy that might exclude local operators. On the contrary, the commentary to the final rule states that no change is intended by the rule since it merely makes BLM practice consistent with the current Forest Service practice and with BLM policy on asserting water rights for livestock grazing prior to changes made in the early 1980s. 60 Fed. Reg. 35, 9897 (1995). The rule simply directs the BLM to comply with state law.

Nevertheless, the testimony before the legislature demonstrated the strong belief of many that the BLM had been directed to acquire stockwater rights as part of a new assault upon Nevada's water. In testimony before the Assembly Committee on Government Affairs on June 27, 1995, Senator Dean Rhoads, chairman of the Senate Natural Resources Committee, explained that Interior Secretary Babbitt's range land reform required federal ownership of stockwatering rights, which contravened Nevada law. He went on to characterize current Nevada law to allow for three ways to obtain permits for water for livestock grazing: "Number one, in the name of the permittee; number two, the permittee and the BLM (Bureau of Land Management); and number three, if the federal government shows beneficial use, they can get a water right for livestock grazing."<sup>23</sup> Senator Rhoads' testimony mirrored that of many others throughout the legislative session by expressing his displeasure over Secretary Babbitt's final rule promulgated in BLM regulations. It is fair to say that the testimony heard by both committees to consider S.B. 96 concentrated on the BLM as the federal agency Nevada must test to see who "legally own[s] and control[s] water in the State of Nevada." Based on the foregoing we believe the legislature deliberately used the term "public land" to exclude federal reserved lands in national forests from the operation of the statute.

### CONCLUSION TO QUESTION ONE

[NRS 533.503](#) applies only to BLM lands, as those lands are commonly thought to be "public lands" as opposed to "reserved" lands and "public ranges" that are administered by the Forest Service and the National Park Service, or other reserved lands which have been withdrawn by Congress from public entry such as military reservations, Indian reservations, wildlife refuges, or state lands.

### QUESTION TWO

What do the phrases from [NRS 533.503](#) 1(a) and (b), "legally entitled to place the livestock on the public lands for which the permit is sought" and "legally entitled to place on the land the livestock which have been watered pursuant to the permit" mean and is the BLM a qualified applicant?

### ANALYSIS

Since 1935 ranchers and livestock operators have been able to secure grazing permits and leases on public lands. The law required that "[p]reference be given in the issuance of grazing permits to those . . . landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of the lands. . . ." *Taylor Grazing Act*, 43 U.S.C. § 315b (1934). The Taylor Grazing Act was made necessary because of the deteriorating condition of the public lands as a result of indiscriminate grazing and overgrazing by sheepmen and cattlemen.<sup>24</sup> The act created grazing districts and authorized the Secretary of Interior to issue grazing permits to qualified livestock operators for a

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<sup>23</sup> Minutes of June 27, 1995, hearing on S.B. 96 before the Assembly Committee on Government Affairs at 2.

<sup>24</sup> Preamble to the Taylor Grazing Act: "AN ACT [t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes."

nominal fee. The widespread practice of indiscriminate grazing was intended to end under the auspices of the act. Before a livestock operator could put livestock on the public lands, a permit or lease was needed; and in order to get a permit or lease, the applicant had to qualify with a preference as a landowner or owner of water or water rights. Current regulations continue to require that an applicant for a grazing permit own or control land or water base property. 43 C.F.R. § 4100.0.5 (1995) (water base property means livestock water suitable for consumption by livestock which is accessible and available to the authorized livestock when the public lands are used for grazing).

The phrases "legally entitled to place the livestock on the public lands for which the permit is sought" and "legally entitled to place on the land the livestock which have been watered pursuant to the permit" are not defined in [NRS 533.503](#) nor are they self-explanatory without consideration of the legislative history. A statute is ambiguous when it is capable of being understood in two or more senses by a reasonably informed person. *Polson v. State*, [108 Nev. 1044](#), 1047, 843 P.2d 825, 826 (1992). The quoted phrases may be understood to mean the landowner (BLM) is "legally entitled" to place livestock on the public lands simply by virtue of the fact that it is the landowner and even though it does not have any interest in the cattle to be watered under the permit. The phrases could also mean the applicant must have a legal right to place livestock on the public lands as evidenced by a grazing permit from the BLM. If a grazing permit from BLM is required to comply with the statute, then obviously BLM would not fit within the definition because, presumably, it would not issue a permit to itself in order to apply for stockwater. Because we feel these phrases are ambiguous as to whether BLM is included or excluded from the operation of the statute, and whether some independent form of legal right must be held by the applicant, the legislature's intent in enacting a statute is the factor which controls its interpretation. *Id.*, at 1047 (citing *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17, 19 (1984)).

Federal grazing regulations require a permit or lease before an operator can legally place livestock on the public lands; thus the phrase "legally entitled to place the livestock on the public lands for which the permit is sought" means the person must have a grazing permit or lease from BLM, or the applicant must place the cattle with permission of the permit holder or holders.

Throughout the legislative consideration of S.B. 96, testimony repeatedly noted BLM does not own any cattle, yet the agency holds stockwatering rights for thousands of cattle and sheep and continues to apply for them.<sup>25</sup> In response to testimony that BLM in the past has received certificates of appropriation for stockwatering, Senator James said he did not know the federal government could file for the watering of livestock when it did not own any livestock, but added that testimony from those appearing before the committee had proven that beyond a reasonable doubt.<sup>26</sup>

Senator Dean Rhoads, chairman of the Senate Natural Resources Committee, asked Mike Turnipseed, State Engineer, why BLM would receive a stockwatering certificate if it does not own the livestock for which the permit is sought. Mr. Turnipseed answered that the determination to grant certificates of appropriation to BLM was a result of the Nevada Supreme

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<sup>25</sup> Minutes of March 15, 1995, hearing on S.B. 96 before the Senate Natural Resources Committee at 11-14. As of November of 1996, 92 stockwater applications in the name of BLM alone were pending a decision from the State Engineer. The earliest of these applications dates to December 1978. These 92 applications were for the stated purpose of watering 35,272 head of cattle; 39,250 sheep; 1,773 wild horses, as well as 15,916 deer/antelope and 50 burros, miscellaneous birds, and water for human recreational use. BLM's acquisition of these rights and other stockwater permits already in its name are for use by ranchers and operators who obtain grazing permits from the BLM.

<sup>26</sup> Minutes of March 15, 1995, hearing on S.B. 96 before the Senate Natural Resources Committee at 13; comments by Senator James: "[I]t's a given that the federal government does not own the livestock, somebody else is grazing it on its land by permit, and the question you are raising is whether or not . . . [BLM would retaliate if they can't have water rights] because now the way it is with their proposed rangeland reform, they're agreeing that they only get to do it [acquire water rights for stockwatering] as much as state law allows."

Court's decision in *State v. State Engineer*, [104 Nev. 709](#), 766 P.2d 263 (1988), which led the State Engineer to treat the federal government "as fairly as any other appropriator." Mr. Turnipseed also commented that his policy in granting certificates and permits did not require the applicant to own the cattle.<sup>27</sup> In comments later in the session before the Assembly Committee on Government Affairs on June 27, 1995, Mr. Turnipseed said he has received hundreds of stockwater applications for joint permits in the name of BLM and the operator. *See infra*; n.18.

Although the Code of Federal Regulations states BLM will acquire stockwater rights in its name to the extent allowed by state law, testimony before both legislative committees expressed the depth of feeling cattlemen, water purveyors, lawmakers, and others had for the perceived federal water rights policy to acquire water rights solely in the name of BLM. Senator Rhoads felt that policy was contrary to Nevada water law and that Secretary Babbitt had been informed at least three times of the three ways stockwatering rights could be obtained in Nevada.<sup>28</sup> The legislative history convincingly demonstrates drafters of S.B. 96 considered the fact that BLM does not own any livestock in Nevada yet could obtain stockwatering permits and certificated water rights. Some lawmakers thought granting a stockwater permit by the State Engineer should be contrary to Nevada law regardless of other benefits from range improvements, or safeguards attached to the water use.<sup>29</sup> The language of the statute was amended during the session to ensure that only livestock operators or their lessees could secure permits and certificates from the State Engineer.<sup>30</sup> The BLM is not a qualified applicant for stockwater permits under [NRS 533.503](#) because it does not own or lease livestock.

## CONCLUSION TO QUESTION TWO

The phrase "legally entitled to place the livestock on the public lands for which the permit is sought" means the applicant must have a grazing permit or lease from BLM under current federal regulations which also require the applicant have base property or water-based property. [NRS 533.503](#) also directs the State Engineer to modify his current practice of allowing persons to prove beneficial use under a stockwatering permit when the person does not own or lease the livestock being watered. When considering stockwater applications the State Engineer should obtain from the applicant for the stockwatering permit on public lands an affirmation or affidavit that affirmatively indicates the applicant satisfies these conditions. The law now requires the person attempting to prove beneficial use to prove legal entitlement to place livestock on public lands which were watered under the permit. The BLM is not a qualified applicant for stockwater permits under [NRS 533.503](#) since it does not, itself, hold grazing permits or leases. To the extent the State Engineer's practice was based on the Nevada Supreme Court's decision in *State v. State Engineer*, S.B. 96 has changed the law; therefore, the State Engineer's practice should also change to conform to the statute.

## QUESTION THREE

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<sup>27</sup> Minutes of March 15, 1995, hearing on S.B. 96 before the Senate Natural Resources Committee at 14.

<sup>28</sup> *See* comments of Senator Rhoads: Minutes of June 27, 1995, hearing on S.B. 96 before the Assembly Committee on Government Affairs at 2.

<sup>29</sup> Senator Rhoads and Director of the Department of Conservation and Natural Resources, Peter G. Morros, on June 12, 1995, engaged in a colloquy about Mr. Morros's proposed amendment to S.B. 96 that would prohibit a person holding a water right on lands managed by a public agency from denying access to that water to wildlife or to any livestock authorized to graze in the area. Senator Rhoads felt the proposed language left room for the federal government to secure water under their name. Director Morros asked whether it made any difference as long as stock and wildlife could not be prevented from watering at the source. The legislative record does not disclose Senator Rhoads' reply.

<sup>30</sup> S.B. 96 was originally a bill introduced by the Department of Conservation and Natural Resources pre-filed in January 1995, that would have codified the department's practice of granting stockwater rights under a three-way system, so that the right could be held alone or jointly by BLM and the livestock operator. During the session it was proposed to amend the bill by allowing only "owners" of the livestock to be eligible for a permit/certificate, but that language was dropped in favor of the language in its final form. *See infra* n.14

Under [NRS 533.503](#) may the State Engineer issue permits for watering livestock on the public lands to a public land management agency either solely in the agency's name or jointly to the agency and the livestock owner? May the State Engineer issue stockwater permits to the land management agency either singly or jointly for applications filed prior to the effective date of the amendment of [NRS 533.503](#)?

### ANALYSIS

Because our answer to the question about the meaning of the phrase "legally entitled to place the livestock on the public lands" excludes BLM as a permittee, joint applications can no longer be accepted and joint permits cannot be issued. While the legislature stopped short of requiring actual ownership of livestock as a prerequisite for issuing a stockwatering permit, they did intend to require that the applicant for a permit solely in its name prove an actual interest in the livestock industry.<sup>31</sup> This requirement of an actual interest in livestock before a permit may be issued clearly signals an intent to change the established practice of the State Engineer in granting permits and certificates without regard to who owns the livestock.

Whether the State Engineer may issue permits jointly to the land management agency and the livestock owner for those applications submitted after the effective date of the act is more problematic.<sup>32</sup> When the bill was considered by the Assembly Committee for Government Affairs toward the end of the session, one other amendment was made, which at first blush appears to approve of joint filings.

On June 27, 1995, the Government Affairs Committee approved a motion to amend S.B. 96 by inserting the words "or joint holders" immediately after the word "holder" in [NRS 533.425\(1\)](#).<sup>33</sup> There was only a short discussion of the meaning and purpose of the amendment, but even this brief legislative history does not alter the legislative intent expressed in [NRS 533.503](#) and its clear requirement that the applicant must have an actual interest in the livestock to be watered.<sup>34</sup>

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<sup>31</sup> The Senate Natural Resources Committee considered an amendment authored by the lobbyist for Sierra Pacific Power Company (he was recruited from the audience during the June 9, 1995, hearing and asked to look at a possible amendment along with Senators James and Adler. He reported back to the committee on June 12, 1995.) which stated the State Engineer may not issue a permit or a certificate "unless the person applying for the permit . . . certificate . . . is the owner of the livestock to be watered . . . ." Two days later on June 14, 1995, following a proposal by the State Engineer to amend S.B. 96 with a mandatory 2-tiered scheme, Chairman Rhoads stated the State Engineer's proposal had merit, but quickly asked for a motion to amend S.B. 96 with new language provided by Legislative Counsel Brenda Erdoes which replaced the words "owner of the" with the words "person legally entitled to place on the land," the words used in the bill as finally approved by both houses of the legislature. The committee voted to amend S.B. 96 in the fashion Chairman Rhoads asked for and the bill passed out of committee on June 14, 1995, practically in its final form.

<sup>32</sup> As of early June 1996, only three applications by BLM (one solely in BLM's name and two jointly with the livestock operator) for permits to appropriate underground water for stockwatering had been filed in the State Engineer's office since S.B. 96 became law on July 5, 1995.

<sup>33</sup> Minutes of June 27, 1995, hearing on S.B. 96 before the Assembly Committee on Government Affairs at 17; motion by Assemblyman Bennett to add the words "or joint holders" in lines 18 and 21 of S.B. 96. Language finally approved by the legislature amending NRS 533.425 dropped the word "joint."

NRS 533.425(1):

Except as otherwise provided in NRS 533.503, as soon as practicable after satisfactory proof has been made to the state engineer that any application to appropriate water or any application for permission to change the place of diversion, manner or place of use of water already appropriated has been perfected in accordance with the provisions of this chapter, the state engineer shall issue to the holder *or holders* of the permit a certificate setting forth:

- (a) The name and post office address of each holder of the permit. [Emphasis added.]

This language "or holders" finally approved by the legislature is slightly different from Assemblyman Bennett's proposal to add "or joint holders."

<sup>34</sup> Assemblyman Bennett made a motion to include the words "or joint holders" in the bill as a way of "resolving the question" of whether S.B. 96 discriminated against the federal government and the state. The motion carried after the committee heard from Mike Turnipseed regarding the

In order to harmonize the language of the two amendments and give effect to the legislative intent without negating one amendment, the amendment allowing for the plural "holders" of a certificate must be read in light of the earlier amendment which requires every applicant, even for a permit to appropriate stockwater, to have a legal right to place livestock on the land, i.e., the applicant must have an actual interest in the livestock. *Allianz Ins. Co. v. Gagnon*, [109 Nev. 990](#), 993, 860 P.2d 720, 723 (1993) (whenever possible the court will interpret a rule or statute in harmony with other rules and statutes); see *First American Title Co. of Nevada v. State*, [91 Nev. 804](#), 806, 543 P.2d 1344, 1345 (1975). The amendment to [NRS 533.425](#) merely makes it clear that more than one applicant *with an actual interest in the livestock* may be named on the certificate of appropriation. This interpretation is made more certain because [NRS 533.425](#) begins with the words "[e]xcept as otherwise provided in [NRS 533.503](#)," a clear indication that the intent as expressed in [NRS 533.503](#) prevails.

While the State Engineer may issue a certificate to appropriate stockwater on public lands to the holder or holders of the permit, each applicant attempting to prove beneficial use must show a legal right to place livestock on the public land. We believe this means BLM must show an interest in the livestock in order to receive either a permit or a certificate for both applications and proof of beneficial use filed after the enactment of S.B. 96. [NRS 533.503](#).

The answer to the second question, whether the State Engineer may act upon applications that were pending prior to the effective date of the act, concerns the retroactive application of the enacted statute, [NRS 533.503](#). We must also consider whether these prior applications represent a protected interest in water rights which may not be divested unless the protections of the Fourteenth Amendment are afforded to the holder of those interests. *Town of Eureka v. State Engineer*, [108 Nev. 163](#), 167, 826 P.2d 948, 950 (1992); citing *Ettor v. Tacoma*, 228 U.S. 148, 155-56 (1913); *Public Emp. Ret. v. Washoe Co.*, [96 Nev. 718](#), 721-23, 615 P.2d 972, 974 (1980). If the applications are not protected interests, the State Engineer must apply the law as amended by S.B. 96 to existing applications for permits to appropriate water for stockwatering.

#### A. Retroactive Application of [NRS 533.503](#)

The Nevada Supreme Court recently considered a case involving the retroactive application of [NRS 534.090](#), a water rights statute governing forfeiture of vested rights after five years of nonuse. *Town of Eureka v. State Engineer*, [108 Nev. 163](#), 826 P.2d 948 (1992). The court upheld the statute's constitutionality and its retroactive application. In considering the retroactive application of the statute the court said:

The constitutionality of [NRS 534.090](#)(1) depends on a balance between vested property rights and the police power of the State. Water rights are subject to regulation under the police power as is necessary for the general welfare. As the owner of all water in Nevada, the State has the right to prescribe how water may be used . . . . Therefore, absent clear legislative intent to make a statute retroactive, this court will interpret it as having only a prospective effect.

Vested water rights are those already established either through diversion and beneficial use or through a state permit. A water right "is regarded and protected as real property." *Carson City v. Estate of Lompa*, [88 Nev. 541](#), 542 (1972). This court has, however, upheld retroactive statutes under due process analysis when the legislative action is a permissible exercise of police power.

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proposal. He stated that the proposed amendment would solve his problem with regard to existing co-ownerships of water rights but not other problems he saw with the bill.

*Town of Eureka* at 167; see also *Castillo v. State*, [110 Nev. 535](#), 542, 874 P.2d 1252, 1256 (1994) (citations omitted).

[NRS 534.503](#) has no language to indicate whether the legislature intended to apply the statute retroactively to pending applications, and a careful review of the legislative history does not reveal that this issue was specifically considered by the legislature; therefore, legislative silence means the law may only be applied prospectively. *Town of Eureka* at 167.

Legislative history contains no discussion regarding retroactivity of S.B. 96, even though the State Engineer told the Senate Natural Resources Committee on March 15, 1995, there were hundreds of applications for stockwatering permits pending in the name of BLM and the livestock operator.<sup>35</sup> We conclude [NRS 533.503](#) may only be applied prospectively. A crucial issue still to be determined is whether the pending applications disclosed by Mr. Turnipseed in committee are subject to statutory or constitutional protections to prevent application of the provisions under S.B. 96. If not, the State Engineer must apply the new law in processing these applications.

#### B. Application to Appropriate Stockwater is not Entitled to Statutory or Constitutional Protections

Merely filing an application does not create a protectible property interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The legislature is free to change procedures and requirements under which the State Engineer must consider applications for a permit to appropriate the state's groundwater. Nev. [Const. art. 4, § 1](#); *Gibson v. Mason*, [5 Nev. 283](#) (1869) (legislative power vested in the state legislature is unlimited except by federal constitution and such restrictions as are expressly placed on it by the state constitution). As discussed below there are no constitutional restrictions or statutory prohibitions which make the statutory application process under chapter 533 a protected property interest.<sup>36</sup>

The Nevada Supreme Court in 1994 decided a case in which they affirmed that granting a building permit was discretionary by the county; therefore, the applicant had no entitlement to a constitutionally protected property interest before the permit issued. *Boulder City v. Cinnamon Hills Assoc.*, [110 Nev. 238](#), 871 P.2d 320 (1994). The court noted that if the city council had *any* discretion in granting or denying the permit application, there could be no entitlement and no constitutionally protected interest. *Id.* at 246.

We believe the application procedures for a permit to appropriate the state's water, found in [NRS 533.370](#), give enough discretion to the State Engineer to prevent a finding that they create a protected property interest on behalf of the applicant. At the application stage the

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<sup>35</sup> Mike Turnipseed, the State Engineer, in answer to a question from Chairman Rhoads about "how many stockwatering permits he has issued, of late, only in the name of the BLM," stated: "prior to 1980, there aren't very many stock watering applications at all, now we are up into . . . in permit stage or application stage, we have several hundred more, both in the name of the BLM, [and] in the name of the operator . . ." Minutes of March 15, 1995, hearing on S.B. 96 before the Natural Resources Committee at 15. As of November 1996 there remain only 19 joint applications between the BLM and a private entity waiting for a determination from the State Engineer. These applications represent water for 8,691 cattle, 1,000 sheep, 250 wild horses, and 1,160 deer and antelope.

<sup>36</sup> In all of the western states (except Colorado, Wyoming, Nebraska, and Idaho which have constitutional amendments prohibiting denial of the right to appropriate water) in which appropriation of water is imposed by statute, no person has an unqualified right to appropriate water. It is the appropriator's privilege to apply to the state authorities for a permit to make the appropriation and it will be granted only if certain conditions and prerequisites are met. *W. Hutchins, Water Right Laws in the Nineteen Western States*, Volume I, page 400-403 (1971).

An applicant for a water right has a right to have his application considered and acted upon by the authorities, but unless and until those requirements are met the applicant obtains no property right or any other right against the state. *Hutchins* at 330; citing *East Bay Municipal Utility Dist. v. State Dept. of Public Works*, 35 P.2d 1027 (Cal. 1934).

See also *Tanner v. Bacon*, 136 P.2d 957 (Utah, 1943) The Utah Supreme Court rejected a contention that under the doctrine of priorities, every person who makes an application to appropriate unappropriated water of Utah has an unqualified right to have his application approved.

applicant has not acquired an interest in the water such that due process protections must attach. Subsection (3) of [NRS 533.370](#) and [NRS 533.371](#) each require the State Engineer to determine whether existing rights would be affected if the application were granted, and the State Engineer is mandated to consider the public interest, and whether there is available water to be appropriated. All of these determinations require the State Engineer to exercise discretion in evaluating an application. A mere application cannot create any entitlement to a benefit under this legislative procedure.

In applying the new law, only vested rights are protected from its application since they are considered property rights under Nevada law. *Application of Fillipini*, [66 Nev. 17](#), 22, 202 P.2d 535, 537 (1949) (a water right "is regarded and protected as real property"). The State Engineer may apply the amendments from S.B. 96 to the pending applications. We do not believe the amendments to [NRS 533.503](#) may be applied to permits already issued in the name of BLM and a livestock operator or solely in the name of BLM simply to divest BLM of its permit or certificate since there is no "clear legislative intent to make the statute apply retroactively." *Town of Eureka* at 167.

Our Supreme Court has held that rejection of an application for a water permit may be challenged as an abuse of discretion based on lack of substantial evidence to support the State Engineer's decision. The court also said that the State Engineer has a duty to resolve all crucial issues before him, giving due deference to basic notions of fairness and due process. *Revert v. Ray*, [95 Nev. 782](#), 787, 603 P.2d 262, 265 (1979). The *Revert* court was merely ensuring that the applicant receives the procedural consideration required by statute (*see* [NRS 533.450\(2\)](#)), but did not hold or imply that the applicant has a property interest in the application process.

### CONCLUSION TO QUESTION THREE

We have concluded that the State Engineer may not issue permits to BLM unless it has an actual interest in the livestock to be watered. This prohibition applies whether the application is made jointly with the operator or is solely in the name of BLM. The State Engineer may apply [NRS 533.503](#), as amended by S.B. 96, to those applications for stockwatering permits that were pending prior to the effective date of S.B. 96.

### QUESTION FOUR

Can the State Engineer approve change applications for permits already granted to public land management agencies?<sup>37</sup> Can the State Engineer approve change applications under a certificate of appropriation already granted to a public land management agency?

### ANALYSIS

The State Engineer may continue to act on a change application made by BLM, whether singly or jointly, based on permits or certificates existing on the effective date of S.B. 96. This is appropriate simply because [NRS 533.503](#), as amended by S.B. 96, does not forbid it and the legislative history does not indicate the legislature intended to make this change. The State Engineer's interpretation of the stockwatering laws and practice of granting stockwatering rights to BLM even though it does not own any livestock, was made known during the hearings on S.B. 96, and as a result the legislature changed the law and corresponding practice regarding granting

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<sup>37</sup> An applicant holding a permit or certificate of appropriation can apply to the State Engineer for three types of changes to his water right under NRS 533.040. They are: (1) change in the place of diversion, (2) change the manner of use, and (3) change in the place of use. These changes may be performed simultaneously or in combination. The State Engineer rules on change applications based on several criteria including whether the changes would impair existing rights and whether the changes are in the public interest. NRS 533.370 (3).



stockwater permits. The legislature did not alter the law regarding change applications. [NRS 533.345](#); *Sierra Pac. Power v. Department of Taxation*, [96 Nev. 295](#), 298, 607 P.2d 1147, 1149 (1980) (where legislature had ample opportunity to amend statute if it disagreed with the agency's interpretation and did not do so, court will not legislate the change).

#### CONCLUSION TO QUESTION FOUR

The State Engineer may continue to act on a change application made by BLM, whether singly or jointly, based on permits or certificates existing on the effective date of S.B. 96.

#### QUESTION FIVE

Does subsection (1)(b) of [NRS 533.503](#), as amended by S.B. 96, apply only to new stockwater permits issued after the effective date of S.B. 96 or does it apply to existing permits at the time of the effective date of S.B. 96?

#### ANALYSIS

Our answer to the second question concerning applicability of [NRS 533.503](#) subsection (1)(b) to existing stockwater permits is somewhat different because the legislative amendment literally applies to one who possesses a stockwatering permit *at the time the act became effective*. Act of July 5, 1995, ch. 652, 1995 Nev. Stat. 2522. As has already been pointed out earlier in this opinion, a permit holder enjoys a property right which cannot be divested without due process or unless the legislative action is a permissible exercise of the police power. *Town of Eureka* at 167.

#### Police Power on the Public Lands

State and federal courts have upheld regulations governing grazing and water on the public range since the early part of this century.<sup>38</sup> With passage of the Taylor Grazing Act in 1934 and subsequent formation of grazing districts overseen by a federal land management agency, the legislature's police power on the public range ceased to extend to determinations of grazing rights but still extended to determinations of water rights including stockwatering.<sup>39</sup> *Ansolabehere v. Laborde*, [73 Nev. 93](#), 107, 310 P.2d 842, 849 (1957).

Long ago the United States Supreme Court declared, "the states may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." *McKelvey v. United States*, 260 U.S. 353 (1922). The Nevada Supreme Court has declared that the state's water law is supreme on the public lands and water rights are subject to regulation under the police power as is necessary for the general welfare. *Town of Eureka* at 167. The court in *Town of Eureka* declared that determination of how the state's water may be used is subject to the plenary power of the legislature. *Id.* Whether subsection (1)(b) of [NRS 533.503](#) applies to existing permittees including BLM depends on whether the statute is a valid exercise of the police power.

The 1925 Nevada Stockwatering Act was held to be superseded by the Taylor Grazing Act by the Nevada Supreme Court, but the ownership of livestock was acknowledged to

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<sup>38</sup> For a description and analysis of the caselaw regarding the police power of the legislature governing grazing prior to passage of the Taylor Grazing Act in 1934, 48 Stat. 1269; 43 U.S.C. § 315, see *In Re Calvo*, 50 Nev. 125, 132-37, 253 P. 671, 675 (1927).

<sup>39</sup> The functions of the Grazing Service created by the Taylor Grazing Act were reorganized under the control of BLM in 1946. Reorg. Plan No. 3 of 1946, reprinted in 5 U.S.C.A. §§ 133y-16, and 69 Stat. 1100.

have always been coupled with the grant of a stockwatering right. *Ansolabehere* at 102. Prior to the Taylor Grazing Act, proof of beneficial use under stockwatering applications could be made by showing the *applicant's* livestock were watered at his troughs and tanks. *Ansolabehere* at 103 n.3. It is not clear from the legislative history how the current practice by the State Engineer of granting stockwatering permits to nonowners or lessees came to pass, but it appears from caselaw there is an historical connection between livestock ownership and stockwatering rights.

Recent determinations of the contours of the police power by the supreme court do not illuminate any distinct boundaries, nor is it a subject capable of precise definition. *Koscot v. Interplanetary, Inc.*, [90 Nev. 450](#), 456, 530 P.2d 108, 112 (1974) (legislature free to enact any law not clearly prohibited by constitutions). Every discussion of a challenged statute by the supreme court begins with the admonition that all legislative enactments, "are presumed to be valid until the contrary is clearly established." *State v. District Court*, [101 Nev. 658](#), 660, 708 P.2d 1022, 1024 (1985). One who attacks the constitutional validity of a statute bears "the burden of making a clear showing that the statute is unconstitutional." *Id.* at 660 *citing* *List v. Whistler*, [99 Nev. 133](#), 137-38, 660 P.2d 104, 106 (1983). Existence of facts that would support the legislative judgment are presumed. *Allen v. State Pub. Emp. Ret. Bd.*, [100 Nev. 130](#), 134, 676 P.2d 792, 795 (1984) *citing* *Viale v. Foley*, [76 Nev. 149](#), 155, 350 P.2d 721, 722 (1960). If a statute is enacted pursuant to the police power, it is presumed that the legislature intended to promote the public welfare. *Id.* at 722.

The Nevada Supreme Court's threshold standard for the constitutionality of a statute being challenged beyond the state's police power is as follows:

The authority to provide for health, safety and welfare of the citizen is inherent in the police power of the State without any express statutory or constitutional provision. *Ex Parte Boyce*, [27 Nev. 299](#), 75 P. 1 (1904). Although the police power cannot justify the enactment of unreasonable, unjust or oppressive laws, it may legitimately be exercised for the purpose of preserving, conserving and improving the public health, safety, morals and general welfare, *Ormsby County v. Kearny*, [37 Nev. 314](#), 142 P. 803 (1914). In exercising its police powers, the legislature may, where public interest demands, define and declare public offenses, although the effect is to restrict or regulate the use and enjoyment of private property. *State v. Park*, [42 Nev. 386](#), 178 P. 389 (1919).

*State v. District Court*, [101 Nev. 658](#), 663, 708 P.2d 1022, 1025 (1985) (requiring motorcyclists to wear protective headgear is within police power since it is rationally related to a legitimate state purpose).<sup>40</sup> The court in *Viale*, quoted with approval from the United States Supreme Court in *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916) describing the legislature's power to enact laws:

[L]egislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety . . . . It is the duty and function of the legislature to discern

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<sup>40</sup> Other cases in which the police power of the state has been challenged include: *SIIS v. Surman*, 103 Nev. 366, 741 P.2d 1357 (1987) (statute which altered timing of payment of compensation due for a permanent partial disability upheld); *State of Nevada v. Glusman*, 98 Nev. 412, 423-25, 651 P.2d 639, 647 (1982) (held that statute requiring nongaming business, which shares premises with gaming establishment, to submit to a suitability determination by Gaming Control Board is reasonable exercise of state's police power; court struck down that part of same statute which assessed costs of the suitability study to the applicant, to be an invalid and excessive use of the police power); *Koscot v. Interplanetary, Inc. v. Draney*, 90 Nev. 450, 530 P.2d 108 (1974) (court upheld statute which declared contracts to participate in a pyramidal scheme to be against the public policy—that is, to prevent fraud against the public); Recent Attorney General opinions have also construed the legislative police power: Op. Nev. Att'y. Gen. No. 93-26 (December 1, 1993) (dairy statutes are within the ambit of the police power as they are based in the health and welfare of its citizens); Op. Nev. Att'y. Gen. No. 85-7 (June 21, 1985) (legislature has power to make criminal, certain acts done by state's licensees irrespective of knowledge or ignorance on their part that their actions are criminal); and Op. Nev. Att'y. Gen. No. 82-15 (June 25, 1982) (legislature may reasonably exercise police powers to regulate the right of citizens to carry or possess certain types of weapons).

and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare.

*Viale* at 155. The *Viale* court upheld the validity of a legislative prohibition on outdoor advertising of hotel and motel rates.

Although it is not possible to precisely analogize the caselaw to the question presented and even though no case we have found is on point, some useful generalizations are obtained from the above-quoted law. The statute is rationally related to a legitimate state interest—the protection and promotion of the livestock industry. The law is clear and the legislature is free to make any law within its police power to govern allocation of water and procedures to appropriate that water. The courts will assume the statute is constitutional based on facts supporting and enhancing the public welfare. Only if the contrary can be shown to subsequent legislatures can this law be changed.

#### CONCLUSION TO QUESTION FIVE

Because the police power of the legislature is plenary and the threshold for finding a statute to be in violation of the police power is so high, then, regardless of whether there is some question that the legislature acted improvidently, it is our view that subsection (1)(b) must be applied to permits which were issued even prior to the effective date of the act. The language in [NRS 533.503](#) clearly applies to any applicant with a permit who seeks to prove beneficial use for stockwater and it does not discriminate between existing or future applicants for a certificate.

#### QUESTION SIX

Does S.B. 96 create a statutory or constitutional conflict with [NRS 533.010](#) and the Nevada Supreme Court's decision in *State v. State Engineer*, [104 Nev. 709](#), 766 P.2d 263 (1988)? Does S.B. 96 create an issue of fairness that could affect the State Engineer's implementation of the law?

#### ANALYSIS

*State v. State Engineer* stands for the proposition that the federal government "is entitled to equal treatment under state water law," but the court's use of the words "equal treatment" under state water law did not rest on constitutional grounds. It was simply a reference to the definition of "person" in the state statute. *Id.* at 717. The court also noted that even though the United States owns no livestock and does not own wildlife, it owns land and may appropriate water for application to beneficial uses on its land, including livestock watering. *Id.* at 718. The court rejected the district court's decision which held that because the federal government does not own any livestock it could not put the water to beneficial use. The supreme court rejected that argument and instead noted that livestock watering and wildlife watering are both recognized as beneficial uses under Nevada law, but did not discuss how a nonowner of livestock could put the water to beneficial use.

When S.B. 96 was enacted into law on July 5, 1995, the legislature intended to overrule the supreme court's decision in *State v. State Engineer*, to the extent that the court held the United States could appropriate water for livestock watering. Nev. [Const. art. 4, § 1](#); *Gibson v. Mason*, [5 Nev. 283](#) (1869) (legislative power is vested in the state legislature and is unlimited except by federal constitution and restrictions in the state constitution); *Castillo v. State*, [110 Nev. 535](#), 542, 874 P.2d 1252, 1256 (1994) (legislative enactments responding to judicial interpretations of a statute are amendments which act prospectively absent legislative intent); *Matter of Estate of Miller*, [111 Nev. 1](#), 9, 888 P.2d 433, 437 (1995) (in amending a statute, the legislature effectively overruled that part of the decision which had been consistent with the statute at the time the court

first interpreted it; that part of the decision overruled by the legislature then is no longer good law); *see also Jensen v. Reno Central Trades and Labor Council*, [68 Nev. 269](#), 282-283, 229 P.2d 908, 914 (1951). The balance of the opinion regarding appropriation of water for wildlife and other purposes is still good law and not affected by enactment of S.B. 96.

S.B. 96 specifically addresses the right of a "person" without any interest in livestock to put stockwater to beneficial use and therefore overrules *State v. State Engineer*, to a limited extent. The definition of "person" was not affected. S.B. 96 overrules the decision only to the extent which states that because the United States government was a "person" under [NRS 533.010](#) there was no reason to forbid the federal government from holding livestock watering permits and certificates. Under S.B. 96 there is a reason now, and the reason is that the legislature has changed the State Engineer's practice and now forbids granting stockwatering permits to anyone without an interest in livestock. S.B. 96 did not forbid the federal government (BLM) from holding stockwater rights, it merely requires BLM to have an actual interest in the livestock to be watered. The legislature did not change the definition of "person" in [NRS 533.010](#), but it did require that "person" to have an actual interest in livestock before a stockwater permit can be granted. There is no statutory or constitutional conflict between the decision in *State v. State Engineer* and S.B. 96. We also cannot find any legal impediment to the law based solely on an issue of fairness. (*But see infra.*, n.28, for an analysis of the related issue of the treatment by the federal courts of discriminatory state laws).

United States Supreme Court caselaw indicates there is no dispute the federal government may acquire water rights in its proprietary capacity and when doing so must be treated the same as any other appropriator.<sup>41</sup> It is arguable that S.B. 96 treats the federal government just as any other appropriator. The bill's language does not single out the federal government nor prohibit it from applying for stockwater permits; its language allows anyone with an interest in livestock to appropriate water for stockwatering.<sup>42</sup> Yet it is clear from the legislative history that this bill was an effort to prevent what the legislators and others perceived as a grab for Nevada's waters and they perceived the final rule on grazing to be a grab.<sup>43</sup> Even though the legislature was displeased with Interior's final rule, the legislative history is replete with comments about perceived fairness to the federal government, but the intended effect of the bill was to prohibit BLM from receiving any more stockwatering rights unless it acquired an interest in livestock.<sup>44</sup>

S.B. 96 must also be analyzed in light of constitutional doctrines to determine whether it suffers from any constitutional infirmity which could result in a declaration of invalidity by the courts.

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<sup>41</sup> In *Kleppe v. New Mexico*, 426 U.S. 539 (1976) the Supreme Court stated: "Congress exercises the powers both of a proprietor and of a legislature over the public domain." Later in *U.S. v. New Mexico*, 438 U.S. 696, 702 (1978) the court noted that Congress intended the U.S. would "acquire water in the same manner as any other public or private appropriator," (when seeking to fulfill secondary uses for federally reserved lands).

<sup>42</sup> In an effort to clarify the intent of S.B. 96, Chairwoman Lambert asked Mike Turnipseed to testify again at the close of the last Assembly Committee on Government Affairs meeting on June 27, 1995, about the committee's vote to amend S.B. 96 to allow "joint holders" of livestock watering permits. Minutes of June 27, 1995 hearing on S.B. 96 before the Assembly Committee on Government Affairs at 18. Mr. Turnipseed stated to the committee that if he understood Assemblyman Ernaut's comments correctly, the State Engineer could issue a stockwatering permit to BLM, the livestock operator, or the Division of State Lands, as long as the applicant was *legally entitled to place livestock on the public lands*. Assemblyman Ernaut then commented he felt Mr. Turnipseed correctly described what the language of S.B. 96 provided for.

<sup>43</sup> *See* n.20.

<sup>44</sup> Director Peter Morros commented in answer to a question from Assemblywoman DeBraga about BLM's qualifications under S.B. 96: "How do you discriminate against the federal government and defend that in court?" He suggested one answer in a scenario in which (following passage of S.B. 96) BLM goes to Congress and asks them to create a federally reserved water right on the public lands. Minutes of June 27, 1995, hearing on S.B. 96 before the Assembly Committee on Government Affairs at 10. Implied in this answer, and something everyone in attendance no doubt understood, is the drastic nature of a new federally created reserved water right on the public domain and its effect on the state's water law.

### A. S.B. 96 Does Not Conflict With Federal Law Nor is it Contrary to Congressional Purposes or Objectives

The Department of Interior's final rule states "any [stockwatering] right acquired on or after August 21, 1995 . . . shall be acquired, perfected, and maintained . . . in the name of the United States." See n.5. Constitutional law requires state law to give way to federal law whenever there is a conflict or when they are so inconsistent that an individual cannot obey both. Interior's final rule on acquisition of stockwatering rights may be in conflict with S.B. 96's prohibition against granting a stockwater right to anyone without an interest in the livestock that are to be watered under the permit. The conflict arises simply because BLM does not own any interest in livestock for which they may seek a water right. This section analyzes the apparent conflict under appropriate constitutional doctrines.

The United States Constitution gives plenary authority to Congress to make all necessary rules for all property belonging to the United States. U.S. Const. art. IV, § 3, cl. 2. This does not mean the state's jurisdiction stops at the boundary of federal land. The Supreme Court has made it clear the states are free to enforce their criminal and civil laws on federal lands as long as they do not conflict with federal law. *Kleppe v. New Mexico*. However, when Congress enacts laws pertaining to federal lands, inconsistent or conflicting state laws are necessarily overridden by operation of the Supremacy Clause. *Id.*

Congress has authority under the Supremacy Clause to preempt state law. U.S. Const. art. VI, cl. 2. Congress can specifically preempt state law by stating its intention to do so in its enactment, or the courts may find preemption implied in congressional enactments in one of two ways. *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). First, to the extent state law actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law; and secondly, where state law stands as an obstacle in accomplishing the full purposes and objectives of Congress, then state law is preempted. *Id.* at 581; citing *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, (1984).<sup>45</sup> This opinion analyzes the issue in light of the

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<sup>45</sup> We believe there is another issue which seriously implicates the vitality of S.B. 96, although it is not likely to result in invalidation of the law on constitutional grounds. A federal court could decide that the law is hostile or discriminatory toward an articulated federal interest; however, a finding that S.B. 96 is discriminatory would not result in S.B. 96 being declared invalid. The caselaw which developed this method of dealing with hostile state laws did not invalidate the state law, rather it lead to the creation of "federal common law," or "interstitial federal law." *U.S. v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 93 S.Ct. (1973) (it is a basic responsibility of federal courts to judicially legislate rules which may be necessary to effectuate the statutory patterns of Congress). Regardless of what it is called, it is judge-made law and does not result in invalidation of the competing state rule, in fact, it may lead to adoption of the state law as the controlling law. *Id.* at 595. When faced with a hostile or discriminatory state law, the federal courts engage in an exercise based on choice of law principles. Courts do not invalidate or declare state law unconstitutional based solely on its discriminatory effect on an articulated federal interest. *Id.* The courts have merely declared the state law to be displaced and inapplicable to the federal issue or they have fashioned their own rule of law. *Southwest Diversified, Inc. v. City of Brisbane*, 652 F. Supp. 788 (N.D. Cal. 1986) ("Federal common law may be created where 'a federal rule of decision is necessary to protect uniquely federal interests . . . or where Congress has given the Courts power to develop substantive law.'" *Id.* at 792 citing *Texas Industries Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2067 (1980).

This is a 2-pronged test, either one will result in the court stepping in and fashioning federal common law. "Determining whether to fashion a new rule of decision or borrow the law of the state requires a balancing of state and federal interests. However, 'the scales of the balance are weighted in favor of borrowing state law . . .'" *Id.* at 794, citing *U.S. v. California*, 655 F.2d 914, 917 (9th Cir. 1980). The linchpin of any analysis in this area was stated by the *Brisbane* court as follows: "[N]ormally . . . a significant conflict between some federal policy or interest and the use of state law . . . must . . . be specifically shown." *Id.* at 794 citing *Wallis v. Pan American Petroleum Corp.*, 86 S. Ct. 1301, 1304 (1966).

We have been asked to examine whether S.B. 96 creates an issue of fairness. We believe the question posed is whether the law impermissibly discriminates against BLM. If the law is discriminatory then the answer probably turns on whether the acquisition of title to stockwater by BLM is in an area comprising issues substantially related to an established government program. *Little Lake Misere Land Co.* at 594. We acknowledged in this opinion elsewhere that grazing and addition of range improvements including stockwells is an objective of the Taylor Grazing Act and Federal Land Policy and Management Act of 1976. We simply did not find in these Acts a congressional directive or purpose supporting BLM's acquisition of title to stockwater. Discriminatory state laws may survive the court's scrutiny, if, when the court balances the competing interests of both federal government and state government, it determines that there are legitimate and important state interests served by the adoption of state law as the rule of decision. *Id.* at 599. If there are none, the court is free to adopt a new rule of decision or fashion its own. *Id.* at 594-95. The legislative history of S.B. 96 does not explain with facts or rational reasons for the restriction on stockwater appropriation. There was no evidence presented to the legislature that the federal government was attempting to control the state's water or that BLM's acquisition of title to stockwater would be contrary to the interest of the livestock industry. It appears to have been a change in the law directed at BLM for a perceived insult by

second part of the *Granite Rock* test, because Interior's final rule states the intention to acquire title to stockwater "only to the extent allowed by law, "thus making analysis under part one unnecessary.

The Supreme Court has also said there is a presumption against finding preemption of state law in areas traditionally regulated by the states, and the courts must always start examining preemption claims with the assumption that the historic police powers of the States were not to be superseded unless that was the "clear and manifest purpose of Congress." *California v. ARC America Corp.*, 490 U.S. 93 (1989); *see also Town of Eureka v. State Engineer* at 167 (Water rights are subject to regulation under the police power as is necessary for the general welfare), *citing V.L. & S. Co. v. District Court*, 42 Nev. 1, 171 P. 166 (1918)).

In reviewing the history of congressional intent in the field of federal/state jurisdiction with respect to allocation of water, the Supreme Court said, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."<sup>46</sup> *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *citing California v. U.S.*, 438 U.S. 653-70, 678-79 (1978). At the same time the court also reemphasized the continuing power of Congress to reserve water for land which is itself set apart from the public domain, and the importance of the "implied reservation of water doctrine" which recognizes the power of Congress to impliedly authorize the President to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *United States v. New Mexico*, at 698, 699, at 700 n.4 *citing Winters v. U.S.*, 207 U.S. 564 (1908).

To analyze whether S.B. 96 is preempted, the question to be answered is whether S.B. 96 conflicts with or frustrates the full purposes and objectives of Congress.<sup>47</sup> Any expression

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Secretary Babbitt in ignoring Nevada when adopting the final rule on grazing in August 1995 and because the legislature determined to end the State Engineer's practice of granting stockwater permits to a person without an interest in livestock.

Even though we do not see any rationale for the law in the legislative history, enactment of S.B. 96 would not forestall development of a single underground source of water since BLM has usually commingled applications for water for stock and wildlife and recreation in the *same application for the same water source*. *See infra*, n.8. S.B. 96 does not prohibit BLM from developing wildlife water sources, water for recreation nor any other component of their range improvement program. In this sense, we feel BLM's range improvement program is marginally affected. *Cf. California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (state law is preempted where it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress).

<sup>46</sup> See n.5 to *U.S. v. New Mexico*, wherein the court notes that in Senate hearings in 1964, Senator Kuchel submitted materials listing 37 statutes in which Congress expressly recognized the importance of deferring to state water law from 1866 to 1958.

<sup>47</sup> Related to the preemption doctrine is another doctrine called the intergovernmental immunity doctrine which in its most recognizable form prohibits state law that "regulates the government directly or discriminates against it." *North Dakota v. U.S.*, 495 U.S. 423, 435 (1990), *citing McCulloch v. Maryland*, 4 Wheat. 316, 425-37 (1819). *McCulloch*, of course, stands for the proposition that the property and instrumentalities of the federal government are immune from state taxation. *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344 (1983) (*see* Blackmun, J. dissenting). The intergovernmental immunity doctrine has most often been applied in the context of disputes between the sovereign legislatures over taxation issues. *Id.* at 540; *citing to U.S. v. New Mexico*, 455 U.S. 720, 730-38 (1982) (the court details the history of the federal government's constitutional immunity from state taxation) and *U.S. v. County of Fresno*, 429 U.S. 452 (1977). These cases hold that a state regulation is only invalid if it regulates the U.S. directly or discriminates against the federal government or those with whom it deals. *North Dakota* at 435. A state does not discriminate against the federal government unless it treats someone else better than it treats them. *Washington* at 545. The law as amended by S.B. 96 is facially neutral and the requirement the applicant have an actual interest in livestock to be watered is rationally related to the state's police power. The BLM is not prohibited from seeking a permit as long as it has an actual interest in the livestock to be watered. This relationship between livestock ownership and stockwatering permits is historical (*Ansolabehere v. Laborde* at 102), thus the legislative rationale for the connection is substantial.

Other Supreme Court cases that have applied the intergovernmental immunity doctrine in contexts other than taxation have been decided more along the lines of general preemption doctrine analysis—that is, whether there is a conflict between state and federal law so that it is impossible to comply with both state and federal law. *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (case decided by general preemption analysis). We believe general preemption analysis is appropriate here. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1943) (a case decided under the intergovernmental immunity doctrine where the issue was whether Pennsylvania's milk price support regulation was in conflict with congressional legislation or policy; the court could not find "evidence of an inflexible congressional policy" authorizing noncompliance with state law). In the context of water, the Supreme Court has been more specific and recognized the fundamental difference between the acknowledged state's police power to regulate the acquisition, use, control and distribution of the state's water and the prohibition against

of intent to preempt state water law should certainly be found in the promulgation on August 21, 1995, of Interior Secretary Babbitt's rangeland reform regulations.<sup>48</sup> The Supreme Court said it would be appropriate to expect an agency to declare any intention to preempt state law with some specificity. *California Coastal Com'n v. Granite Rock Co.*, citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). We could find no expression in Interior's final rule which indicates that the agency intended to preempt state water law governing stockwater appropriation and use. In fact, the final rule specifically acquiesces to state law when the agency seeks stockwater rights. Even though S.B. 96 was passed subsequent to adoption of the final rule, the Secretary could have anticipated a conflict with any state's water law.<sup>49</sup> Despite absence of intent in the final rule, we must look past the final rule and look to Congress's purposes and objectives in underlying legislation applicable to the public lands, since the Supreme Court defines part two of its preemption criteria based on congressional purposes. *Granite Rock* at 581.

The Secretary of the Interior in August 1995 adopted new regulations under which BLM must seek to acquire stockwatering rights, to the extent allowed by state law, for permanent range improvements made on public lands. Adoption of the final rule and Interior's policy to acquire title to permanent improvements is based on common law concepts. 43 C.F.R. § 4120.3.2 (1995). When the final rule was published in the Federal Register on February 22, 1995, announcing the rule would be effective on August 21, 1995, the opening sentence in the description of the major elements of the new rule on water rights and range improvements said: "The final rule conforms with common law concepts regarding retention of the title of permanent improvements in the name of the party that holds title to the land." 60 Fed. Reg. 9897 (1995). 43 C.F.R. § 4120.3.2 (1995), specifically states that title to new water wells "shall be in the name of the U.S." While we do not quarrel with the Secretary's reliance on common law for support for title to permanent range improvements, we do not find a statement of authority for acquisition of title to stockwater; therefore, we read that section to mean that title to stockwater may only occur where the particular state allows BLM to hold title.

Interior's final rule states it was promulgated under the "principal authorities of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1739, 1740 (1976)), and the Taylor Grazing Act of 1934 (43 U.S.C. § 315a-r); 60 Fed. Reg. 9894, Rules and Regulations (1995); 43 C.F.R. § 4100.0-2, Objectives (as amended by the final rule) (1995). We have examined Federal Land Policy and Management Act and Taylor Grazing Act for an expression of congressional purpose authorizing the Secretary to acquire title to stockwater rights to fulfill the agency's mission with regard to grazing on the public lands by installing additional range improvements to prevent

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the state's interference with congressional directives on a federal project. *California v. United States*, 438 U.S. 645, 674 (1978) (the Court disavowed certain dictum found in prior cases that construed the congressional intent behind § 8 of the Reclamation Act of 1902 as allowing the Secretary of the Interior to ignore state water law when delivering water to the state. The prior affected cases are: *State of Arizona v. State of California*, 373 U.S. 546 (1963); *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963). We think the distinction drawn by the Court in these cases between direct regulation of a federal function or purpose and the longstanding acquiescence by Congress to state hegemony over acquisition and appropriation of water within its boundaries supports our view that S.B. 96 must be analyzed under the general preemption doctrine and not the intergovernmental immunity doctrine.

For these reasons we think the intergovernmental immunity doctrine is inapposite to these facts, and the issue of discrimination and conflict with federal law should best be analyzed under the general preemption doctrine. *North Dakota* at 435 (claims to any further degree of immunity beyond the economic burdens that result from the application of the state law must be resolved under principles of congressional preemption); See also *North Dakota*, J. Brennan's dissent at 2007 n.6, (the doctrine of preemption is characterized as "much broader" than the doctrine of federal immunity).

<sup>48</sup> See n.2 for text of final rule, § 4120.3-9, Water Rights, for the purpose of livestock grazing on public lands.

<sup>49</sup> The Supreme Court has analyzed state law which conflicted with federal programs and even after a finding that the law was discriminatory, the Court observed that the law could have been saved if Congress had anticipated or contemplated that the law served important and legitimate state interests that could only have been fulfilled by application of state law. *U.S. v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 599 (1973). Similarly, Secretary Babbitt should have realized the importance of state water law and the possibility that a state would change the law to restrict who could appropriate stockwater.

the continuing deterioration of the public rangelands which should lead to betterment of forage conditions that would benefit wildlife, watershed protection, and livestock production. Federal Land Policy and Management Act, 43 U.S.C. § 1751(b)(1) (1976); Taylor Grazing Act, 43 U.S.C. 315 (1934) (primary purpose of Taylor Grazing Act is to promote the highest use of public lands pending its final disposal); *accord Fallini v. Hodel*, 963 F.2d 275, 289 (9th Cir. 1992) (purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference). As stated above, we cannot find any congressional expression supporting the Secretary's final rule with regard to acquisition of title to stockwater rights.

The issue to be decided is whether S.B. 96 and its requirement that an applicant for stockwater on the public lands be legally entitled to place the livestock on the land is in conflict with congressional purposes and objectives. We do not believe the final rule, which requires BLM to acquire stockwater rights, embodies congressional purposes or objectives and we have not been able to find any expression in either Federal Land Policy and Management Act or Taylor Grazing Act stating that acquisition of stockwater rights is necessary to "stabilize the livestock industry and protect the rights of sheep and cattle growers from interference." *Hodel*, 963 F.2d at 279. There is no question that water development is a range improvement authorized by Congress and is a stated purpose of the Federal Land Policy and Management Act, and we do not quarrel with expressed stated purposes of both Taylor Grazing Act and Federal Land Policy and Management Act. Our point is that the stated purposes under both Federal Land Policy and Management Act and Taylor Grazing Act do not require BLM to pursue and protect *its rights to water on the public lands*, rather, the stated purpose is to protect stockgrowers' rights. We can find no mention nor inference in the underlying congressional legislation indicating that acquisition of title to stockwater on the public lands furthers any stated purpose under Taylor Grazing Act or Federal Land Policy and Management Act.<sup>50</sup>

#### B. Western Reclamation Water Law and Congressional Directives

Our reliance on congressional purposes and directives as the touchstone for an analysis of the preemption issue is not misplaced. Those cases we have already mentioned which decided preemption issues clearly incorporate congressional purposes into the test. It is also instructive to examine the long history of litigation over various reclamation laws passed by Congress beginning in the last century to understand the importance of congressional directives. That history is carefully laid out in *California v. United States*, 438 U.S. 645 (1978) (White, J. dissenting; Brennan and Marshall joining). The history of reclamation laws litigation reveals the struggle between the federal government and the states over appropriation, control, use, and distribution of water in very large and expensive projects to reclaim the arid lands in the west and generally constructed and paid for with federal dollars. *Id.* at 653.

After reviewing the long history of litigation generally centering on the Reclamation Law of 1902, the *California* court held that a state may impose any condition on the control, appropriation, use, or distribution of water in a federal reclamation project which is not inconsistent with *clear congressional directives* respecting the project. In arriving at this holding,

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<sup>50</sup> The Congressional declaration of policy in Federal Land Policy and Management Act requires the Secretary to establish comprehensive rules and regulations to administer the public land statutes only after considering the views of the general public. It also requires that goals and objectives be established by law and that public lands be managed to protect water resources. 43 U.S.C. § 1701 (1976). Federal Land Policy and Management Act also contains savings provisions which appear to preserve to each sovereign certain rights on the public lands especially with regard to water:

- (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or-
- (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
- (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control

....



the court decided to disavow dictum from three earlier cases which also reviewed § 8 of the Reclamation Act of 1902.<sup>51</sup> The court said:

But because there is at least tension between the above-quoted dictum and what we conceive to be the correct reading to § 8 of the Reclamation Act of 1902, we disavow the dictum to the extent that it would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question. Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights . . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

*Id.* 438 U.S. at 674-75.

Even though the context of the court's decision in *California* is the Reclamation Law of 1902, still the lessons taught by the Court after almost 100 years of struggle between the federal government and the states should not be discarded for purposes of this inquiry. An analogy between reclamation water law and the struggle for water on the public lands used for grazing is useful and instructive. The Secretary should be bound by similar requirements as he already is under the Reclamation Act for "control, appropriation, use, or distribution of water" when appropriating stockwater under state law for the livestock industry. The contexts are different but the fundamental issue of the state's hegemony over its water is the same.<sup>52</sup>

Justice Rehnquist in *California* quoted from prior cases involving the Reclamation Law of 1902 which said the federal government did not acquire vested water rights to impounded water even though it built the project, because the "appropriation [of the water] was made not for the use of the government, but . . . for the use of the landowners," and the government was merely the "carrier and distributor of the water." This quoted language is directly analogous to the development of water resources on the public lands by BLM for stockwater. There is no dispute that livestock operators actually put the water to use. Development of stockwater, then, is not for the benefit of the government, but for the livestock operators and to "stabilize the livestock industry and protect the rights of sheep and cattle growers from interference." *Hodel* at 279 citing *Kidd v. U.S. Dep't of the Interior, Bureau of Land Management*, 756 F.2d 1410, 1411 (9th Cir. 1985); 43 C.F.R. § 4100.0-2 (1995), Objectives.

There are clearly other purposes enumerated in Federal Land Policy and Management Act and Taylor Grazing Act including those specified in the new final rule as objectives which do not have as their object the protection of livestock industry, but BLM may pursue those objectives without acquiring stockwater rights in the name of the United States government. The BLM has long allowed ranchers to develop stockwater resources for grazing on the public lands and presumably these ranchers held title to the water. *Hodel* at 276 (rancher developed deep water wells at his own expense in 1967 with the proviso that the water produced be made available to wildlife); 43 C.F.R. § 4120.3-2 (1995), Cooperative Range Improvement

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<sup>51</sup> *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546 (1963).

<sup>52</sup> Justice Rehnquist's majority opinion in *California v. U.S.* not only reviewed the legislative history of the Reclamation Law of 1902 and determined that Congress intended the states to retain its right to control, use, appropriate and distribute water, he made the following observation: "[a]s the legislative history of the 1902 Act convincingly demonstrates, however, if state law did not allow for the appropriation or condemnation of the necessary water, Congress did not intend the Secretary of the Interior to initiate the project." *California v. U.S.* at 668, n.21. Although there was language in the bill purporting to give the Secretary the power to condemn the state's water for a project. Rep. Mondell, the principal sponsor of the bill, stated that power existed only "wherever the state law gives him authority to do so." *Id.*

Agreements (authorizes private development of permanent range improvements). The objective here is not to protect the federal government's rights to water on the public lands, but to protect the stockgrowers rights.

We do not address nor are we concerned with any claim by the federal government to proprietary rights to water on the unappropriated public lands.<sup>53</sup> We do not think S.B. 96 addresses or affects the federal government's putative proprietary claims to unappropriated waters on the public lands given the long history of acquiescence to state hegemony in this area. The government is already beneficiary of the implied reserved water rights doctrine developed by the United States Supreme Court for reserved lands and there is too much history in both litigation and statute which supports the view that the federal government must adhere to substantive state water law when seeking to appropriate water on the public lands for other than primary purposes of a reservation. While we realize that the California Supreme Court in *In Re Water of Hallett Creek Stream System*, 44 Cal. 3d 448 (Cal., 1988) has acknowledged that the federal government in the Desert Land Act of 1877 did not affirmatively abandon its proprietary claim to water on the public lands (the Supreme Court has not addressed this issue), still in light of the caselaw developed over the years it seems that at the very least the government should have a stated congressional directive defining its interest in acquiring title to stockwater so that the appropriation may be considered for the government's use as opposed to the use and benefit of the stockgrower.<sup>54</sup> Absent such a directive, we feel that S.B. 96 is constitutional and on its face, at least, seeks to protect the stockgrower's rights to stockwater.

The Department of Interior's final rule not only does not express any intent to preempt state water law, it clearly states an intention to acquiesce to state water law. The final rule published in the Federal Register on February 22, 1995, contained a section-by-section analysis and response to public comment. Fed. Reg. 9,909 (1995). The explanation for § 4120.3-9 is an express acknowledgement that the Department's policy in the past has been to seek water rights under state substantive and procedural requirements, and the final rule "does not alter that policy." 43 C.F.R. § 4120.3-9 (1995). The agency also acquiesced to state law when defining qualified applicants, beneficial use, and quantity and place of use. *Id.* Finally, the Department stated that the final rule does not create any new federal reserved water rights nor does it affect valid existing rights.<sup>55</sup> Fed. Reg. at 9,936. The analysis and response to public comment is clearly an express

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<sup>53</sup> The Forest Service disputes whether a private party may own water rights for stockwatering purposes on the public domain including Forest Service lands. This is an issue in the Monitor Valley water rights adjudication ongoing now before the State Engineer. General counsel for the Forest Service argues in his prehearing brief that because the United States is the owner of the land "benefitted by stockwater use" then it is the United States which is entitled to hold the stockwater right. He bases his assertion on Nevada caselaw which seems to say that agricultural water is appurtenant to the land on which it is applied, therefore, by analogy, stockwater must also benefit the land by "necessity," and since the federal government is the owner of the land, stockwater rights must inure to the United States. Thus decreeing a private water right on public land "creates a property interest in the land to which the water right is appurtenant" and this process and resulting property interest, it is argued, "interferes with the ability of the United States to manage and administer public grazing lands." The author of the brief does not enlighten the reader as to how the government's ability to manage the public lands are affected much less made "virtually impossible."

<sup>54</sup> The California Supreme Court in *In Re Water of Hallett Creek Stream System*, 44 Cal. 3d. 448, 466-67 (Cal., 1988) rejected the California Water Board's assertion that Congress in the Desert Land Act of 1877 affirmatively relinquished all proprietary claims to western waters. The court based its determination on what the Supreme Court in *California Oregon Power Co. v. Beaver Portland C. Co.*, 295 U.S. 142 (1935) did not say. The California Supreme Court simply noted that even though *California Oregon Power Court* held that the Desert Land Act had severed the water from the land which it (federal government) conveyed, there was no statement that the U.S. thereby relinquished all water rights in the land it retained. The Court held that under California law riparian water rights exist on federal lands located within the State of California.

<sup>55</sup> On April, 26, 1926, the President, under congressional authority found in Act of Congress approved June 25, 1910, withdrew from entry and settlement via executive order #107, "the smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole." All land within a quarter mile of said spring was withdrawn and "reserved for public use." By opinion dated February 16, 1983, the Department of Interior's solicitor concluded the purposes of reservation of water under the withdrawal was limited to human and animal consumption, specifically needs of homesteaders and their livestock, and the right to use water from these sources for any other purpose must be obtained under state law because other purposes do not come within the reserved right. Because the stockwatering rights at issue under S.B. 96 generally involve underground sources and their development, the public water reserve has limited application, if at all.

It should also be noted that the public water reserve #107, "does not expressly state an intention to reserve water in public springs or waterholes and to withdraw it from appropriation under state law." *United States v. City and County of Denver*, 656 P.2d 1, 31 (Colo. 1982). In fact,

acknowledgment that state water law remains the sole means by which any applicant, whether public agency or individual stock owner, may acquire water rights. The final rule does not preempt state water law as amended by S.B. 96.

### CONCLUSION TO QUESTION SIX

S.B. 96 overruled *State v. State Engineer* only to the extent that the court held the United States could appropriate water for livestock watering even though it owns no livestock or interest in livestock. The legislature amended the state's water law prospectively and it does not create a conflict with prior Nevada supreme court cases or statutory law including [NRS 533.010](#).

S.B. 96 does not conflict with federal law since even the final rule states BLM shall acquire title to stockwater only to the extent allowed by state law. The act does not offend congressional purposes or objectives since the Federal Land Policy and Management Act and Taylor Grazing Act do not state or imply acquisition of title to stockwater rights is necessary to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference. We could not find a statement or expression of congressional purpose requiring (or suggesting) BLM pursue and protect *its rights to water on the public lands*, rather it seems clear that congressional purposes since the nineteenth century have been to protect stockgrowers rights.

Long-standing acquiescence by Congress and the courts lends weight to any amendment of the state's water law by the legislature. We feel there is no principled reason why the Secretary of Interior should not be bound by requirements similar to those already developed and applied to him in the context of reclamation water law, when seeking to acquire stockwater under state law.

Finally, when these issues are considered in light of the preemption doctrine, it seems that at the very least the government should have a stated congressional directive or purpose defining its interest in acquiring title to stockwater so that appropriation of stockwater may be considered for the use and benefit of the federal government as opposed to the use and benefit of the stockgrower.

Absent such a directive we feel S.B. 96 is constitutional and on its face, at least, seeks to protect stockgrower's rights. 43 C.F.R. § 4120.3-9 (1995) does not preempt state water law as amended by S.B. 96.

### SUMMARY OF OPINION

[NRS 533.503](#), as amended by S.B. 96, applies only to public lands administered by BLM and not any other reserved federal land. The phrase "legally entitled to place the livestock on the public lands for which the permit is sought" excludes BLM from applying for a stockwater permit since the applicant must have a grazing permit or lease from BLM in order to qualify. The State Engineer may not issue stockwater permits subsequent to July 3, 1995, to any applicant, unless the applicant has an interest in or possesses a grazing permit or lease from BLM. When considering stockwater applications, the State Engineer should obtain from the applicant for the stockwatering permit on public lands an affirmation or affidavit that affirmatively indicates the applicant satisfies these conditions.

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the *Denver* court held the state law of prior appropriation governed allocation of excess waters from a water hole not needed to fulfill the purposes of the reservation. *Id.* at 32. Current Interior regulations limit the reservation to those waterholes or springs "capable of providing enough water for general use for watering purposes." 43 C.F.R. § 2311.0-3(a)(2) (1980) Smaller springs suitable for one family and its livestock are excluded.

S.B. 96 acts only prospectively; therefore, the State Engineer's former practice of granting stockwatering rights to an applicant who did not have an interest in the livestock to be watered is reversed from the effective date of the Act. Permit holders and certificate holders, including BLM, prior to the effective date of the Act have a property interest and may not be divested of that interest without due process. Applications submitted prior to the effective date of the Act are not protected by statutory or constitutional law, and the State Engineer must apply the provisions of S.B. 96 to any application for a permit to appropriate stockwater.

The State Engineer may continue to issue change application approvals based on permits already issued for stockwatering in the name of BLM. [NRS 533.503](#) does not forbid this kind of action by the State Engineer.

There is no statutory or constitutional conflict between [NRS 533.503](#) and prior caselaw. To the extent prior caselaw is in disagreement with [NRS 533.503](#), prior caselaw is overruled by legislative action. The 1995 Legislature, through S.B. 96, limited the State Engineer's discretion. Under current law, the State Engineer may only grant stockwatering rights to applicants who have an interest in the livestock to be watered.

Federal law does not preempt state water law since there is an express acquiescence in the new final Interior rule to state water law. State water law provides procedures for determining qualified applicants, beneficial use, and quantities of water appropriated. We can find no mention nor inference in the underlying congressional legislation indicating the acquisition of title to stockwater on public lands furthers any stated purpose under Taylor Grazing Act or Federal Land Policy and Management Act.

FRANKIE SUE DEL PAPA  
Attorney General

By: GEORGE H. TAYLOR  
Deputy Attorney General

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OPINION NO. 97-06 PUBLIC RECORDS; PERMITS; FIREARMS: A permit holder's name and information on the face of the permit is public information absent extraordinary circumstances in a specific instance.

Carson City, February 11, 1997

Mr. Leon Aberasturi, Deputy District Attorney, Lander County District Attorney's Office, Post Office Box 187, Battle Mountain, Nevada 89820

Dear Mr. Aberasturi:

You have asked this office for an opinion regarding permits to carry a concealed firearm which are issued pursuant to [NRS 202.3653](#)-.369. Such permits are sometimes referred to in the vernacular as CCW permits (carry concealed weapon permits).

QUESTION

Are concealed firearm permits public records?

ANALYSIS

[NRS 202.3653](#)-369 provides that a person desiring to carry a concealed firearm shall make application to the sheriff's office of their county of residence and the sheriff shall investigate the background and training of the applicant to determine if the applicant is eligible to hold the permit. The permit allows the person to carry two firearms specified in the application. Pursuant to [NRS 202.366](#) the permit shows the name, height, weight, date of birth, address, city, county, zip code, and photograph of the permit holder. It also includes make, model, and caliber of the firearm authorized. The permit is valid for five years.

The concealed firearm statutes and the legislative history are silent regarding confidentiality of the permit.<sup>56</sup> [NRS 239.010](#) provides that all public records not confidential by law shall be open to inspection and copying. However, this statute does not resolve all the issues related to information in the record especially when it is personal information or when its release presents a matter of public safety. Without specific guidance in the statute, the custodian of the record must balance the public interest in disclosure against the public interest in nondisclosure. *Donrey of Nevada v. Bradshaw*, [106 Nev. 630](#), 798 P.2d 144 (1990).

The Lander County Sheriff has indicated to you concerns for public safety and safety of the permit holders if the names and addresses are public information. Some fear that if the type of firearm was public information, together with the home address, it may attract a thief to the home to steal the weapon. The concerns related to disclosure of concealed firearm permits have been considered by the Appellate Court and Supreme Court of California with different results. In *CBS, Inc. v. Sheriff Block*, 207 Cal. Rptr. 65 (Cal. Ct. App. 1984), the California Court of Appeal, Second District, was concerned that persons intent on harm to Los Angeles County permit holders would approach a permit holder with greater sophistication or an escalated use of force if they knew their target carried a concealed weapon, thus putting the permit holder at even greater risk. *Id.* at 70. Unlike Nevada's current law, the law in California at the time limited permits to persons for whom there was a clear and present danger to their life or the life of their family members. *Id.* Though the Court of Appeal was impressed that California permit holders were persons for whom it was known that someone intended them harm, the California Supreme Court reached a different result, finding that the balance of interests favored disclosure to the media. *CBS, Inc. v. Block*, 42 Cal. 3d 646, 75 P.2d 470 (Cal. 1986) (*en banc*) (Mosk, J. dissent, Panelli, J., joined.)

Previously in Nevada, a CCW permit was based upon a demonstrated high degree of need of the individual to carry the weapon for protection. The current statute in Nevada follows a trend in other states to allow anyone who qualifies to have a permit without showing there is a known threat to life or an occupation that makes one a target of criminals. Today, there is no reason to assume a special danger for concealed firearm permit holders or for the public if it is public knowledge that a particular person holds a permit. We agree with your district attorney that the list of concealed firearm permit holders is a public record.

We take guidance from a careful reading of the California Supreme Court opinion in *CBS*.<sup>57</sup> CBS sought information to develop a program it intended to air concerning issuance of concealed weapon permits in Los Angeles County. The Los Angeles County Sheriff had issued

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<sup>56</sup> In hearings before the Subcommittee of the Senate Committee on Judiciary a discussion ensued about the desirability of a 3-person appeal panel. Senator McGinnis stated "it is his view that the citizens' board would be problematic because they would have limited access to the confidential records which are the basis for the sheriff's decision." Minutes of April 25, 1995, hearing on S.B. 299 before the Subcommittee of the Senate Committee on Judiciary at 2. Such records would be part of the application but not on the face of the permit.

<sup>57</sup> In 1983 *CBS, Inc.*, filed a motion challenging the sheriff's refusal to release applications submitted for CCW permits and the permits issued. The superior court ordered disclosure of most of the permits in effect with deletion of home addresses. Both sides appealed. The court of appeal reversed and remanded. The California Supreme Court granted access to the names of the permit holders and the applications. The California Supreme Court found access to the applications to be necessary to know the reason why a license was needed and if the grant or denial was a proper exercise of discretion. Justice Mosk dissented, Justice Panelli concurred in the dissent.

only 35 CCW permits. We find it significant that the California Supreme Court refused to recognize "defendants' claims for the wholesale suppression of records of the granting of licenses to carry a weapon" (*Id.* at 654) while recognizing that certain information related to some licensees may justify nondisclosure as to that permit holder. *Id.* at 655. We recognize there could be circumstances regarding a particular permit holder which would compel a decision that the permit information should not be released for public safety reasons. However, such circumstances would be the exception, not the rule. We caution that such a balancing of public interests must not be based on supposition, unsupported speculation, or merely preference of the permit holder.

### CONCLUSION

Concealed firearm permits are subject to disclosure as a public record. In a rare instance public safety might require the name of the permit holder or some of the information on the permit be withheld, but that is the exception, not the rule. Specific legislative change should be sought if it is desirable to make names of permit holders and minimal information on the permit confidential in every case.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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OPINION NO. 97-07BOARD OF EXAMINERS; ATTORNEY GENERAL; CONTROLLER; TORT CLAIMS: The Board of Examiners may promulgate rules under [NRS 353.040](#) to delegate tort claims settlement authority to the Attorney General. The Controller may legally honor delegated tort claim warrant requests by the Attorney General's office.

Carson City, February 14, 1997

The Honorable Darrel Daines, Nevada State Controller, Capitol Building, Carson City, Nevada 89710

Dear Mr. Daines:

On January 28, 1997, we met to discuss your concerns regarding the Board of Examiners' (BOE) long-standing practice of delegating part of the approval process for damage claims (tort claims) to the Attorney General's office. In a further effort to respond to these concerns, on January 30, 1997, we met with the Attorney General and members of her staff to discuss legality of the BOE's delegation. At this meeting with the Attorney General, you requested this office provide an opinion setting forth the legal basis upon which the warrant requests made directly from this office may be honored.

### QUESTION

May the BOE delegate the same or similar tort claims authority to the Attorney General's office that [NRS 353.190](#) conditionally authorizes to the ex officio clerk of the BOE?

### ANALYSIS

The BOE delegated authority to deny or settle tort claims for amounts up to \$10,000 to the Attorney General, with specific authorization to redelegate this authority. *See* SAM

2906.0. You indicated you believe there must be specific statutory authority for such a delegation. The opinion of the Attorney General's office is to the contrary.

[NRS 41.036](#) requires the claimant to file his claim with the clerk of the BOE and provide a copy of the same within ten days to the Attorney General's office.<sup>58</sup> The Attorney General's office and the relevant agency must then investigate and report findings to the BOE. Upon receiving the report, the BOE may allow and approve any claim or settle in any action not exceeding \$50,000. In addition to this statutory process, the BOE has expressed its decision through the State Administrative Manual (SAM) that claims of \$10,000 or less can be decided by the Attorney General's office without submitting such claims to the full Board for specific additional approval. *See* SAM 2906.0.

As we have previously expressed, the authority to delegate does not require specific legislative action in every circumstance. Within any agency of the executive department of government, duties are statutorily charged to the head of that agency, but routinely carried out by subordinates.

The BOE is an agency of the state having its roots in the Nevada Constitution. *See* Nev. Const. art 5, § 21; *see also* [NRS ch. 353](#). [NRS 353.040](#) provides: "The state board of examiners shall have authority to establish rules and regulations for its government not inconsistent with law." This constitutes the agencies' delegated authority to construe its own statutes and operate within the bounds of law. The SAM is a "rule" under the meaning of this authority statute, and the BOE may conduct its business pursuant to its rules without the need for additional legislative authority. *See* [NRS 233B.050\(1\)](#).

The ultimate question you have raised regarding SAM as the vehicle for delegation of authority to the Attorney General is whether such BOE rule making is "not inconsistent with law." Central to this question is the apparent authority the BOE may grant to its clerk. The specific delegation statute relevant to the clerk of the BOE is [NRS 353.190](#), which provides:

1. In addition to his other duties, the chief is ex officio clerk of the state board of examiners. He shall:
  - (a) Assist the state board of examiners in the examination, classification and preparation for audit of all the claims required to be presented to the board.
  - (b) Conduct an effective check and preaudit of all such claims before they are submitted to the board.
  - (c) Approve, on behalf of and when authorized by the board, claims against the state not required to be passed upon by the legislature.
2. The rules of procedure governing the duties of the chief under this section shall be promulgated by the state board of examiners.
3. The chief may delegate these duties to his deputy.

Regarding your authority to act upon the delegated warrant requests, you have expressed concern the law could be construed to require a specific delegation statute for the BOE to delegate any of the same duties to the Attorney General. It is our opinion the constitution and [NRS 353.040](#) provide sufficient authority to support the BOE's action.

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<sup>58</sup> Because a denial to settle a tort claim does not deny a claimant their right to proceed to civil action, the delegated acts would not implicate a claimant's due process rights. "The filing of a claim in tort against the state or a political subdivision as required by subsections 2 and 3 is not a condition precedent to bringing an action pursuant to NRS 41.031." NRS 41.036(4). However, paragraph (1) of NRS 41.036 requires the claim must be filed with the clerk of the BOE and a copy of the same delivered to the Attorney General as requirements that ultimately could bar their recovery in court if they fail to comply. Therefore, a claimant may file his civil action to preserve it and then must file the claim with the BOE for the state's statutorily required opportunity to adjust and settle the claim.

The mere fact that the legislature chose to grant a nonmember clerk or deputy the right, if so authorized by the BOE, to settle claims, does not foreclose the inherent right of the BOE to make a rule to govern itself otherwise. The clerk enjoys a conditional right that cannot be exercised absent specific action by the BOE. However, action taken by a majority vote is the recognized legitimate basis for conducting the business of the BOE as long as they are not violating law.<sup>59</sup>

The expressed power of the BOE, as set forth in the Nevada Constitution, must be fully considered in determining the limits of its authority. The Constitution of the State of Nevada provides:

The Governor, Secretary of State, and Attorney General shall constitute a Board of Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall also constitute a *Board of Examiners, with power to examine all claims against the State (except salaries or compensation of Officers fixed by law) and perform such other duties as may be prescribed by law*, and no claim against the State (except salaries or compensation of Officers fixed by law) shall be passed upon by the Legislature without having been considered and acted upon by said "Board of Examiners."

Nev. Const. art 5, § 21 (emphasis added).

The constitution provides the BOE with two separate powers. The power to "examine all claims" and the power to "perform such other duties as may be prescribed by law." Because the foundation of your concern is the specific authority statute granted by the legislature to the BOE clerk, a legislative act that allegedly threatens the BOE's constitution power must be addressed. The constructive rule expressed by the Nevada Supreme Court applicable to the BOE's constitutional power requires that any restriction or qualification of a constitutional expression must be fairly expressed and not left to implication or conjecture. *See State ex rel. Cutting v. LaGrave*, [23 Nev. 387](#), 48 P. 370 (1897).<sup>60</sup>

Applying this constructive rule to the facts now being considered, the first expressed constitutional power of the BOE to "examine all claims against the state" cannot be restricted or qualified by the second and separate constitutional power to "perform such other duties as may be prescribed by law." Each power, and the authority incident thereto, must stand alone and be given their plain meaning. *See State of Nevada v. Doron*, [5 Nev. 329](#) (1870).

It follows that the BOE clerk's conditional authority statute, which appears in the State Budget Act rather than the BOE statutes, is a legislative act that neither impinges upon the BOE's constitutional power to "examine," nor does it otherwise "prescribe" a duty by law. *See NRS 353.150-.246; compare NRS 353.010-.057; compare Nev. Const. art. 5, § 21.*

To accept the premise that the clerk's authority statute has foreclosed the BOE's inherent constitutional and statutory authority to examine claims under rules lawfully promulgated,

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<sup>59</sup> "A majority of the state board of examiners shall constitute a quorum and may, as such, discharge any of the duties specified by law." NRS 353.015.

<sup>60</sup> In *State ex rel. Cutting*, the Attorney General, on behalf of the controller against H.C. Cutting, curator of the state museum, opposed a writ for issuance of a warrant arguing that the parenthetical exception expressed in art. 5, § 21 "(except salaries or compensation of Officers fixed by law)" should only apply to legislatively appropriated compensation claims set out in "preexisting" law. The original appropriation of 1891 had become inoperative and the retroactive appropriation of February 18, 1897, was challenged by the controller as legislative action on a claim that had not been previously examined by the BOE. The court was not willing to add by implication or conjecture the 'preexisting law' restriction or qualification sought to be added to the constitution's parenthetical exception to BOE authority.



we would have to construe the clerk's statute as being superior to the constitution. Clearly, that is not the case.

The first constitutional power to "examine" remains unaffected by the legislative act. The second power to perform "other duties as may be prescribed by law" is not implicated when the duty is not "prescribed," but is in fact conditional.<sup>61</sup> Therefore, if the BOE's delegation to someone other than the BOE's clerk is not expressly restricted or qualified within the BOE's constitutional powers, our analysis must turn to the actual delegation and law in that regard.

While delegation of authority within an agency is not without its limits, the official status of the Attorney General should not be overlooked in construing whether the delegation abrogates the BOE's statutory responsibility.<sup>62</sup>

"The attorney general and his duly appointed deputies shall be the legal advisers on all state matters arising in the executive department of the state government." [NRS 228.110\(1\)](#). As legal counsel for the BOE, the Attorney General's office occupies a unique position that is completely distinguishable from the average delegation of statutory authority and discretion to an otherwise unauthorized staff. In all tort claims the Attorney General occupies two positions of responsibility. The Attorney General is a member of the BOE and also serves as the BOE's legal counsel. The legislative scheme establishing authority of the Attorney General is extraordinary. For example, the Attorney General has express authority to approve certain actions of the Controller. See [NRS 227.150\(2\)\(b\)](#) (where the Controller may: "[u]pon approval of the attorney general, direct the cancellation of any accounts or money due the state"). Inherent in this legislative scheme is the legislature's apparent recognition that, as attorney for the state, the Attorney General enjoys the general authority to exercise discretion over legal issues that are incident to the scope of legal representation. The BOE's delegation of tort claim settlement authority to the Attorney General is not inconsistent with this apparent legislative scheme.

It has long been the right of a client to delegate authority to legal counsel to investigate and settle claims that, in the professional judgment of the attorney, may lead to more expensive litigation. Supreme Court Rule 152(1) provides in part:

[a] lawyer shall abide by a client's decision concerning the objectives of representation, subject to subsections 3, 4 and 5, and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

Through legitimate rule making, the BOE decided it was in the state's best interest to authorize its attorney to settle potential lawsuits where the amount in controversy is relatively small. Delegation of this authority to the Attorney General is rational and beneficial to the state and its citizens in several ways. First, delegation alleviates delay that otherwise cannot be accurately anticipated and expressed to claimants.<sup>63</sup> Second, in many of the small dollar claims involving automobile accidents with clear state liability, the state's interest and the citizen's need are better served by immediate funding for transportation while the vehicle is repaired. Delegation of settlement authority to the Attorney General can better accommodate these damages. Third, the timely exercise of settlement authority is commonly used in the insurance industry to minimize risk

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<sup>61</sup> "Prescribe is defined as follows: [T]o lay down authoritatively as a guide, direction, or rule; to impose as a preemptory order; to dictate; to point, to direct; to give as a guide, direction, or rule of action; to give law. To direct; define; mark out." Black's Law Dictionary 1064 (5th ed. 1979).

<sup>62</sup> See *Craddock v. State Bd. for Com. Colleges*, 768 P.2d 716 (Colo. Ct. App., 1988) (where the body upon which statutory authority rests must retain sufficient authority over the process delegated to not be considered to have abrogated its statutory responsibilities).

<sup>63</sup> The BOE does not have a set schedule for its meetings, nor does it preset its next meeting during its meetings.

of loss potential. The same holds true for the state. In the modern world of insurance adjustment, even minor delays have the potential to add a claim for attorney's fees and litigation risk that may not otherwise be present in the early stages of the claim.

Common law also suggests that delegation in this case is within legal limits. *See Ybarra v. Nevada Bd. of State Prison Com'rs*, 520 F. Supp. 1000 (D. Nev. 1981) (where through a regulation the Prison Board delegated to prison superintendents authority to establish policies that were "less restrictive" than the policy promulgated in the Prison Board's regulation). This action was found to be a constitutional and lawful delegation of authority notwithstanding the authority statute that specifically required the superintendents to operate "under regulations adopted by the director and approved by the board." *Id.* at 1002.

In the BOE's case the statute allows it to govern itself by rules or regulations or both. *See* [NRS 353.040](#). With policy considerations and limited delegation fully considered under the *Ybarra* rationale, delegation cannot be considered to be an improper abrogation of statutory responsibility. Therefore, the only question that remains is whether such a delegation is constitutional.

The delegation doctrine is one of constitutional origin, limiting the authority of one branch of government from delegating its duties to another branch of government. *See Moore v. Humboldt County*, [48 Nev. 397](#), 403, 232 P. 1078, 1080 (1925) (where it was stated regarding the delegation of legislative power: "It is the well-recognized general rule that a power vested in one of the departments of our government by the constitution cannot be delegated to any other branch of the government, board, or tribunal"). This type of improper delegation can run into due process problems as it impacts citizens' rights. As indicated above, the constitutional rights of citizens are not implicated in the BOE's claim settlement process. In addition, even with prohibition against delegation between the constitutional branches of government, the court has held "the legislature cannot delegate legislative power, but it may delegate authority or discretion, to be exercised under and in pursuance of the law." *See Ex Re. Ginocchio v. Shaughnessy*, [47 Nev. 129](#), 136, 217 P. 581, 583 (1923).

The Nevada Legislature has set numerous statutory standards regarding liability of the state and its officers and employees. *See* [NRS 41.010-.039](#). In a manner not inconsistent therewith, the BOE delegated appropriate authority and discretion to its lawfully recognized executive department attorney. This delegation would not be in violation of the delegation doctrine. However, whether this delegation is appropriate is a policy question that is within the BOE's inherent authority and is not within the Controller's statutory authority. [NRS 41.037](#) provides: "[u]pon approval of any claim by the state board of examiners, the state controller shall draw his warrant for the payment thereof . . . ." By its delegation of authority the BOE has "approved" the warrant requests made by the Attorney General's office within the \$10,000 limit.

Regardless of the apparent mandatory language of [NRS 41.037](#) regarding the Controller's duty, the Controller has the responsibility to decide whether a tort claim is "just and legal." *See* [NRS 227.160\(1\)\(b\)](#); *see also State of Nevada v. Doron*, [5 Nev. 329](#) (1870). The Controller's authority goes to the nature of the claim itself, not the process of another agency of government that presents that claim. [NRS 277.160](#) requires the Controller to allow those just and legal claims that are presented to the BOE and not acted upon within 30 days. The BOE's approval process, or lack thereof, does not impact the justness or legality of the claim itself. If the claim has been presented to the Controller's office through a process approved by the BOE, that is sufficient statutory basis to honor the warrant request.

## CONCLUSION

The Board of Examiners, pursuant to [NRS 353.040](#) rule making in the State Administrative Manual, has properly delegated tort claim settlement authority to the Attorney General's office for claims of \$10,000 or less.

FRANKIE SUE DEL PAPA  
Attorney General

By: RANDAL R. MUNN  
Deputy Attorney General

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OPINION NO. 97-08CHILDREN; CHILD ABUSE AND NEGLECT;HEALTH; COURTS; JUVENILES: In cases where a ward of the state is terminally ill, the court has the authority upon a physician's recommendation to order placement of a "Do Not Resuscitate" order on the chart of a minor in custody by the ward's treating physician. In this process the Division of Child and Family Services acts as a presenter of evidence under [NRS 432B and](#) no liability attaches to the Division of Child and Family Services for any action the court may take.

Carson City, February 27, 1997

Mr. Ken R. Patterson, Administrator, Division of Child and Family Services, 711 East Fifth Street, Carson City, Nevada 89710-1002

Dear Mr. Patterson:

You have asked this office for an opinion as to under what circumstances a "Do Not Resuscitate" (DNR) order may be placed on the chart of a terminally ill child in the custody of the Division of Child and Family Services (Division). In responding to this inquiry, the issue of appropriate legal relationship needed to place such an order is addressed. Also examined is the impact, if any, placement of such an order may have on Medicaid or other federal funding.

#### QUESTION

Under what circumstances can DNR orders be placed on the chart of a child in the Division's custody who is terminally ill?

#### ANALYSIS

As each child's situation is unique, it is clear this issue must be addressed on a case-by-case basis. There are, however, categories under which this larger question can be subdivided to help provide the Division guidance with how to proceed in future cases.

A DNR order prepared by a treating physician, also commonly referred to as a "no code," prevents emergency action from being taken upon a patient in a hospital setting by specialized teams formed in acute hospitals composed of doctors, nurses, and other professional support staff trained in administration of cardiopulmonary resuscitative measures. If a patient goes into cardiac or respiratory arrest and such an order is not in place, the nurse in attendance causes a code word to be broadcast on the hospital's intercom system. In response, the members of this code team converge on the room immediately perform extraordinary resuscitative measures upon the patient. A DNR order interrupts such a convergence of medical personnel at those emergency instances when it is required to sustain life.

This type of order is not to be confused with [NRS 449.535](#), which describes the legal circumstances whereby a person 18 years of age or older may knowingly withhold or withdraw from use of life-sustaining treatment. "Life-sustaining" treatment is defined by [NRS 449.570](#) as "a medical procedure or intervention that, when administered to a patient, serves only to prolong the process of dying."

With a DNR order placed on the medical charts by the treating physician the patient is still administered life-sustaining treatment, even though it may merely prolong the process of dying. This opinion contemplates appropriateness of extraordinary emergency resuscitation measures only, not cessation of all treatment. Moreover, it is only concerned with terminally ill children in the Division's custody.<sup>64</sup> The analysis of DNR orders for children not in the Division's custody is beyond the scope of this opinion.

Analytically, there are three circumstances that must be separately considered to fully address interrelated issues of when a treating physician in consultation with the Division can place a DNR order on a terminally ill minor ward's charts, and what legal relationship with the child is necessary to allow the Division to seek such an order.

The first and easiest scenario is where the Division worker puts before the court a physician who can produce medical evidence that a DNR order is appropriate in the case of a terminally ill ward and the parent consents to placement of same.<sup>65</sup> In this particular case, the person most responsible for the minor (the parent) agrees with the physician's assessment of their child's condition, and that is the end of the inquiry. Indeed, while it is advisable to make the juvenile court aware of such events, the decision under this set of facts is properly placed in the hands of that parent. The court plays no role in the decision, nor does the Division.

The second circumstance is one where the Division worker puts before the court a physician who can produce competent medical evidence to prove that a DNR order is appropriate in the case of a terminally ill child in Division custody, and no parent can be reached to make the final decision. In this case, after diligently attempting to contact a parent to no avail, the Division takes the matter before the juvenile court for further direction. After the Division offers a physician who presents competent medical evidence which indicates it would be in the minor's best medical interest, the juvenile court possesses authority to directly order placement on the subject minor's medical charts of the DNR order as prepared by the appropriate medical professional.

This power is derived most directly from [NRS 432B.560\(1\)\(a\)](#) wherein the juvenile court may order a minor ward "to undergo such medical, psychiatric, psychological or other care or treatment as the court considers to be in the best interests of the child." *Id.* While there has been no case within this jurisdiction construing this provision in this manner, there exists persuasive legislative history in Nevada and authority from other jurisdictions to assist this office in making a determination on this issue of first impression.

The *Minutes of February 27, 1985, hearing on A.B. 199 before the Joint Senate and Assembly Committees on the Judiciary* indicate that § 63 (later [NRS 432B.560\(1\)\(a\)](#)) was created "to essentially take care of section the foster care situation." *Minutes* at 9. While only brief

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<sup>64</sup> A child is "terminally ill" when competent medical evidence indicates there is no reasonable hope for recovery. The status of terminally ill is a medical determination that must be specifically indicated in the supporting materials presented by the doctor to the court in support of the appropriateness of a DNR order.

<sup>65</sup> In many instances, children can be in the custody of the Division, while parents simultaneously maintain their parental rights.

commentary, this legislative history provides some guidance to show that this statute was created to allow the juvenile court to make medical decisions for wards of the state where there were no parents available. Without this provision, there would be a void in the "foster care situations," as no person would be allowed by law to make these decisions. Foster parents do not possess such authority.

Two other jurisdictions have addressed authority of the juvenile court to grant DNR orders for terminally ill wards of the state in cases of an absent parent. Each has approached it in a slightly different manner.

In *Custody of a Minor*, 434 N.E.2d 601 (Mass. 1982), the Supreme Judicial Court of Massachusetts offered the most useful and common sense approach to this issue. It began with the general proposition that the "statutory grant of jurisdiction . . . carries with it by implication power to use necessary means to exercise and enforce that jurisdiction . . . ." *Id.*

The court then enunciated seven well-considered factors that it used in deciding *whether* it possessed the power to order placement of the DNR order.<sup>66</sup> It took note that:

1. The child is a ward of the state;
2. The child is not competent to make the decision;
3. The parents have not exercised their parental responsibilities toward the child;
4. The child's condition is incurable and the prognosis for treatment is negative;
5. Medical opinions were "clear and unanimous";
6. Resuscitation attempts would be "painful and intrusive"; and
7. The child was a ward of the state before this DNR issue arose.

*Id.* at 608.

With all of these factors considered, the court concluded that "absent a loving family with whom physicians may consult regarding the entry of a 'no code' order, this issue is best resolved by requiring a judicial determination . . . ." *Id.*<sup>67</sup>

Use of this procedure in Nevada in accordance with this Massachusetts case is legally and practically sound. It should be used by the Division. The Division should present these factors to the juvenile court while requesting a bifurcated hearing: (1) It should request that the court establish that it is the appropriate forum to make this decision in the "parent-absent" scenario; and (2) The Division should inquire of the court whether it will, in fact, order the appropriate physician to place a DNR order on the chart of the terminally ill child in the Division's custody.

In this scenario, it is irrelevant that the Division is merely the child's custodian and not the guardian, because the court is acting directly. The Division is merely a presenter of facts, and holds no decision making or discretionary authority.

In *In re C.A.*, 236 Ill.App.3rd 594, 603 N.E.2d 1171 (Ill. App. Ct. 1992), another approach is offered that would be sound under Nevada state law if the court refuses at part two of

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<sup>66</sup> The issue of whether the juvenile court has the *authority* to make this determination is a different inquiry than whether the court actually *should* enter the order. The latter inquiry is beyond the scope of this opinion. Nevertheless, the Division should provide the court with a potential decision-making apparatus for appropriateness of the actual DNR order. The suggested test for the court to consider is whether placement of such an order is proven to be in the best medical interests of the child. This test seems to fit most closely with the court's statutory authority under NRS chapter 432B.

<sup>67</sup> The case of *Care and Protection of Beth*, 587 N.E.2d 1377 (Mass. 1992) held the same way as *Custody of a Minor* on this issue of appropriateness of a judicial determination for a DNR order. This court also used many of the above factors in reaching its determination.

the bifurcated hearing to directly order a physician to place a DNR order on the child's chart. This method, although legally sound, presents greater difficulty for the Division in its execution.

In that case, a ward of the state of Illinois, suffered from "severe and incurable conditions," including Human Immunodeficiency Virus (HIV) and a severe neurological impairment. *In re C.A.* at 1181. The child's guardian sought the court's permission to allow him to authorize a DNR order to be placed on the child's chart. This request was made pursuant to the treating physician's judgment that such an order was medically appropriate.

In holding it was within the juvenile court's power to grant such permission to the guardian for a DNR order, the court relied on Illinois' "Juvenile Court Act," particularly § 2-11, which empowers the Illinois Juvenile Court during temporary custody to approve "medical, dental, or surgical procedures if such procedures are necessary to safeguard the minor's life or health." *In re C.A.* at 1178. The court stated that such a holding was particularly appropriate because "the court is charged with ruling on all matters presented to it regarding the welfare of the child." *Id.* The child's guardian sought the court's permission to allow him to authorize a DNR order to be placed on the child's chart. This request was made pursuant to the treating physician's judgment that such an order was medically appropriate.

As to the absence of the parents or guardians, the court later stated:

Because wards of the court are not in the care of their biological parents, representatives of the State step in to act in *Parens Patriae*.<sup>68</sup> Section 2-22 of the Act expressly requires the trial court to adhere to the 'best interests of the minor and the public,' in dispositional hearings concerning wardship.

*Id.* at 1180 (emphasis added).

The case of *In Re C.A.* supports the proposition [NRS 432B.560\(1\)\(a\)](#) should be read to include such powers as well. The two statutes in Illinois and Nevada are nearly identical in coverage. Indeed, following the logic and important public policy considerations behind this case, not only is it appropriate for a juvenile court in Nevada, when presented with appropriate medical evidence from health care professionals, to make these types of medical decisions, it is necessary if the court wishes to discharge its obligation under [NRS 432B.560\(1\)\(a\)](#) to both the ward, as well as to the public at large.

Procedurally, upon finding the DNR order was in the minor's best medical interest, the court authorized the ward's guardian to consent to placement of the DNR order by the treating physician on the chart of the minor. This is decidedly different from the court ruling on the issue in Massachusetts.

While the approach taken in this case is legally sound and may be correctly adopted by any or all juvenile courts in Nevada, it presents a problem for the Division as the mere custodian of children in custody. Indeed, no authority has been uncovered that would allow a mere legal custodian to make this difficult medical decision.

Therefore, the method used in Massachusetts in the form of a direct DNR order from the juvenile court is preferable. If however, as has been the case in some juvenile cases in Nevada in the past, the court refuses to order the DNR directly under part two of the bifurcated hearing, the Illinois method can then be used, as [NRS 432B.560\(1\)\(a\)](#) empowers the juvenile court

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<sup>68</sup> This term refers to the role of state as sovereign and guardians of persons under legal disability, such as wards of the state.

to authorize the Division to consent to the treating physician's decision to place a DNR order on the medical chart of a minor in custody.

If the juvenile court in question favors the Illinois method as to part two of the bifurcated hearing, the Division should seek status as a temporary guardian of the child in custody pursuant to [NRS 159.052](#), before any order on the matter is rendered. Temporary guardianship can be established by law for a 10-day period in situations where a "proposed ward . . . needs immediate medical attention." It is during this period of time that the Division authorize the treating physician to place a DNR order on a child's chart, if the juvenile court so instructs.

The final scenario is one in which the parent or legal guardian objects to placement of a DNR order on a ward's charts. In this case, the judge still possesses authority under [NRS 432B.560\(1\)\(a\)](#) to order placement of the DNR order, although the court's footing may be decidedly less firm.

Nonetheless, the Division can put before the court medical professionals to present evidence that such an order would be in the medical best interests of the minor, even over the parents' objection. While the parents should be given tremendous deference in this setting, the parents' rights are not absolute.<sup>69</sup> They are subject to review by the court to ensure that the parents are making decisions based upon the medical best interests of the child, and with no other motive.

Under each of these scenarios presented above, the Division would be immune from liability. In cases where the parent of the ward decides the DNR order is appropriate, the Division is not making the decision and is thus not liable. In the other two situations, the Division would be merely presenting the case for review pursuant to [NRS 432B](#), "exercising due care" in obeying a court order handed down pursuant to [NRS 432B.560\(1\)\(a\)](#). In this scenario, the Division would have immunity from liability as per [NRS 41.032](#).

The final issue is whether placement of the DNR order would affect Medicaid or other federal funding to the Division. In each of these instances, the Division is merely presenting information to the juvenile court for its review. It is not affirmatively acting, other than pursuant to statutory mandate and court order, as all citizens and agencies must. The Medicaid regulations for the state program include only dictates for the state agency to follow and services covered. It does not appear that a DNR order will have any impact on federal funding to Medicaid. If you have other specific programs about which you are concerned regarding continuation of federal funding, please provide information regarding those concerns so they can be addressed.

## CONCLUSION

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<sup>69</sup> Although there is no published case where a DNR order was ordered by a juvenile court over the objection of a parent, the limits of parental discretion have been tested. In the case of *In Re Custody of a Minor*, 393 N.E.2d 836 (Mass. 1979), the parents of a child suffering from acute lymphocytic leukemia wished to continue "metabolic therapy" on the child, despite medical evidence that such treatment would be detrimental to the child's condition. While recognizing that parents have the right to raise their children in accordance with the "dictates of the conscience," the court noted that this right is not absolute. *Id.* at 843.

The court later states its position thusly:

[T]he parental right to control a child's nurture is grounded not in any absolute property right which can be enforced to the detriment of the child, but rather is akin to a trust, subject to a correlative duty to care for and protect the child, and terminable by the parents' failure to discharge their obligations. Thus we have stated that where a child's well-being is placed in issue, it is not the rights of the parent that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child.

*Id.* (citations omitted).

It is upon these principles that the court may rely in making these decisions. It is the role of the Division to merely present the situation to the juvenile court for its review.

In conclusion, DNR orders are only appropriate in situations where medical evidence indicates the child in custody is terminally ill. Where a parent of a child in custody consents to placement of a DNR order, the consent should be put in place with notice to the juvenile court. Consent of the court or the Division is not required. Where no parent is available and/or willing to make this decision for a ward of the court, two avenues are available to the Division to secure placement of the order.

The Division should begin by requesting a bifurcated hearing in the matter. First, it should provide information to the court for it to determine if it has authority to make the decision in that case. The court should base its decision upon a number of factors including the minor's inability to express his or her wishes as well as the natural parents' absence from the decision making process. In the second phase of the hearing, the Division should inquire as to whether a DNR order will issue directly from the court. If so, the inquiry is complete and the treating physician is authorized to do so.

If the juvenile court is unwilling to issue the order directly at the second phase of the hearing, under the Illinois method, the Division should request permission to authorize the treating physician to place the order on the terminally ill minor's charts, upon a finding that such an order is in the medical best interests of the child under [NRS 432B.560](#). In this particular case, the Division should first establish a 10-day temporary guardianship to follow through on such authorization with the treating physician, as the Division's current status as legal custodian of the child is not sufficient under law, to possess such authorization.

Where a parent objects to placement of a DNR order, against the weight of medical evidence to the contrary, the Division should still request a hearing on the matter before the juvenile court. While the court's footing on this issue is decidedly less firm, a parent's right is not absolute, and the court may indeed issue the order over objection of the parent if said parent is not acting in the best medical interests of the child.

Finally, if the Division takes any of the above actions, it should not be legally liable for doing so, nor would such actions place its federal funding in jeopardy. In all of these cases, the Division would be acting in strict accordance with a court order, from which no negative legal ramifications should follow.

FRANKIE SUE DEL PAPA  
Attorney General

By: MICHAEL DREITZER  
Deputy Attorney General

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OPINION NO. 97-09 ATTORNEY GENERAL; BOARDS AND COMMISSIONS; TAXATION:  
The Department of Taxation did not have authority to seek judicial review of Nevada Tax Commission decisions in *Newmont* and *Kassbohrer*. Under Rule 157 of the Supreme Court Rules, the decision on whether a conflict of interest exists in representation of multiple clients is left to the sound and reasonable belief of the particular attorney. The mere fact that the Attorney General's office may represent numerous state agencies within the executive branch, in various roles, does not constitute an inherent conflict of interest for which disqualification is necessary. The Director of the Department of Taxation generally may not act independently of the Commission in directing what proceedings, actions, or prosecutions are instituted to support the tax laws of the state.

Carson City, March 10, 1997



Barbara Smith Campbell, Chairperson, Nevada Tax Commission, 1550 East College Parkway,  
Carson City, Nevada 89706

Dear Chairperson Campbell:

On January 28, 1997, the Nevada Tax Commission (Commission) requested, by unanimous vote, this office clarify Op. Nev. Att'y Gen. No. 97-01 (January 16, 1997). Specifically, the Commission asked the opinion be clarified in several respects, as set forth below.

#### QUESTION ONE

Did the Department of Taxation (Department) have authority to appeal the Commission's decisions in the contested tax cases of *Newmont Gold Company* and *Kassbohrer, Inc.*, to state district court?

#### ANALYSIS AND CONCLUSION TO QUESTION ONE

On May 2, 1996, the Commission ruled against the Department's position in an appeal of a hearing officer's decision in two contested tax cases. Specifically, the Commission ruled that certain transactions involving *Newmont* and *Kassbohrer* were not taxable under chapter 372 of the Nevada Revised Statutes. Without advising the Commission, the Department filed appeals in district court seeking judicial review of these decisions. Following the district court dismissal of the appeals on the grounds that the Department did not have standing or authority to file the appeals, the Department filed a notice of appeal to the Nevada Supreme Court.

At the Tax Commission hearing held on November 13, 1996, the Commission ordered the Director of the Department to withdraw the appeals. The Director indicated that he would not withdraw the appeals and stated his belief that as Director of the Department he had the authority to bring the appeals. In light of these circumstances, the Commission requested the opinion of this office as to who is the head of the Department. Although that question was addressed in AGO 97-01, the Commission now seeks clarification of the opinion under the specific facts outlined above.

The analysis and conclusion to Question One of AGO 97-01 are hereby incorporated by this reference and are clarified are set forth below.

The statutes governing appeals from Commission decisions do not specifically address whether the Director of the Department may appeal to district court a decision of the Commission. However, the various procedural provisions regarding redeterminations and appeals of contested tax matters clearly differentiate between the individual or business which has paid or failed to pay taxes to the state and the Department. See, e.g., [NRS 360.300-.410](#). For example, [NRS 360.300](#) indicates if a "person" fails to pay taxes, the Department may compute the amount owed. The "person" must be given notice of the Department's determination. See [NRS 360.350](#). The statutes set forth the right of a "person" to seek judicial review of the Department's final order, but do not address the right of the Department to seek judicial review. See [NRS 360.395](#). See also [NRS 360.416](#).

The term "person" is defined in the Sales and Use Tax chapter at [NRS 372.040](#) as:

'Person' includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit, but shall not include the United States, this state or any agency thereof, or any city, county, district or other political subdivision of this state.

This statute specifically excludes the Department from the definition of "person." Thus, there is no doubt that [NRS 360.395](#) does not grant the Department the right to seek judicial review of final orders of the Commission in these contested tax matters.

It must also be noted, however, that in at least one type of tax matter, assessment of property for taxation, the Department is specifically given the authority to appeal decisions of the Commission on centrally assessed properties to the State Board of Equalization. See [NRS 361.403\(2\)](#). This suggests that where the legislature intends the Department to have authority to appeal decisions of the Commission in contested tax matters, it specifically provides for such appeals in a statute.

Finally, while the statutory scheme creating the Commission and the Department defines particular duties and responsibilities for each, the legislature unequivocally established the Commission as "[t]he head of the [D]epartment." [NRS 360.120\(2\)](#). See Act of May 27, 1975, ch. 748, § 11, 1975 Nev. Stat. 1643, 1647. Although the statutes now provide for the Governor to appoint the Executive Director of the Department who is designated the "chief administrative officer," there is no doubt that Commission is the final authority over the Department of Taxation. See *id.*, at 1646-48 (now codified in [NRS 360.120](#), [360.200](#)).

The broad general powers of the Commission to review decisions of the director, to supervise and regulate assessment of property, collection of taxes, and direct what actions or proceedings will be instituted, make it clear that the Commission is the final authority over the Department. See [NRS 360.245](#), [360.250](#), and [360.260](#). Thus, in the *Newmont* and *Kassbohrer* cases, unless the taxpayers filed a notice of appeal to district court, the Commission's decision was final. The Department lacked statutory authority to seek an appeal of those decisions.

## QUESTION TWO

When the Commission, as a body, perceives that the Attorney General's office has developed a conflict of interest in its representation of the Commission and the Department, pursuant to Rule 157 of the Supreme Court Rules, does the Commission have the right to request independent counsel or is the issue of disqualification to be determined solely by the Attorney General?

## ANALYSIS AND CONCLUSION TO QUESTION TWO

The Commission is seeking reconsideration of the Attorney General's opinion on this question because the question as phrased in AGO 97-01 did not follow the Commission's original question verbatim. Question Two, as set forth above, is exactly the question asked by the Commission and set forth by Chairman Campbell in a memorandum to Deputy Attorney General Jeff Rodefer, dated January 13, 1997. After consideration of the question as it is stated above we have concluded that our analysis and conclusion to Question Two contained in AGO 97-01 remains the same, and we hereby incorporate that analysis and conclusion.

## QUESTION THREE

Pursuant to [NRS 360.260](#), or any other applicable state statute, under what circumstances, if any, may the Department act independently of the Commission in any legal proceedings for enforcement of law?

## ANALYSIS AND CONCLUSION TO QUESTION THREE

This office was asked to clarify our analysis and conclusion to Question Three of AGO 97-01 because some of the language of the opinion was considered ambiguous by the Commission. After careful review of analysis and the conclusion to Question Three, we believe the opinion is correct as written and appropriately addresses the powers, duties, and responsibilities of both the Commission and the Director. The analysis and conclusion to Question Two of AGO 97-01 are incorporated herein by this reference.

In order to provide further clarification, we reiterate that, as stated above in this opinion, the Commission is the final authority and the head of the Department of Taxation. The Director is the "chief administrative officer," and as such is given numerous duties and responsibilities. See, e.g., [NRS 360.120](#)-245. However, it is the Commission which is made the "head of the department," and it is the Commission which prescribes the "regulations for carrying on the business of the tax commission and of the department." [NRS 360.120](#) and [NRS 360.090](#). The Director acts independently only in the sense that the activities of the Department in enforcing Nevada tax laws are carried out on daily basis under the administration of the Director. There are a few instances in the tax statutes, such as the provisions of [NRS 361.403](#)(2), where the Department is apparently given some independent authority; however, these instances appear to be the exception and not the rule. In keeping with the statutorily created preeminent position of the Tax Commission as the head of the Department, it is the Commission which under [NRS 360.260](#) has "the power to direct what proceedings, action or prosecution shall be instituted to support the law."

The Department, under the administration of the Director, must carry out its daily duties and responsibilities created by law, and must do so in a manner which is consistent with statute, and with the regulations and policies established by the Commission for such enforcement. In accordance with [NRS 360.260](#), the Commission directs what actions, proceedings or prosecutions are to be instituted. However, as we concluded in AGO 97-01, in the case of actions brought in the courts of this or another state, the Attorney General has the independent authority to determine whether the action will be brought or defended on behalf of the state.

In conclusion, the Department of Taxation did not have the authority to seek judicial review of Nevada Tax Commission decisions in the *Newmont* and *Kassbohrer* cases. Under Rule 157 of the Supreme Court Rules, the decision on whether a conflict of interest exists in representation of multiple clients is left to the sound and reasonable belief of the particular attorney. The mere fact that the Attorney General's office may represent numerous state agencies within the executive branch, in various roles, does not constitute an inherent conflict of interest for which disqualification is necessary.

The Director of the Department of Taxation as a general rule, may not act independently of the Commission in directing what proceedings, actions or prosecutions are instituted to support the tax laws of the state.

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
Assistant Attorney General

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OPINION NO. 97-10 DISTRICT ATTORNEYS; DRIVING UNDER THE INFLUENCE; PROSECUTIONS: [NRS 484.3792](#)(3) limits the discretion of district attorneys to negotiate driving under the influence charges down to lesser charges pursuant to plea negotiations. This limitation on discretion is authorized by the Nevada Constitution and the limitation applies only to charged

conduct, and provides no limitation to the prosecutor's discretion concerning what charge may be filed in the first instance.

Carson City, March 17, 1997

The Honorable Robert Beckett, Nye County District Attorney, Post Office Box 593, Tonopah, Nevada 89049

Dear Mr. Beckett:

The Nye County District Attorney's office has pending a possible driving under the influence (DUI) prosecution. The facts of the case appear to reasonably support a conviction for DUI. In this regard, you have asked the following question.

#### QUESTION

May the Nevada Legislature limit discretion of a district attorney pursuant to [NRS 484.3792](#)(3) concerning the decision to negotiate a DUI charge, the facts of which appear to reasonably support a conviction for DUI, and if so, does this limitation to negotiate such cases further limit the district attorney's discretion concerning the original charge which may be brought?

#### ANALYSIS

The Nevada Constitution provides for election of certain county officers, properly referred to as constitutional county officers, including district attorneys. The office of district attorney predated the approval of the Constitution by a vote of the people of the Nevada Territory in September 1864 and admission into the Union of the new state the next month. *See State v. Tilford*, [1 Nev. 201](#) (1865); Nev. [Const. art. 17, § 13](#). The Constitution specifically grants to the legislature authority to establish the parameters and duties of all constitutional county officers, including district attorneys.

Article 4, § 32 provides:

The Legislature shall have power to increase, diminish, consolidate or abolish the following county officers: County Clerks, County Recorders, Auditors, Sheriffs, District Attorneys and Public Administrators. The Legislature shall provide for their election by the people, and fix by law their duties and compensation.

The legislature has fixed the duties of the office of district attorney primarily in chapter 252 of the Nevada Revised Statutes. The legislature has further fixed the duties of district attorneys in numerous statutes in addition to those found in that chapter. It is clear that the constitutionally authorized legislative mandate concerning duties of that office is not confined to chapter 252. Some examples include: [NRS 200.5081](#) (duties regarding child abuse); [NRS chapters 31A](#) and 125B (duties regarding child support collections); [NRS chapter 62](#) (duties regarding juvenile courts); [NRS 201.241](#) (duties regarding obscene materials); and [NRS 218.539](#) (duties regarding provision of statistical data to Legislative Counsel Bureau).

Because the duty to initiate criminal prosecutions lies primarily with the district attorney ([NRS 252.080](#)), duty of the district attorney to function as the public prosecutor may be defined by the legislature according to the constitutional authority of art. 4, § 32 described above.

In addition to the numerous other statutory provisions establishing and fixing the duties of district attorneys, [NRS 484.3792](#)(3) further fixes and defines the duties of that office regarding prosecution of persons driving under the influence of intoxicating liquor or controlled substances. That provision provides that a charge of violating provisions of [NRS 484.379](#), which

outlaws such conduct, may not be dismissed in exchange for a guilty or nolo contendere plea by the defendant to a lesser charge, or for any other reason, unless the charge is not supported by probable cause or cannot be proved at trial.

This provision, by its express and unambiguous terms, applies to charged conduct only. It is important to recognize that the subject which the statute regulates is the "charge" of DUI, and not the "offense" or "act" of DUI. It applies to a specific point on the prosecutorial timeline. In practice, were a prosecutor to negotiate a DUI charge down to a lesser offense, these negotiations would usually occur well after the charge had been filed. The legislative intent that prosecutors must follow through with the full DUI charge once it is filed reflects an understanding by the legislature of the prosecutorial reality that the negotiation process usually follows, and normally does not precede, filing criminal charges.

In Nevada, as in our sister jurisdictions, the well-known guidelines of statutory interpretation focus on the provision's express language and intent. When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. *City Council of Reno v. Reno Newspapers*, [105 Nev. 886](#), 784 P.2d 974 (1989). Additionally, statutes should be interpreted to effect the intent of the legislature in enacting them; the interpretation should be reasonable and avoid absurd results. *Las Vegas Sun v. District Court*, [104 Nev. 508](#), 761 P.2d 849 (1988).

When another branch of government attempts to construe a statutory provision which regulates duties of a district attorney in his prosecutorial function, the legislature must be presumed to understand the practicalities of the criminal prosecution system, because legislative bodies are presumed to be aware of existing statutes and the rules of statutory construction. *Airport Authority v. City of Omaha*, 177 N.W.2d 603 (Neb. 1970). Changes in statutory language are presumed to intend a change in result. *Eide v. Kelsey-Hayes Co.*, 427 N.W.2d 488 (Mich. 1988). Our legislature chose to change the existing provision by limiting the discretion of the prosecutor at a specific point on the prosecution timeline, i.e., after a criminal charge is filed. The choice to include one act within a regulatory scheme, but no others, indicates an intent to exclude all other items which could be regulated, but were not, from that class. *See Pima County v. Heinfeld*, 654 P.2d 281 (Ariz. 1982). The canon of statutory construction "*expressio (inclusio) unius exclusio alterius est*," the inclusion of one thing implies the exclusion of others, applies with convincing force to this provision. The legislature appears to have made a purposeful decision regarding the point at which the prosecutor's discretion would be proscribed. This legislative choice indisputably lies within the legislature's constitutional authority to fix the duties of district attorneys. Our opinion is buttressed by the conclusion that applying the plain meaning of the statutory provision results in no harsh, unjust, or absurd results. Being cognizant of the practical realities of the prosecution function, this statutory provision realistically draws the regulatory line limiting the prosecutor's discretion after the charging act takes place but before most negotiations would take place.

The legislative intent appears to be clear and unambiguous, and the intent appears to be plain on its face. Thus, the plain meaning of the language must be given its full effect. *Michigan Harness Horsemen's Ass'n. v. Racing Commissioner*, 333 N.W.2d 292 (Mich. 1983).

## CONCLUSION

It is clear that in passing this statute the legislature intended to strengthen Nevada's criminal DUI laws by eliminating plea bargaining after a DUI charge is filed in court. Whereas, the present statute comprises a precise and constitutionally authorized restriction on the plea bargain function, it does not act as a limit on the charging function. However, until that point is reached, prosecutors retain their discretion regarding the nature of the charges to be filed.

FRANKIE SUE DEL PAPA  
Attorney General

By: VICTOR H. SCHULZE, II  
Deputy Attorney General

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OPINION NO. 97-11 CRIMINAL LAW; MENTAL HEALTH AND MENTAL RETARDATION; PAROLE; PRISONS; PSYCHIATRIC SCREENING: Sex offenders subject to psychiatric screening prior to parole and who have received an enhanced sentence for use of a deadly weapon or for victimizing a person 65 years of age or older must also be certified by a psychiatric screening board prior to parole from the enhanced sentence.

Carson City, March 27, 1997

Mr. Robert Bayer, Director, Department of Prisons, Post Office Box 7011,  
Carson City, Nevada 89702

Dear Director Bayer:

You have requested an opinion from our office on the following:

QUESTION

Must an offender convicted of a sexual offense subject to psych panel certification, and who received an additional sentence for use of a deadly weapon or for committing a crime against a person 65 years of age or older, also be certified by a psych panel before he may be paroled from the additional sentence?

ANALYSIS

Nevada law specifies that an offender convicted of specified sexual offenses may not be paroled unless a board, commonly referred to as a "psych panel," consisting of the Administrator of the Division of Mental Hygiene and Mental Retardation, and the Director of the Department of Prisons, or their respective designees, and a psychologist or psychiatrist licensed to practice in Nevada, certifies that the offender was under observation while incarcerated and is no longer a menace to the health, safety, or morals of others.<sup>70</sup>

[NRS 193.165](#) subsections (1) and (2) provide:

1. Except as otherwise provided in [NRS 193.169](#), any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by [NRS 202.375](#), in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.

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<sup>70</sup> The following Nevada statutes contain the above-described "psych panel" certification requirement: NRS 200.375 (sexual assault or attempted sexual assault); 201.195 (soliciting minor to engage in act constituting crime against nature); 201.210 (open or gross lewdness); 201.220 (indecent or obscene exposure); 201.230 (lewdness with child under 14). NRS 201.450 (sexual penetration of dead human body) requires a psychologist or psychiatrist licensed in Nevada to certify the offender is not a menace to the health, safety or morals of others.

2. *This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact. [Emphasis added.]*

Similarly, [NRS 193.167](#) provides an "additional" jail or prison term, equal to the term imposed for the primary offense, when the crime is committed against a person 65 years of age or older. Sexual assault is among the primary offenses listed. Like subsection (2) of [NRS 193.165](#), subsection (3) of [NRS 193.167](#) provides: "This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." In short, [NRS 193.165\(2\)](#) and [193.167\(3\)](#) both specify the respective statutory sections do not create a separate offense, but provide "an additional penalty for the primary offense." This is clear and unambiguous language which results in two consecutive prison terms being imposed for one primary offense, such as sexual assault, when a deadly weapon is used or when the victim is 65 years of age or older. The statutes requiring psych panel certification also clearly and unambiguously provide that the offender may not be paroled from the specified offense, described as a "primary offense" in [NRS 193.165](#) and [193.167](#), unless a psych panel certification is first obtained.

### CONCLUSION

Words in a statute should be given their plain meaning unless to do so violates the spirit of the act, or produces an absurd or unreasonable result. *Neal v. Griepentrog*, [108 Nev. 660](#), 664, 837 P.2d 432, 434 (1992); *Alsenz v. Clark Co. School Dist.*, [109 Nev. 1062](#), 1065, 864 P.2d 285, 286 (1993). The plain meaning of the statutes requiring psych panel certification prior to parole, and of the statutes which impose an additional, consecutive term for a primary offense, such as for sexual assault, is that an offender must be psych panel certified before he may be paroled from either the initial or additional term. This interpretation does not violate the spirit of the laws addressed in this opinion or produce an unreasonable or absurd result. The intent of the statutes which require psych panel certification is to enhance public safety and requiring psych panel certification prior to parole from an "additional" term for use of a deadly weapon or for victimizing a person 65 years of age or older serves to enhance that purpose.

FRANKIE SUE DEL PAPA  
Attorney General

By: THOMAS M. PATTON  
Deputy Attorney General

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OPINION NO. 97-12 PUBLIC OR PATENTED LANDS; UNITED STATES; SUBDIVISIONS:  
The United States is not constrained by state laws controlling land division; patentee must abide by all state and local laws respecting division of lands.

Carson City, March 27, 1997

Mr. Zane Stanley Miles, Chief Deputy District Attorney, Eureka County, Justice Facility, Post Office Box 190, Eureka, Nevada 89316

Dear Mr. Miles:

You have asked this office for an opinion which explains the interrelation of state and federal laws concerning division of land in Nevada. You have asked (1) whether state laws on division of land control federal agency action; and (2) whether federal land divisions established

prior to patent preclude independent state or county requirements for division after patent has issued.

## BACKGROUND

The facts which you have supplied as the basis for your opinion request are as follows. A private developer has approached the Eureka County Planning Commission for assistance with division of certain private lands located in Diamond Valley. The subject lands appear to have been originally divided by the United States prior to patent into 19 lots of various sizes, most approximately 40 acres. The current owner or owners hold title to 588.8 contiguous acres comprised of a number of such government lots.

The developer has submitted to the county planning commission a preliminary draft of a map for division of land into large parcels, pursuant to [NRS 278.471](#)-4725. The map depicts a reconfiguration of the acreage into 15 new lots of exactly 40 acres each, with one exception being a lot of 57.77 acres.

## QUESTION ONE

Is the federal government required to comply with the provisions of Nevada Revised Statutes governing division of land into large parcels when the federal government sells or otherwise disposes of a parcel of public land?

## ANALYSIS

Although the facts presented do not directly establish an issue about federal actions, the following analysis is offered for background purposes.

The federal government has authority pursuant to the Property Clause to survey its own lands. U.S. [Const. art. 4, § 3](#), cl. 2. "So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries." *Lane v. Darlington*, 249 U.S. 331, 333 (1919). The federal government's right to conduct surveys of public lands is exclusive. *United States v. Montana Lumber & Mfg. Co.*, 196 U.S. 573 (1905).

The Ninth Circuit has acknowledged the "power of the federal government to make its own surveys." *Jones v. United States*, 195 F.2d 707, 709 (9th Cir. 1952), *quoting United States v. Montana Lumber & Mfg. Co.* The method of federal survey is described, among other places, in the opinions of the United States Supreme Court. *See, e.g., So. Pac. R.R. Co. v. Fall*, 257 U.S. 460 (1922).<sup>71</sup>

In general, the activities of the federal government are free from regulation by the states. *Mayo v. United States*, 319 U.S. 441 (1943). "It is well settled that the activities of federal installations are shielded by the Supremacy Clause [U.S. Const. art. VI, cl. 2] from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988).

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<sup>71</sup> The public lands are surveyed and platted, as nearly as may be, into rectangular tracts, known as sections, half sections, quarter sections, half quarter sections, and quarter quarter sections, and where the lines of the survey are interrupted by lakes, public reservations, Spanish or Mexican grants, state or territorial lines, etc., the irregular tracts at the point of interruption are platted and known as fractional sections, etc., or as lots having particular numbers. After the survey the land officers dispose of the lands only according to these legal subdivisions—that is, as sections, half sections, etc.—and regard the minor subdivisions, quarter quarter sections and lots, as not subject to further division, save in exceptional instances, where Congress has specially provided otherwise.

*Id.*



## CONCLUSION TO QUESTION ONE

Based upon the strong statements in the law supporting federal authority to survey on public lands, combined with the equally strong statements of federal immunity from state regulation, this office concludes the federal government is not constrained by state laws controlling land division or survey.

## QUESTION TWO

Is the purchaser or other transferee of land which is divided into government lots free to dispose of or alienate such parcels to subsequent transferees without complying with provisions of state law governing division of land?

## ANALYSIS

The preceding analysis concludes the federal government's interests prevent state regulation of survey and division of public lands while public lands are in federal ownership.

However, "[t]he government has no power to control 'previously disposed of lands.' *Moore v. Robbins*, 96 U.S. 530 , 24 L.Ed. 848 (1877); *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891); *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960)." *United States v. Reimann*, 504 F.2d 135, 138 (10th Cir. 1974). "[A] patent once issued passes beyond the control of the executive branch of the Government." *United States v. Washington*, 233 F.2d 811, 817 (9th Cir. 1956), citing *Bicknell v. Comstock*, 113 U.S. 149 (1885), and *United States v. Schurz*, 102 U.S. 378 (1880). This rule has ancient roots. "'A patent,' says the court in *United States v. Stone* (2 Wall. 525) is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles . . . ." *Moore* at 533. Once patent issues, "there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government." *Id.* "If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office." *Id.* at 534.

Because the United States normally retains no interest in public lands once patent issues, there is no occasion for preemption by the Supremacy Clause of state rules regarding survey and division of land. Thus it is the opinion of this office that state rules on division of land would apply to any private owner whose land was originally acquired from the federal government. This office notes that nearly all privately owned lands in the state were originally property of the United States, part of the acquisition by the federal government pursuant to the Treaty of Guadalupe-Hildago, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

This office also would note, however, that under existing state law, a purchaser of multiple contiguous parcels may subsequently, without further approval by the county pursuant to [NRS chapter 278](#), alienate the existing parcels. This is true regardless of the origin of the purchaser's title. There is no requirement for the owner to revert the aggregated lots to acreage and reapply for division of the land. However, the owner may at his option do so, pursuant to [NRS 278.490](#), and must do so if his intent is to reconfigure parcel boundaries of existing lots. Once having reverted the preexisting division to acreage, the owner then would apply to the county to divide the land with the proposed new boundaries.

## CONCLUSION TO QUESTION TWO

The purchaser of government lots must abide by all state and local laws and regulations respecting division of lands.

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Senior Deputy Attorney General

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OPINION NO. 97-13 LOANS; PAWNBROKERS; LICENSES: Pawnbrokers who make loans with terms that violate statutory limitations on pawn transactions set forth in [NRS chapter 646](#) do not make such loans under the authority of that chapter and are therefore not exempt from licensing requirements for installment lenders pursuant to [NRS 675.040\(1\)](#). Loans that violate provisions of the Pawnbroker Act, [NRS chapter 646](#), will subject pawnbrokers making such loans to regulatory action by officials who enforce that act.

Carson City, April 1, 1997

Mr. Burns Baker, Deputy Commissioner, Financial Institutions Division, 400 East Second Street, Carson City, Nevada 89710

Dear Mr. Baker:

In Op. Nev. Att'y Gen. No. 97-03 (February 10, 1997), we were presented with the question of whether a company licensed as an installment lender pursuant to chapter 675 of NRS needed to become licensed as a pawnbroker pursuant to chapter 646 of NRS in order to make loans secured by motor vehicles. In concluding that such licensing was not required, we distinguished "Vehicle Title Pledge" transactions, used by many pawnbrokers, where the title to the vehicle is pledged to the pawnbroker and automatically forfeited if repayment is not made by the specified date, from "U.C.C. Secured Transactions," used by installment lenders, where the lender retains a security interest in the vehicle which, in the event of default, is foreclosed upon pursuant to applicable provisions of the Uniform Commercial Code. This opinion clarified an earlier opinion wherein we concluded that pawnbrokers making auto loans were exempt from licensing provisions for installment lenders. Op. Nev. Att'y Gen. No. 95-20 (November 17, 1995). The Financial Institutions Division has now received an inquiry from local law enforcement officials regarding the types of loans that are authorized pursuant to the Pawnbroker Act, [NRS chapter 646](#). It is apparently the practice of some pawnbrokers to make installment loans containing terms prohibited by statutory provisions governing pawn transactions. This practice has raised the following question.

#### QUESTION

May pawnbrokers make loans that would otherwise require licensing pursuant to [NRS chapter 675](#) with terms prohibited by statutory limitations on pawn transactions and remain exempt from licensing as installment lenders pursuant to [NRS 675.040\(1\)](#)?

#### ANALYSIS

In your opinion request, you cite as an example of a loan that is prohibited by the Pawnbroker Act a loan with interest payable in excess of 8 percent per month. Another example would be a loan providing for forfeiture of the collateral in fewer than 120 days. When questioned by local law enforcement officials about loans containing terms prohibited by statutory limitations

imposed on pawn transactions, some pawnbrokers have apparently responded the loans are not subject to the Pawnbroker Act but are instead authorized by the Installment Lender's Act, [NRS chapter 675](#). These pawnbrokers also assert that, despite making loans that would otherwise subject them to licensing as installment lenders, they are exempt from licensing pursuant to [NRS 675.040\(1\)](#). We must therefore examine this exemption.

The Installment Lender's Act does not apply to "[a] person doing business under the authority of any law of this state or of the United States relating to banks, savings banks, trust companies, savings and loan associations, credit unions, development corporations, mortgage companies, thrift companies, pawnbrokers or insurance companies." [NRS 675.040\(1\)](#). As noted in our previous opinion, this provision is apparently intended to exempt those companies that are already subject to licensing and regulation by other authorities from licensing and regulation under [NRS chapter 675](#). An interpretation that would permit pawnbrokers to make loans not authorized by the Pawnbroker Act and still retain the exemption from licensing under [NRS chapter 675](#) would be inconsistent with the apparent rationale for the exemption. When a pawnbroker makes a loan prohibited by provisions of the Pawnbroker Act, the loan escapes regulatory scrutiny altogether if the loan is also exempt from regulation pursuant to [NRS chapter 675](#).

More importantly, the licensing exemption in [NRS 675.040\(1\)](#) is, by its plain terms, limited to persons doing business "under the authority of" the laws referred to in the exemption. The Pawnbroker Act does not, of course, authorize a pawnbroker to make loans that are prohibited by statutory limitations placed on pawn transactions. To paraphrase the exemption as applied to pawnbrokers, only persons making loans authorized by the law governing pawnbrokers are exempt from licensing pursuant to [NRS 675.040\(1\)](#). Since pawnbrokers are not authorized to charge interest at a rate greater than 8 percent per month or permit forfeiture of redemption rights in fewer than 120 days, loans with such terms would not, in the examples given, be made "under the authority" of the Pawnbroker Act. Such loans would therefore not qualify for the exemption set forth in [NRS 675.040\(1\)](#). Moreover, a pawnbroker without an installment lender's license making loans with terms prohibited by the Pawnbroker Act would be violating the Pawnbroker's Act and subjecting itself to regulatory action by officials who enforce that act. Pawnbrokers who make loans with terms that violate statutory limitations on pawn transactions must therefore either cease making such loans or obtain an installment lender's license pursuant to [NRS chapter 675](#).

## CONCLUSION

Exemption from the licensing requirement of the Installment Lender's Act set forth in [NRS 675.040\(1\)](#) is limited by its plain terms to persons doing business "under the authority of" the laws referred to in the exemption. Pawnbrokers who make loans with terms that violate statutory limitations on pawn transactions set forth in [NRS chapter 646](#) do not make such loans under the authority of that chapter and are therefore not exempt from licensing requirements for installment lenders pursuant to [NRS 675.040\(1\)](#). Loans that violate provisions of the Pawnbroker Act, [NRS chapter 646](#), will subject pawnbrokers making such loans to regulatory action by officials who enforce that act. Pawnbrokers who make loans with terms that violate statutory limitations on pawn transactions must either cease making such loans or obtain an installment lender's license pursuant to [NRS chapter 675](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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OPINION NO. 97-14 DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY; INSURANCE VERIFICATION: State law requires Department of Motor Vehicles and Public Safety to refund a \$50 reinstatement fee imposed and collected from a registered owner who failed to respond to an insurance verification inquiry and who, having maintained insurance on his vehicle at all relevant times, proves to satisfaction of the Department of Motor Vehicles and Public Safety that there was a justifiable cause for his failure to respond to the insurance verification inquiry.

Carson City, April 3, 1997

Mr. Raymond L. Sparks, Acting Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Sparks:

This letter is in response to your request for an opinion from this office concerning the following inquiry:

#### QUESTION

Does state law permit refund of a \$50 reinstatement fee imposed and collected from a registered owner who failed to respond to an insurance verification inquiry made by the Department of Motor Vehicles and Public Safety and who, having maintained insurance on his vehicle at all relevant times, proves to the satisfaction of the Department that there was a justifiable cause for his failure to respond to the insurance verification inquiry?

#### ANALYSIS

##### A. BACKGROUND

In 1981, the legislature conferred on the Department of Motor Vehicles and Public Safety (DMV/PS) authority to administer the insurance verification program. Initially, state law required DMV/PS on an annual basis to randomly select not more than 10 percent of the vehicles registered in this state and conduct an insurance verification inquiry. The penalties for nonresponse to an insurance verification inquiry included suspension of registration, return of license plates, and, at reinstatement, filing by the registered owner of proof of insurance for a period of three years.

During every session of the legislature from 1981 to 1995, the statutes pertaining to the insurance verification program have been amended. See [NRS 482.480](#) and [485.317](#). Penalties for nonresponse to an insurance verification inquiry have become increasingly less severe. In 1987, [NRS 485.317](#) was amended by creating an exception to payment of a reinstatement fee for nonresponse to an insurance verification inquiry upon proof to the satisfaction of DMV/PS of a justifiable cause.

It is our understanding the current inquiry stems from increased public concerns with DMV/PS's administration of the insurance verification program and, specifically, DMV/PS's imposition and collection of statutorily mandated reinstatement fees. It is further our understanding there is confusion by DMV/PS whether it should be collecting a \$50 reinstatement fee in every case where the registered owner, with or without a justifiable cause, failed to respond to an insurance verification inquiry.

## B. STATUTORY INTERPRETATION

There is nothing in the insurance verification provisions set forth in [NRS chapters 482](#) and [485](#) precluding DMV/PS from refunding a \$50 nonresponse reinstatement fee provided certain criteria are met, nor is there any authority allowing DMV/PS to refund a \$50 nonresponse reinstatement fee. However, in reading those provisions, it appears the legislature did not intend to penalize the registered owner who otherwise complies with statutory mandates pertaining to vehicle insurance yet, due to a "justifiable cause," failed to respond to an insurance verification inquiry.

DMV/PS, as a state administrative agency, has no general or common law powers, but only such powers which have been conferred on it by law expressly or by implication. *See Andrews v. Nevada State Board of Cosmetology*, [86 Nev. 207](#), 208, 467 P.2d 96, 96 (1970). Authority granted to DMV/PS to impose and collect a reinstatement fee is found in [NRS 482.480](#) and [485.317](#). Under these statutory provisions, there are two scenarios wherein a registered owner *must* pay a reinstatement fee:

1. Where the registered owner failed to have insurance on the date specified in the insurance verification form, [NRS 482.480\(4\)\(a\)](#) and [485.317\(6\)](#); or
2. Where the registered owner failed to respond to the insurance verification inquiry within the prescribed time period, [NRS 482.480\(4\)\(b\)](#) and [485.317\(7\)\(b\)](#).

Imposition and collection of a \$50 nonresponse reinstatement fee is referenced in [NRS 482.480](#):

There must be paid to the department for the registration or the transfer or reinstatement of the registration of motor vehicles, trailers and semitrailers, fees according to the following schedule:

...

4. Except as otherwise provided in [NRS 485.317](#), to reinstate the registration of a motor vehicle suspended pursuant to that section:

(a) A fee of \$250 for a registered owner who failed to have insurance on the date specified in the form for verification that was mailed by the department pursuant to subsection 2 of [NRS 485.317](#); or

(b) A fee of \$50 for a registered owner who had insurance on the date specified in the form for verification that was mailed by the department pursuant to subsection 2 of [NRS 485.317](#), but failed to return the form within the time specified in that subsection, both of which must be deposited in the account for verification of insurance which is hereby created in the state highway fund. Money in the account must be used to carry out the provisions of [NRS 485.313](#) to [485.318](#), inclusive. [Emphasis added.]

[NRS 485.317\(5\)](#) specifically sets forth the exception:

If an owner who did not return a completed form for verification within the specified period:

(a) Proves to the satisfaction of the department that there was a justifiable cause for his failure to do so;

(b) Submits a completed form regarding his insurance on the date stated in the form mailed by the department pursuant to subsection 2;<sup>72</sup> and

(c) Presents evidence of current insurance, the department shall rescind its suspension of the registration if it is able to verify the information on the form. For the purposes of this subsection, 'justifiable cause' may include the fact that the owner did not receive the form mailed by the department pursuant to subsection 2.

Authority to impose a \$50 reinstatement fee is, therefore, limited. If a registered owner meets these criteria, DMV/PS should not impose and collect a \$50 reinstatement fee.

It is a fundamental principle of statutory construction that statutes should be construed to give effect to the legislative intent. *Sheriff v. Morris*, [99 Nev. 109](#), 117, 659 P.2d 852, 858 (1983). Such intent is to be gleaned from reading the entire statute. *A Minor v. Clark Co. Juvenile Ct. Servs.*, [87 Nev. 544](#), 548, 490 P.2d 1248, 1250 (1971). Moreover, statutes should be construed in such a manner as to render them compatible with each other whenever possible. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227, 1229 (1982); *see also*, *Bowyer v. Taack*, [107 Nev. 625](#), 627, 817 P.2d 1176, 1177 (1991).

Equally fundamental is the rule of statutory construction:

[W]here one act of the legislature specifically adopts provisions of another act, the latter being of the same general subject matter, or being by nature or substance properly connected therewith, the effect of the adopting act is to incorporate the adopted act and make the latter effective in the policy and for the purpose designated.

*Maclean v. Brodigan*, [41 Nev. 468](#), 475, 172 P. 375, 376 (1918). [NRS 482.480\(4\)](#) adopts and incorporates by reference [NRS 485.317](#).

Moreover, the relevant statutes are not at odds. [NRS 485.317](#) carves out the exception to imposition and collection of a reinstatement fee under [NRS 482.480](#). Specifically, [NRS 485.317\(5\)\(c\)](#) requires DMV/PS to rescind its suspension of the registration if the registered owner complies with paragraphs (a) and (b) of subsection (5). The statute does not require the registered owner to pay a reinstatement fee in this scenario. Had the legislature intended to impose a reinstatement fee, it would have done so by inserting language to that effect. *See State, Dep't. Mtr. Vehicles v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988). It chose not to do so. Accordingly, DMV/PS does not have authority to impose and collect a reinstatement fee. Since DMV/PS lacks authority to do so, any reinstatement fees imposed and collected must be returned.

Further, a comparison of [NRS 485.317\(5\)](#) with [NRS 485.317\(7\)\(b\)](#) also supports this conclusion. [NRS 485.317\(7\)\(b\)](#) requires payment of a \$50 reinstatement fee pursuant to [NRS 482.480\(4\)\(b\)](#) by a registered owner who, at all relevant times maintained insurance on his vehicle, and without justifiable cause, failed to respond to the insurance verification inquiry. The language in this statutory provision parallels the language found in [NRS 482.480\(4\)\(b\)](#) requiring payment of a \$50 reinstatement fee.

## CONCLUSION

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<sup>72</sup> Subsection (2) of NRS 485.317 reads as follows:

The department shall mail a form for verification to each registered owner that it determines has not maintained the insurance required by NRS 485.185. The owner shall complete the form with all the information which is requested by the department, including whether he carries an owner's or operator's policy of liability insurance or a certificate of self-insurance, and return the completed form within 10 days after the date on which the form was mailed by the department.

DMV/PS has no statutory authority to impose and collect a reinstatement fee from a registered owner who failed to respond to an insurance verification request and who, having maintained insurance on his vehicle at all relevant times, proves to the satisfaction of DMV/PS a justifiable cause for his failure to respond. Accordingly, state law requires DMV/PS to refund a reinstatement fee imposed and collected in error pursuant to [NRS 485.317\(5\)](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: MARIAH L. SUGDEN  
Senior Deputy Attorney General

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OPINION NO. 97-15 COUNTIES; ELECTIONS; PUBLIC OFFICERS; SECRETARY OF STATE: The provisions of the Sparks City Charter and [NRS 293.610](#) do not conflict regarding placement of an unopposed candidate's name on the general election ballot in the city election. If there is only one candidate for nomination for any city office, that candidate must be declared elected and no election may be held for that office.

Carson City, May 5, 1997

Maureen Sheppard-Griswold, Deputy District Attorney, Washoe County District Attorney's Office,  
Post Office Box 11130, Reno, Nevada 89520

Dear Ms. Sheppard-Griswold:

You have requested an opinion from this office regarding placing names of unopposed candidates on the general election ballot in the 1997 City of Sparks Municipal Election.

#### QUESTION

Do the provisions of the Sparks City Charter and [NRS 293.610](#) conflict regarding placement of an unopposed candidate's name on the general election ballot in the city election?

#### ANALYSIS

According to information provided, several races in the Sparks election are uncontested. [NRS 293.610](#) provides "In any city election, if at 5 p.m. on the last day for filing an affidavit or declaration of candidacy, there is only one candidate for nomination for any office, that candidate must be declared elected and no election may be held for that office." The Sparks City Charter contains several sections pertaining to elections, none of which specifically address the circumstances described above, but several of which must be examined before a conclusion can be made.

Your letter dated April 24, 1997, to Attorney General Frankie Sue Del Papa contains a thorough analysis of each relevant provision of the Sparks City Charter and we agree with your analysis and conclusion that the Sparks City Charter does not conflict with [NRS 293.610](#).

As you point out, the preamble to the Sparks City Charter states in pertinent part, "All provisions of Nevada Revised Statutes which are applicable generally to cities . . . which are not in conflict with the provisions of the charter apply to the City of Sparks." Sparks City Charter

art. I, § 1.010(2). In addition, the charter provides "All elections held under this charter shall be governed by the provisions of the elections laws of this state so far as such laws can be made applicable and are not inconsistent herewith." Sparks City Charter art. 5 § 5.030(1). These provisions are clear Nevada's election laws, codified in title 24 of the Nevada Revised Statutes, govern Sparks city elections if the Sparks City Charter is silent on a particular issue.

Section 5.020 of the charter is entitled "Primary municipal elections: Declaration of candidacy." This section describes under what circumstances a primary city election is to be held. We agree with your analysis that nothing in this section requires the name of a candidate in an uncontested race to be placed on a general city election ballot.

Likewise, when section 5.010(4) is read in conjunction with section 5.020 and [NRS 293.610](#), we reach the same conclusion as you: the two candidates who receive the highest number of votes in the primary city election will be voted on at large in the general city election.

How names are to appear on a city election ballot is addressed by section 5.050, but, as you correctly indicate, nothing in the section mandates placement of the name of a candidate in an uncontested race on the ballot, since according to [NRS 293.610](#), ". . .that candidate must be declared elected and no election may be held for that office."

Finally, we also agree with your analysis regarding appointees who fill vacancies in elective offices. Section 1.070(3) of the charter provides for an appointee to serve until his successor is elected, and [NRS 293.610](#) would merely operate to declare a candidate for an uncontested race elected subject to the further requirements of this section of the charter.

You raise the concern that a candidate for office must receive at least one vote or the candidate is not duly elected. In view of a specific statute, [NRS 293.610](#), which states that if a candidate in a city election is unopposed, that candidate is declared elected and no election may be held for that office, the requirement that a candidate receive one vote is superseded by the statute.

#### CONCLUSION

For the reasons stated above in your letter of April 24, 1997, we agree with your conclusion that the provisions of the Sparks City Charter and [NRS 293.610](#) do not conflict regarding placement of an unopposed candidate's name on the general election ballot in the city election. [NRS 293.610](#) governs. If there is only one candidate for nomination for any city office, that candidate must be declared elected and no election may be held for that office.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 97-16 WILDLIFE; CRIMINAL LAW; LEGISLATURE; PUBLIC LANDS: State wildlife agency is authorized by law to participate with federal land management agencies to determine extent of mitigation required for permitted activities which affect habitat on public land; wildlife agency properly obtained legislative approval for acceptance and use of mitigation funds from mining company for development of off-site habitat mitigation; no basis exists to support grand jury determination that officials committed crime of oppression.

Carson City, May 9, 1997



Mr. Peter G. Morros, Director, Department of Conservation and Natural Resources, 123 West Nye Lane, Carson City, Nevada 89710

Dear Mr. Morros:

You have asked for an opinion from this office concerning possible criminal liability of certain Nevada Division of Wildlife (NDOW) employees, whose questioned actions arise from performance of their official duties for the state.

### BACKGROUND

You have provided the following detailed factual account giving rise to your opinion request.

In January 1993, the Independence Mining Company, Inc. (IMC) submitted a plan to the United States Forest Service (USFS) for a series of gold mining activities in the Independence Mountains, located in Elko County. The activities would result in an estimated loss of up to 5,500 acres of important deer habitat on USFS land. In order to obtain approval for its operations, IMC was required by the USFS to mitigate the impacts to the habitat.

On March 31, 1993, NDOW signed a three-party agreement with the USFS and IMC, which provided that mitigation would be achieved by payment to NDOW of \$500,000, to be used by NDOW for mule deer habitat enhancement "primarily within Deer Management Area 6, the area in which the mineral development activity has occurred or will occur." In return for the payment, IMC received NDOW's assumption of "all responsibility for the work done regarding management of Deer Habitat," together with NDOW's promise to "indemnify and hold IMC harmless from and against all claims, demands, lawsuits or liabilities arising out of or in connection with the work" performed with the funds.

Receipt of the \$500,000 was approved by the legislature's Interim Finance Committee (IFC) on February 17, 1993. The funds were placed in a special habitat mitigation account established by the State Budget Office and the IFC.

The Elko County Grand Jury (Grand Jury) was empaneled pursuant to [NRS 6.130](#). The petition circulated to form the Grand Jury alleged the existence of undefined collusion among "employees and officials of the United States Forest Service, preservationist groups, and possibly State officials," and concerning management of public lands, in violation of [NRS 199.480\(3\)\(b\)-\(g\)](#). The petition stated federal officials had falsely alleged crimes of violence committed or threatened by Elko County residents against federal agents, even though no such crimes had been reported. The petition also claimed a federal official had counselled federal employees about ways to conceal federal documents from disclosure under the federal Freedom of Information Act.

On February 13, 1997, the Grand Jury filed a presentment and an Investigative Report (Report), stating in each that a crime had been committed by two USFS employees and four named employees of NDOW. The criminal violation allegedly committed by the NDOW employees was Oppression Under Color of Office, [NRS 197.200](#).

The Grand Jury concluded that:

[T]he Nevada Division of Wildlife and the United States Forest Service proceeded in bad faith in the negotiations [with IMC] . . . NDOW and the USFS had essentially absolute control over IMC's financial well-being. The Grand Jury recognizes that disparate bargaining positions often exist between contracting parties, but suggests that when one of

the parties is a governmental agency or has governmental powers, that disparity can be disastrously out of proportion.

Report at 18. It recommended that: "giving NDOW the power to obtain and distribute funds not under legislative control or at least the control of the Board of Wildlife Commissioners eliminates the check and balance system that was built into our system of government." Report at 6. Also included within the Grand Jury's recommendations is a statement that: "neither NDOW, nor any other state agency, should join in concert with federal agencies to extract monies from local businesses for the purposes of habitat mitigation or any other purpose where monies are spent for other purposes or elsewhere in the state." Report at 6. The Report concludes:

[T]he facts clearly establish that . . . employees of NDOW deliberately and maliciously withheld and delayed issuance of permits to which IMC was entitled in order to force IMC to pay sums of money for habitat development which, when augmented by federal grant funds that NDOW official [sic] knew was available, exceeded by a factor of 3 what IMC was legally or morally obligated to pay.

Report at 7.

The district court declined to issue indictments for the alleged criminal violations, but only because the applicable statute of limitations had run. Therefore a strong possibility exists that indictments could issue from the Grand Jury in the future for similar mitigation actions taken by state wildlife officials.

#### QUESTION

Was a crime committed under [NRS 197.200](#) by NDOW personnel when they participated with federal agencies in determining the extent of mitigation payments to be paid by a mining company, and by receiving and expending the mitigation payments on behalf of the State for habitat mitigation purposes?

#### ANALYSIS

The answer to your question requires inquiry into three different areas of law. It is first necessary to examine the law which authorizes NDOW to be involved with federal land management agencies and their management actions and decisions. The second area of inquiry concerns the manner in which funds are received into, and are authorized for expenditure out of, the state treasury. The final area of inquiry involves examination of the elements of the crime alleged to have occurred, and the evidence to support each of the necessary elements.

A. NDOW is authorized and required by law to cooperate with federal land management agencies in order to protect wildlife habitat within the state.

Management responsibility for the federal public lands and its resources is shared by numerous governments and agencies.

Title to the public lands resides in the federal government. *United States v. Gardner*, 903 F. Supp. 1394, 1399-1400 (D.Nev. 1995), *aff'd*, 107 F.3d 1314 (9th Cir. 1997). Federal land ownership, however, does not preclude state jurisdiction which is not in conflict with legitimate federal purposes. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), *United States v. Nye County*, 920 F. Supp. 1108, 1117-1118 (D.Nev. 1996). Moreover, the states have been invested with authority in certain areas of natural resource management on public lands by virtue of a combination of customary practice together with an evolution of the law surrounding such practice. One such area is wildlife management. *See generally* George Cameron Coggins and

Robert L. Glicksman, 3 PUBLIC NATURAL RESOURCES Law §§ 18.01 and 18.02 (1997). *Cf. In re Crosby*, [38 Nev. 389](#), 392, 149 P. 989 (1915) ("[i]t may be asserted as an established proposition of law that it is a right inherent in the state, as the sovereign power, to enact laws for the protection and preservation of fish and game in the waters and on the land within the confines of its territory").

Jurisdiction over wildlife and its habitat in Nevada is divided, with jurisdiction over wildlife resting principally in the State, and jurisdiction over wildlife *habitat* residing principally in federal land management agencies such as the U.S. Bureau of Land Management and the U.S. Forest Service. *See e.g.* "Department of Interior Fish and Wildlife Policy: State-Federal Relationships." 43 C.F.R. § 24 (1996). Therefore, in order for the State to participate in habitat management, it must, through its executive branch agencies, cooperate and coordinate with federal land management agencies.

State agency involvement in habitat management is expressly authorized by law. The Nevada Board of Wildlife Commissioners (Commission) is established by statute, [NRS 501.167](#), and is required to "establish policies and adopt regulations necessary to the preservation, protection, management and restoration of wildlife *and its habitat*." [NRS 501.105](#) (emphasis added). In addition, the Commission is authorized to establish policies for "the protection, propagation, restoration, transplanting, introduction and management of wildlife," [NRS 501.181\(1\)\(a\)](#), and for "[c]ooperation with federal, state and local agencies on wildlife and boating programs." [NRS 501.181\(3\)\(g\)](#).

Pursuant to its statutory authority, the Commission enacted Commission Policy No. 62 on January 23, 1987, entitled "Mitigation Policy." Policy No. 62 specifically provides that "[t]he Division [of Wildlife] will provide recommendations for mitigation, enhancement and/or replacement as appropriate for individual project proposals where without such actions significant adverse impacts to the wildlife resources would occur." It further states, "[i]t is the policy of the Division that costs associated with mitigation are all normal costs of land or water development projects and therefore should be borne by the developers and/or beneficiaries of the project." Included in a hierarchy of preferred forms of mitigation is specific provision for "[c]ompensating for the impact by replacing or providing substitute resources or environments."

The Nevada Division of Wildlife (NDOW) is an agency of the State of Nevada, established by statute, and located within the Nevada Department of Conservation and Natural Resources (DCNR). [NRS 501.331](#). The agency is to "administer the wildlife laws of this state . . ." *Id.* The Administrator of the Division, established at [NRS 501.333](#), is to "[c]arry out the policies and regulations of the commission," [NRS 501.337\(1\)](#), and "direct and supervise all administrative and operational activities of the division, and all programs administered by the division as provided by law." [NRS 501.337\(2\)](#). The Administrator is specifically authorized to "enter into cooperative or reciprocal agreements with the Federal Government or any agency thereof. . . [and] any public or private corporation . . . in accordance with and for the purpose of carrying out the policy of the [wildlife] commission." [NRS 501.351](#).

Federal law is the primary source of mitigation requirements. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., requires identification of mitigation measures whenever federal action, such as approval of mining operations on public lands, will cause impacts to the environment. 40 C.F.R. §§ 1502.14(f), 1505.2, 1505.3. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Mitigation of impacts from such action can include "[c]ompensating for the impact by replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20(e).

Not only does federal law authorize and require the USFS to consider mitigation measures in its environmental analyses, it authorizes the USFS to impose mitigation as a

requirement for approved mining operations on Forest Service lands. Such authority exists in the broad authority conferred by 16 U.S.C. §§ 478 and 551 for the Secretary of Agriculture to issue use permits under such regulations as he may make and upon such terms and conditions as he may deem proper. *See United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981). *See also* 30 U.S.C. § 612 and 36 C.F.R. § 228.8(e).

Federal law provides states with opportunity to participate in decisions about mitigation. The law authorizes and requires federal agencies such as the USFS to consult with state wildlife agencies whenever conducting environmental review of proposed actions, 40 C.F.R. § 1501.7, 1506.2, 1506.6, and particularly requires the USFS to cooperate with states regarding wildlife protection. 36 C.F.R. Part 241. *See also* 16 U.S.C. §§ 530, 551a, 553, 661 to 666b, 1604(a) and 1612.

All NDOW involvement in the USFS decision to require mitigation payments was therefore fully authorized by law. Not only was NDOW, in conjunction with the USFS, permitted by law to seek mitigation for the IMC activities; it was required to do so by Commission policy. The Grand Jury's conclusion that "neither NDOW, nor any other state agency, should join in concert with federal agencies to extract monies from local businesses for the purposes of habitat mitigation," Report at 6, is squarely at odds with the law.

In addition to the Grand Jury's erroneous assertion that NDOW had no authority to participate in the mitigation decision, another apparent grievance is the amount of payment required of IMC. The mining company apparently objected to NDOW's initial determination that every acre lost to mining activity in the Independence Mountains would require a corresponding treatment on three acres of lower quality habitat elsewhere in the same management area. Report at 3. However, IMC did not dispute NDOW's estimation that 5,500 acres of habitat in the Independence Mountains would be lost, or the figure of \$105 for each off-site acre to be improved. *Id.* Moreover, NDOW ultimately accepted payment based upon a 1:1 ratio.

Still the Grand Jury found fault.

Throughout the negotiations, NDOW was aware that a federal law, the Pittman-Robertson [sic] Act, provided a federal grant which could supplement any contribution made by IMC by a ratio of up to 3:1 . . . IMC was not informed of and did not know that the act would supplement any funds received by NDOW, which could effectively convert the Five Hundred Thousand Dollars (\$500,000) that was agreed on and paid to NDOW by IMC, to Two Million Dollars (\$2,000,000).

Report at 3.

This office notes express reference in Nevada statutes to the Pittman-Robertson Act, 16 U.S.C. §§ 669-669j. *See* [NRS 501.115](#). It notes the pervasive reliance by states on Pittman-Robertson funds.<sup>73</sup> It furthermore notes that availability and amount of federal matching funds under the Pittman-Robertson Act cannot be determined in advance.<sup>74</sup> However, it is not necessary to opine on NDOW's legal requirement to disclose the existence of Pittman-Robertson funds as a possible supplement to the mitigation funds, or to resolve factual inquiries into whether actual disclosure occurred or whether IMC's attorneys had actual or constructive notice of the law. As noted by the Grand Jury, a full match of every state dollar by Pittman-Robertson money would

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<sup>73</sup> "Virtually every state fish and wildlife code contains assent provisions to the [Pittman-Robertson Act]." Musgrave and Stein, *STATE WILDLIFE LAWS HANDBOOK*, 10 (1993).

<sup>74</sup> Procedures for obtaining Pittman-Robertson funds are explained in 25 Federal Procedure, L. Ed. § 56:1975 (1984).

yield a total of \$2,000,000, Report at 3, which is within the reasonable range of actual damage done to habitat by the mining activities.

There may obviously be disagreements between a regulated entity and a regulating agency. However, considerable deference is due the judgment of an administrative agency, particularly where judgment calls for scientific expertise which is within the special competence and jurisdiction of the agency. *Downer v. U.S. By and Through U.S. Dept. of Agriculture and Soil Conservation Service*, 97 F.3d 999, 1002 (8th Cir. 1996). Even if there were reasonable competing scientific opinions regarding a disputed issue such as the value of habitat destroyed by mining activities—and no such competing judgments are disclosed by the Grand Jury—an agency's decision will be upheld as long as the opinion of its expert is also reasonable. *Id.*

This office is in receipt of various documents from NDOW and the USFS which describe the significance of deer habitat in the Independence Mountains. In a memorandum from Larry Barngrover, Manager, NDOW Region II, to William Molini, dated June 15, 1992, Mr. Barngrover in fact observed that NDOW's original estimates were conservative:

We feel very strongly that the ratio of three acres mitigated in the southern winter ranges to every one acre disturbed within the Independence Range is fair. The deer habitat within the Jerritt Canyon area is simply some of the best we have in the State. This habitat cannot be duplicated . . . . We in no way inflated figures to take advantage of IMC. In fact, we feel that even the ratio of 3:1 will not adequately compensate deer for the loss of high quality habitat that has and will continue to occur.

Memorandum at 1. There appears from these various documents a more than adequate basis for NDOW's calculation of necessary mitigation. Nothing presented by the Grand Jury supports its pejorative claim that NDOW relied on "pseudo-scientific data." Report at 4. Therefore NDOW's determination was not error, and was certainly not criminal,<sup>75</sup> even if the mitigation funds are considered in combination with matching federal funds.

The Agreement and the Grand Jury's Report both make clear that IMC assented to the arrangement for payment of mitigation funds to NDOW. However, even if IMC did not agree, there would be no significance in that fact. The law does not require the assent of a regulated entity to the requirements imposed by law. Government regulation does not depend upon a voluntary contract, as the Grand Jury's peculiar reference to IMC's disparate bargaining power would infer. Report at 5 ("[t]he Grand Jury recognizes that disparate bargaining positions often exist between contracting parties, but suggests that when one of the parties is a governmental agency or has governmental powers, that disparity can be disastrously out of proportion").

B. NDOW's receipt and expenditure of mitigation funds, following approval by the Interim Finance Committee, complied with all applicable legal requirements.

NDOW's acceptance of the IMC mitigation funds followed substantial involvement by Nevada's legislature which satisfies all legal requirements pertaining to receipt and expenditure of funds from nonappropriated money. The following information is drawn from an exhaustive study by this office of the legislative history behind the establishment of NDOW's Habitat Mitigation Account.

On February 17, 1993, the Interim Finance Committee (IFC) first met to consider the acceptance of the IMC mitigation funds. Eighteen of the twenty IFC members were present for

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<sup>75</sup> Even where agency action is arbitrary, civil remedies exist for redress. Appeals may be taken from USFS actions pursuant to 36 C.F.R. subpart 251. *Elko County Bd. of Sup'rs v. Glickman*, 909 F. Supp. 759, 765 (D.Nev. 1995).

the meeting, including Senator William J. Raggio, who is also Chairman of the Senate Finance Committee. Minutes of February 17, 1993, meeting on approval of Gifts, Grants and Work Program Revisions in Accordance with [NRS 353.220\(5\)\(B\)](#) before the Interim Finance Committee at 1. Also present were the Legislative Auditor, the Legislative Counsel, and a fiscal analyst for both the Senate and the Assembly. *Id.*

The minutes of the IFC identify the subject matter considered: "[a]cceptance of \$500,000 from Independence Mining Company (IMC) to be used to rehabilitate big game habitats that are presently below optimum because of wild fires, pinion-juniper encroachment and other factors." *Id.* at 14. The minutes further report:

It was Chairman Raggio's understanding that NDOW had negotiated a settlement with Independence Mining Company (IMC) in the amount of \$500,000.

...

It is NDOW's desire to establish a new budget account, similar to the Trout Stamp Account, in which the principal from mitigation contributions will be deposited. NDOW would then use the annual interest earned in the account to specifically fund big game habitat improvement projects.

...

To respond to Mr. Marvel's inquiry, [NDOW Deputy Director] Crawford advised that the money would be deposited with the State Treasury in the Wildlife Account and NDOW would use only the interest earned each year for big game habitat improvement projects.

Senator Jacobsen wanted to know if the funding would be used for habitat improvement projects solely on the USFS land located in the Independence Range.

Mr. Crawford indicated that the funding could be used for habitat improvement projects in other areas; however, NDOW's agreement with IMC includes doing some work initially, within the next 2 years, on deer winter range south of the Independence Range.

*Id.* at 15-16. Following this colloquy, Senator Jacobsen moved to approve the request, the motion was seconded by Mr. Arberry, and was carried unanimously by voice vote.

The effect of the IFC vote was two-fold. First, it authorized NDOW to accept \$500,000 from IMC. This was necessary because the amount exceeded NDOW's existing authorization to receive gift funds. Any proposal for accepting gift or grant money which exceeds an agency's biennial authorization "must be submitted to the interim finance committee" for approval. [NRS 353.335\(2\)\(c\)](#). Second, it created budget account number 101-4451, the Habitat Mitigation Account, into which the money would be received.<sup>76</sup> Action by IFC to effect this change was necessary pursuant to [NRS 353.220\(5\)](#), because creation of the new account represented a change in the NDOW work program.

These changes were subsequently approved by both houses of the legislature. This is confirmed in the May 20, 1993, minutes of the Senate Committee on Finance, which report that

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<sup>76</sup> By personal conversation on April 23, 1997, with Jeanne L. Botts and Dave Purcell, Program Analysts in the Legislative Counsel Bureau's Audit Division, we have determined that the manner of establishing the Habitat Mitigation Account was consistent with the legislature's regular practice for creating budget accounts. Typically, a work program change sheet is drafted by the requesting agency in cooperation with the Budget Office. The Budget Office obtains a new account number—in this case 101-4451—from the Controller, and enters it onto the form. The form is presented to the IFC, and the IFC's approval of the request creates a new account bearing the number assigned to it by the Controller.

the Committee voted to approve the continuation of the account originally established by the IFC, as well as authorize expenditure from the account. Minutes of May 20, 1993, meeting on Wildlife—Habitat Mitigation Budget before the Senate Committee on Finance at 13. The closing pages of the Senate Committee on Finance show a balance forward in the account of \$300,000, with authorization to receive another \$300,000 during each of Fiscal Years 1994 and 1995, and expenditure authorization from the account in the amount of \$50,000 each fiscal year. Closing pages of the Senate Committee on Finance at 30. Attached to the Budget Closing Forms are two letters from NDOW Director William A. Molini, one addressed to Mark W. Stevens, Legislative Council Bureau (LCB) Analyst, the other to Judy Matteucci, Budget Director. In each of these letters, Mr. Molini clearly identifies the source of the habitat mitigation funds, the desire to establish a new account, the purpose for which the account would be established, and the manner in which the funds would be expended.

The Assembly Committee on Ways and Means also considered and approved the matter. Committee minutes reflect the understanding that NDOW:

[R]equested the establishment of an additional budget account titled Wildlife Habitat Mitigation. The new account would authorize expenditure of gifts and donations from businesses. The Department of Wildlife received \$500,000 from the Independence Mining Company for use on habitat improvements. The new account would bring in \$600,000 in FY 94 and \$850,000 in FY 95. It would also establish an expense category called habitat improvements, \$50,000 in each year of the biennium, with the balance placed in the reserve category.

Minutes of May 27, 1993, meeting on Wildlife—Habitat Mitigation Account before the Assembly Committee on Ways and Means at 8. The Committee unanimously approved the proposal. *Id.*

Approval for the proposal was subsequently obtained in the Senate and Assembly, and is set forth at Act of June 30, 1993, ch. 352, § 1, 1993 Nev. Stat. 1134 at 1143. Similar authorization was made during the subsequent session. *See* Act of June 30, 1995, ch. 574, § 1, 1995 Nev. Stat. 1398 at 1408.

The omission of these legislative measures from the Nevada Revised Statutes, apparently deemed significant by the Grand Jury, is in fact irrelevant. "[A]ppropriation bills . . . are passed for the support of the state government, and are not legislative acts changing the substantive or general laws of the state. . . . It is not expected that changes and amendments in the general laws of the state will be made in general appropriation bills, and the life of such acts is only two years." *Nevada ex rel. Abel v. Eggers*, [36 Nev. 372](#), 375, 136 P. 100, 101 (1913). Although the legislature's actions respecting the mitigation funds were not *per se* appropriations, and were instead expenditure authorizations for nonappropriated money, they too make no changes in the state's substantive law, and their duration is for two years. *See also* Op. Nev. Att'y Gen. No. 33 (March 18, 1980) ("agencies are allowed by the Legislature to receive and expend nonstate funds in two ways: (1) through individual statutes in the agency's enabling legislation that permit the agency to accept and expend gifts, federal grants, or private donations; or (2) through inclusion of an agency in the Authorized Expenditure Act . . . .") (quoting language from Legislative Fiscal Analyst William Bible).

The Grand Jury also expresses umbrage at the alleged lack of legislative guidance provided with the authorizations. However, intimations that necessary legislative control over the IMC funds is lacking are repelled by this record, which demonstrates a high degree of legislative involvement at every juncture. Neither Art. 4, § 19 of the Nevada Constitution, nor any other provision of law, requires exacting detail to accompany legislative expenditure authorizations. *State ex rel. Davis v. Eggers*, [29 Nev. 469](#), 91 P. 819 (1907). The Grand Jury's erroneous position on this point is similar to that expressed by complaining taxpayers in *Wells v. Clinton*, 666 S.W.2d

684 (Ark. 1984): "[t]he [complainants] argue that the members of the General Assembly must themselves decide and specify in the statute 'what will be built, where it will be built and what it will cost.'" 666 S.W. 2d at 686. This position was rejected by the court. "The administrative determination of such facts may properly be delegated to a subordinate agency." *Id.* See also *Commonwealth v. Johnson*, 166 S.W.2d 409, 414 (Kent. Ct. App. 1942) (the law "does not prescribe the form to be used in making appropriations nor does it require that appropriations shall be detailed, definite, or specific"), *Black v. Oklahoma Funding Bond Commission*, 140 P.2d 740, 745 (Okla. 1943), *Wells v. Childers*, 165 P.2d 358, 360-361 (Okla. 1945), *State v. Lee*, 27 So.2d 84, 87 (Fla. 1946).

Moreover, the context provided by the general wildlife laws gives more than adequate legislative direction for NDOW's use of the mitigation account.

In general appropriations bills appropriations are made in concise language, usually intended to be supplemented by more definite, existing statutes, and for the purpose of meeting the expenses of the state government in accordance therewith.

Sections of the general appropriations act are *in pari materia* with the general acts controlling the purposes for which the appropriation is made. They are therefore to be considered in connection with the general provisions of law to which they relate, and unless there is such a manifest repugnance as to leave no room for reasonable construction otherwise, they will be construed so as to carry out the provisions of the general law.

*Abel v. Eggers*, 36 Nev. at 376-377. Analogously, expenditure authorizations from nonappropriated funds are also *in pari materia*, and need not reiterate the legislative policies contained in the general laws of the state. Legislative statements protective of wildlife which pervade NRS Title 45 provide adequate guidance for NDOW's use of the mitigation funds.

Finally, this office is in possession of documents demonstrating a continuous legislative oversight of the Habitat Mitigation Account. For example, we are in possession of a memorandum dated March 13, 1997, from Dave Pursell, Program Analyst at LCB, to the Administrator of NDOW, inquiring about numerous wildlife accounts, including a request for information on "projects completed in FY 96 and a list of projects completed and/or in progress for FY 97" with funds from the Habitat Mitigation Account. The Administrator provided the requested information by memorandum dated March 31, 1997.

This office concludes that all necessary procedures were followed by NDOW for (1) establishing the Habitat Mitigation Account by vote of the IFC, (2) obtaining legislative authorization for the account, (3) receiving \$500,000 from IMC, and (4) expending funds from the account after it was established.

C. No violation of NRS 197.200 occurs where the actions of state officials are expressly authorized by law.

At common law, the crime of official oppression "consists in the inflicting upon any person, from an improper motive, of any illegal bodily harm, imprisonment, or any injury other than extortion, by a public officer while exercising, or under color of exercising, his office." Annotation, What Constitutes Offense of Official Oppression, 83 ALR2d 1007, 1008 (1962). Nevada's statutory offense is analogous to the common law offense.

1. An officer, or a person pretending to be an officer, who unlawfully and maliciously, under pretense or color of official authority:
  - (a) Arrests another or detains him against his will;
  - (b) Seizes or levies upon another's property;



(c) Dispossesses another of any lands or tenements; or  
(d) Does any act whereby another person is injured in his person, property or rights, commits oppression.

2. An officer or person committing oppression shall be punished:

(a) Where physical force or the immediate threat of physical force is used, for a category D felony as provided in [NRS 193.130](#).

(b) Where no physical force or immediate threat of physical force is used, for a gross misdemeanor.

[NRS 197.200](#).

It is elementary that, in order to establish the commission of a crime, each element of the offense requires proof beyond a reasonable doubt. *Epp v. State*, [107 Nev. 510](#), 513, 814 P.2d 1011, 1013 (1991), *Jimenez v. State*, [105 Nev. 337](#), 341, 775 P.2d 694, 697 (1989).

The elements of the crime of oppression in Nevada law include the illegality of the underlying act. This is a common requirement in jurisdictions which identify an offense of official oppression. See e.g. *Prevo v. State*, 778 S.W.2d 520 (Tex.Ct. App. 1989) ("[i]n order to commit the offense, one must know that the alleged 'mistreatment' (apart from the offense of official oppression) is unlawful. In order for one to know this, the mistreatment must in fact be unlawful"), *Com. v. Eisemann*, 453 A.2d 1045 (Pa. Sup. 1982), *State v. Edmond*, 903 S.W.2d 856 (Tex.Ct. App. 1995), *modified*, 933 S.W.2d 120 (Tex.Ct. App. 1996).

No evidence of illegality is identified in the Grand Jury's Report or its Presentment. The foregoing analysis demonstrates that the establishment of the Habitat Mitigation Account and receipt of IMC funds complied with the requirements of law. The foregoing also demonstrates the express provisions in law authorizing NDOW to become involved in habitat mitigation decisions made by federal land management agencies. The receipt of the funds and subsequent expenditure of them was authorized and approved by the legislature. As a consequence there has been no crime as alleged by the Grand Jury.

### CONCLUSION

This office concludes that NDOW is fully authorized to participate with federal land management agencies to determine the extent of mitigation required for permitted activities which affect wildlife habitat on public land. NDOW's acceptance and use of mitigation funds from IMC, for development of off-site mitigation to mule deer habitat, was in full compliance with all legal requirements for acceptance and use of nonappropriated money. Consequently, no basis exists to support the Grand Jury's determination that NDOW officials are criminally liable for oppression under color of office.

The Nevada Supreme Court has held:

Acts which the law declares to be criminal are the only ones which constitute crime . . . . The feeling of persons, one or more, in any community, however sincerely believing themselves to have been wronged, and the zeal or desire to convict or prosecuting or other officers, or of special counsel employed, or the indictment of a grand jury, which is in its nature a criminal complaint, cannot make any person guilty of a felony for the commission of an act which the law does not make criminal.

[However strongly people may feel], their desire, or the desire of friends or sympathizers, to punish cannot authorize punishment or prosecution further than the law itself provides. Any other rule would be dangerous, and would lead to the overthrow of the law, or to its supplanting by the desires for revenge or will of persons aggrieved, and to uncertainty and

chaos in the administration of justice. Courts, district attorneys, and law-abiding citizens cannot properly demand that any person be punished or prosecuted for any act which is not made criminal by law. When a court attempts to punish for the commission of acts which are not made criminal by law, it goes beyond its jurisdiction into the domain of legislation, which is committed exclusively to another department of government.

*Eureka Bank Cases*, [35 Nev. 80](#), 102, 126 P. 655, 661 (1912).

The Grand Jury's actions amount to an attempt to convert its view of desirable public land policies, which are at odds with state and federal law, into a criminal indictment against state officials. Its actions are thus an attempt to change or override state policy. Only the legislature may enact such change. By invoking the criminal justice system for such improper purpose, the Grand Jury risks not only infringement on the powers of the legislative and executive branches of state government, it furthermore verges on committing the very crime of which it wrongly accuses others. "The power of the state to prosecute cannot be made an engine of persecution." *Id.*, 35 Nev. at 106, 126 P. 655 at 663.

The conclusion of this office is that the Grand Jury has exceeded its jurisdiction by alleging crimes against four NDOW employees whose actions were consistent with law and were performed on behalf of the state. Their actions were plainly not criminal.

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Senior Deputy Attorney General

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OPINION NO. 97-17 CITIES AND TOWNS; CREDIT UNIONS: Incorporated cities are not authorized to deposit public funds in an insured credit union.

Carson City, May 27, 1997

Mr. Tony Terry, City Attorney, City of Mesquite, 1200 South Fourth, Street, #D, Las Vegas, Nevada 89104

Dear Mr. Terry:

You have requested our opinion on the following questions.

QUESTION 1

May a city government deposit its funds in an insured credit union?

ANALYSIS QUESTION 1

[NRS 356.005](#) provides in part:

1. The state, a local government or an agency of either, *if specifically authorized by statute* or a state agency if approved by the state board of finance, may deposit public money in any insured state or national bank, in any insured credit union or in any insured savings and loan association. [Emphasis added.]

We agree with your conclusion this statute unambiguously authorizes a local government to deposit public money in an insured credit union only if authorized by another specific statute. If we were to construe the statute as authorizing such deposits by itself, the emphasized language would be unnecessary. We are instructed to avoid an interpretation that would render a part of the statute meaningless or unnecessary. *Rodgers v. Rodgers*, [110 Nev. 1370](#), 1373, 887 P.2d 269, 271 (1994).

Having reviewed the statutes governing incorporated cities, we find only [NRS 268.025](#) as bearing directly on the question of deposit of city funds. This statute provides in full: "Any incorporated city or other local government may deposit any money under the control of its treasurer in any insured state or national bank, or in any insured savings and loan association which has an office within the State of Nevada." This statute, specifically addressing the issue of deposit of a city's public funds, does not authorize deposit of such funds in an insured credit union.

[NRS 678.490](#) (2) authorizes a credit union to "[p]erform such tasks and missions as may be requested by the Federal Government, the State of Nevada or any agency or political subdivision thereof when approved by the board of directors and not inconsistent with the provisions of this chapter." This statute does not, in our opinion, authorize the deposit of public funds by a city. Subsection (3) specifically authorizes the Federal Government and any subdivision thereof, to make deposits in state chartered credit unions. Had the legislature intended such authority for cities and other subdivisions of the State of Nevada, it could easily have so provided as clearly as it did with respect to the Federal Government.

#### CONCLUSION QUESTION 1

Construing [NRS 356.005](#), [268.025](#) and 678.490 together, we conclude that incorporated cities are not authorized to deposit public funds in an insured credit union.

#### QUESTION 2

May an incorporated city open an account in an insured credit union for the purpose of permitting citizens to make payments for municipal utilities into the account?

#### ANALYSIS QUESTION 2

An account established for this purpose would still be an account owned by and under the control of the city. Although residents, and not the city itself, would be making the deposits, the money in the account would be owned by the city. We agree with your conclusion that the statutes cited above do not authorize, and by implication, prohibit this practice.

#### CONCLUSION QUESTION 2

An incorporated city may not establish an account in an insured credit union for the purpose of permitting citizens to make payments for municipal utilities into the account.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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OPINION NO. 97-18 CONSTITUTIONAL LAW; SALES AND USE TAX DEDUCTIONS DEBTS: [NRS 372.365](#) and [374.370](#), the Act of July 5, 1995, ch. 666, 1995 Stat. Nev 2555, which provides for a deduction from gross receipts subject to the sales tax for bad debts arising from a retailer's sale of tangible personal property, violates art. 19 § 1 of the Nevada Constitution because it effectively amends the definition of gross receipts subject to sales tax in [NRS 372.025](#) of the Sales and Use Tax Act without approval by a vote of the people. To the extent that the Act amends [NRS 374.370](#), the Department may adopt regulations establishing reasonable restrictions or conditions on the proof that must be shown for a retailer to take the deduction for bad debts, and on how to report the later recovery of taxable gross receipts.

Carson City, June 2, 1997

Michael A. Pitlock, Executive Director, Nevada Department of Taxation, 1550 East College Parkway, Carson City, Nevada 89706

Dear Mr. Pitlock:

In its 1995 session, the legislature amended [NRS 372.365](#) and [374.370](#) by adding a new section to those statutes that purports to provide a deduction for "bad debts" from the amount of sales tax that must be reported on the tax return to the Department of Taxation. The effective date of the amendment is July 1, 1997. With the effective date of this legislation approaching, you have requested an opinion from this office on the following questions:

#### QUESTION ONE

Was the enactment of S.B. 485, without a vote of the people of the State of Nevada, in effect an amendment to the Sales and Use Tax Act of 1955, and so unconstitutional under art. 19, § 1 of the Nevada Constitution?

#### ANALYSIS OF QUESTION ONE

In 1995 the legislature enacted S.B. 485. *See* Act of July 5, 1995, ch. 666, 1995 Stat. Nev. 2555-6. By this bill, the legislature added the following provision to both [NRS 372.365](#) and [374.370](#):

4. If during the period covered by the return:

(a) A retailer has not received a deferred payment due or is unable to collect all or part of the sales price of a sale, the amount of which is included in the gross receipts or total sales price reported or was so included for a previous reporting period, he may deduct the amount of sales or use tax paid or payable on account of that deferred payment or uncollected sales price from the amount of sales or use tax otherwise payable for the current reporting period.

(b) A retailer collects all or part of any deferred payment or uncollected sales price for which he claimed a deduction on a return for a previous reporting period pursuant to paragraph (a), he shall add to the amount of sales or use tax otherwise payable for the current reporting period the amount he deducted on the return for the previous reporting period on account of the portion of that deferred payment or uncollected sales price which he collected during the current reporting period.

It is well settled that a statute enacted by the legislature is presumed to be constitutional, and in case of doubt as to its constitutionality, the doubt must be resolved in favor of its validity. *Viale v. Foley*, [76 Nev. 149](#), 155, 350 P.2d 721, 724 (1960). With this presumption in mind, we turn to an analysis of the statute.

The analysis of the constitutionality of this statute first requires an examination of the evolution of the Sales and Use Tax Act. The Sales and Use Tax Act was originally enacted in 1955. *See* Act of March 29, 1955, ch. 397, 1955 Stat. Nev. 762.<sup>77</sup> A petition was then circulated that met the requirements of art. 19, § 1 of the Nevada Constitution for the submission of this legislation to the voters as a referendum for approval. On November 6, 1956, a majority of the voters approved the legislation.

As a result of the voters approval of the Sales and Use Tax Act in a referendum, according to Nev. [Const. art. 19, § 1\(3\)](#): "[S]uch statute . . . shall stand as the law of the state and shall not be amended, annulled, repealed, set aside, suspended or in any way made inoperative except by the direct vote of the people." *See* Op. Nev. Att'y Gen. 228 (December 1956).

In 1979, the legislature determined it would be wise to regain direct control over the administrative aspects of the sales and use tax so that these provisions could be changed without the requirement of obtaining the voter's approval.<sup>78</sup> Accordingly, the legislature enacted A.B. 616 (1979) which provided (among other things) for repeal of §§ 22 to 32, inclusive; 39 to 47.1, inclusive; and 68 to 153.2, inclusive, of the Sales and Use Tax Act. *See*, Act of May 4, 1979, ch. 286, § 31(2), 1979 Stat. Nev. 409, 410. The people approved this legislation at a special election held on June 5, 1979.

Among the provisions of the Sales and Use Tax repealed were the statutes that described how taxpayers were to prepare and file tax returns. These statutes were replaced with the current statutes found at [NRS 372.355](#) through 372.380. *Compare, id.* § 31(2), at 410 and Act of March 29, 1955, ch. 397, §§ 68-70, 1955 Stat. Nev. 762, 773-4, with Act of May 4, 1979, ch. 286, §§ 66-71, 1979 Stat. Nev. at 415-6. Accordingly, [NRS 372.365](#) is no longer a part of the Sales and Use Tax Act of 1955 and may generally be amended without the voter's approval.

It is often stated in various contexts that the legislature may not do indirectly what the law prohibits the legislature from doing directly. *See, e.g., State v. Clark*, [90 Nev. 144](#), 147, 520 P.2d 1361, 1363 (1974); *United States v. Smith*, 47 F.3d 681, 684 (4th cir. 1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 1456 (1995); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). This principle of law would naturally apply in the case of a statute enacted by the legislature (or regulation promulgated by the Tax Commission), not submitted to a vote of the people for approval, that had the effect of "amending, annulling, repealing, setting aside, suspending or in any way making inoperative" any of the provisions of the Sales and Use Tax Act.<sup>79</sup> Nev. [Const. art. 19, § 1](#). Accordingly, the question presented is whether the enactment of S.B. 485 has the effect of amending, etc., the Sales and Use Tax Act in violation of Nev. [Const. art. 19, § 1](#).

Sales tax is a tax on the retail sale of tangible personal property in Nevada. [NRS 372.105](#). The measure of the sales tax is the retailer's gross receipts from the retail sale of tangible personal property. *Id.* The term "gross receipts" is defined in [NRS 372.025](#) as:

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<sup>77</sup> All references to the Sales and Use Tax Act herein are to those statutes contained in chapter 372 of NRS that were enacted by the legislature and approved by the voters of the state, starting with the original Act enacted in 1955 and approved by the voters in 1956, and as amended since then.

<sup>78</sup> The actual ballot question approved was:

Shall the Sales and Use Tax Act of 1955 be amended to exempt certain foods and restore administration of the tax to legislative control.

<sup>79</sup> This principle is also cited by Justice Collins in dissent from the majority opinion in *Matthews v. State ex rel. Nevada Tax Commission*, 83 Nev. 266, 271, 428 P.2d 371, 374 (1967).

1. 'Gross receipts' means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the tax commission may prescribe, a deduction may be taken if the retailer has purchased the property for some other purpose other than resale, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property prior to its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. 'Gross receipts' does not include any of the following:

(a) Cash discounts allowed and taken on the sale.

(b) Sale price of property returned by customers when the full sale price is refunded in cash or credit; but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

The term "sales price" is defined in [NRS 372.065](#) similarly to the term "gross receipts." Both of these statutes provide for certain deductions and exclusions from the calculation of gross receipts or sales price, but no others. Certain exemptions from the sales and use tax are found at [NRS 372.260](#) through 372.345, inclusive. These provisions are all part of the Sales and Use Tax Act, as amended, and as approved by a vote of the people. There are no statutes within chapter 372 of NRS that are not a part of the Sales and Use Tax Act that contain any deductions, exemptions, exceptions, or exclusions from the measure of the sales and use tax.

[NRS 372.365](#) generally governs how the sales tax is to be reported on a tax return to the Department of Taxation by the retailer. Subsection 1 sets forth how gross receipts from the sale of tangible personal property are to be reported on the tax return for purposes of the sales tax. Subsections 2 and 3 describe how the measure of the use tax is reported on the tax return. Subsection 4 mandates the return also show the amount of sales and use taxes for the period covered by the return.

Subsections 5 and 6 were added by the 1995 legislature, and are currently effective.<sup>80</sup> See, Act of July 5, 1995, ch. 577, 1995 Nev. Stat. 1970, 1971. These statutes describe how penalties for failure to properly report sales and use taxes in the correct county on the tax return apply to retailers.

On July 1, 1997, when S.B. 485 becomes effective, subpart (a) of new subsection 5 will specifically permit a retailer to make a *deduction* from the reportable taxable gross receipts

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<sup>80</sup> These subsections will become subsections (6) and (7) as of July 1, 1997.

from sales made during the period covered by the return when the "retailer has not received a deferred payment due or is unable to collect all or part of the sales price of a sale" during the period covered by the report. This deduction is what the legislative description of S.B. 485 refers to as the "credit for bad debts against taxes on retail sales."

Subpart (b) of subsection 5 will provide that if the retailer eventually collects the delinquent deferred payment or previously uncollected sales price, the retailer is to report the amount collected on the tax return for the period in which it was collected, and pay the sales tax on it. Amounts that are never collected will not be subject to sales tax due to the effect of subpart (a).

By way of illustration of how [NRS 372.365](#) will work, consider a retailer of television sets who allows a purchaser to make four equal monthly installment payments to satisfy the \$1,000 purchase price after payment of \$200 down. The sales tax on the sale, assuming a 7 percent rate, is \$70, and must be reported and paid in the month of the sale. The installment payments are due on the last day of each month. If the purchaser fails to make the first installment payment by the end of the month, under [NRS 372.365\(5\)\(a\)](#) the retailer can take an immediate deduction of \$14 on the next tax return. As the statute is written, the tax on the amount deducted will only have to be repaid if the installment payment is eventually collected.<sup>81</sup>

It has long been the department's interpretation of [NRS 372.025](#) and [372.065](#) that sales tax must be reported on the total amount of the sales price in the period in which the sale takes place, regardless of whether the full sales price is collected at the time of the sale or credit is given the purchaser to pay the sales price in future installments. See, [NAC 372.050](#) and its predecessor, Ruling No. 35, adopted May 23, 1955. This interpretation has been fully supported by this office. See Op. Nev. Att'y Gen. 386 (February, 1967).<sup>82</sup> Accordingly, since neither [NRS 372.025](#), [372.065](#), nor any other statute provides a deduction or exemption to retailers for bad debts, the department has never permitted a retailer to deduct from taxable gross receipts the amount of the sales price that the retailer was unable to collect from the purchaser.

This interpretation of [NRS 372.025](#) and [372.065](#) was recently validated by the Nevada Supreme Court in *Bing Construction Company v. Nevada Department of Taxation*, [109 Nev. 275](#), 849 P.2d 302 (1993). In *Bing*, the taxpayer sought an interpretation of [NRS 372.025](#) that would require sales tax to be reported and remitted only on those gross receipts *actually received*. *Id.* at 278. The court, relying on [NRS 372.025](#) and [NAC 372.050](#), the regulation interpreting that statute, disagreed with the taxpayer. *Id.* The court held that [NAC 372.050](#) was a reasonable interpretation of [NRS 372.025](#), and was a construction within the language of the statute. *Id.* at 279. Furthermore, the court noted that as the regulation had been in effect for 25 years without legislative change, the legislature had clearly acquiesced in the department's interpretation of [NRS 372.025](#) as being consistent with legislative intent.<sup>83</sup> *Id.*

The clear effect of S.B. 485 is to change the statutory construction of [NRS 372.025](#) and [372.065](#) that has been followed by the Department of Taxation, the legislature and the courts for 42 years, even though neither the legislation nor the legislative history suggests the legislature

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<sup>81</sup> According to the legislative explanation of S.B. 485, the statute: "[A]llows a retailer to deduct from sales tax payments any tax that was reported but not collected in a previous reporting period. If the retailer receives the uncollected sales tax at a later date, it must be reported in the current reporting period." This statement technically is incorrect. In the case of many installment sales, the retailer requires a down payment which may cover all or part of the sales tax due on the sales price. Thus, the retailer may have collected all of the sales tax at the time of sale, but not all of the purchase price.

<sup>82</sup> There was a short period of time where the Tax Commission adopted a regulation that provided a bad debt deduction in the early 1960's. See, Ruling 65, adopted February 26, 1962. This regulation was repealed on March 1, 1967, in reliance on the Attorney General's Opinion. See Op. Nev. Att'y Gen. 386 (February, 1967).

<sup>83</sup> Actually, the Tax Commission adopted this construction of NRS 372.025 originally on May 23, 1955.

disagreed with or found fault with the department's long-time construction of [NRS 372.025](#), as codified in [NAC 372.050](#). Such a change is clearly within the prerogative of the legislature to propose. However, every other statute in ch. 372 of NRS providing for a deduction, exception, exclusion, or exemption from the gross receipts subject to the sales or use tax is a part of the Sale and Use Tax Act and has been subject to prior approval of the voters in this state.<sup>84</sup>

In *Matthews v. State, ex rel. Nevada Tax Commission*, [83 Nev. 266](#), 428 P.2d 371 (1967), the Nevada Supreme Court considered the issue of whether the Local School Support Tax Act, enacted by the legislature in 1967, violated Nev. [Const. art. 19, § 1](#), by amending the Sales and Use Tax Act without approval of the voters. In analyzing that issue, the court preliminarily noted that the power to tax is an essential attribute of sovereignty of the states, and that Nev. [Const. art. 19, § 1](#) was a limitation on that power. *Id.*, 83 Nev. at 268. The court determined that a reasonable but narrow construction of Nev. Const. art 19, § 1, was essential to preserve the proper balance. *Id.*

Turning to the statute at hand, the court instructed, "when a new act is complete in itself, when it does not purport to be amendatory of any previous act, and requires no reference to another law to discover its scope and meaning . . . though the new law has the effect of modifying a former law, it is not an amendatory statute . . ." *Id.*, 83 Nev. at 269. A majority of the court in *Matthews* concluded that the Local School Support Tax Act, while it effectively raised the total sales tax rate by 1 percent, was not an amendment of the Sales and Use Tax Act, since the purpose of the Act was different and the Act stood on its own with no need to refer to ch. 372.<sup>85</sup> *See also, Westinghouse Beverage Group, Inc. v. Department of Taxation*, [101 Nev. 184](#), 698 P.2d 866 (1985), wherein the court, relying on *Matthews*, disposed of a similar argument with respect to the enactment of chapter 369A of the Nevada Revised Statutes imposing a tax on the privilege of importing for sale at retail, or selling at wholesale, soft drinks; and *City of Las Vegas v. Mack*, [87 Nev. 105](#), 481 P.2d 396 (1971), wherein the court relied on *Matthews* to avoid a similar challenge to the enactment of the City and County Relief Tax Act (chapter 377 of NRS) in 1969.

The same cannot be said for S.B. 485. Section 1 of S.B. 485 is clearly intended to be amendatory of the definition of taxable gross receipts found in [NRS 372.025](#). Even assuming the average retailer's incidence of bad debt is less than one percent, the undeniable effect of S.B. 485 is to amend the Sales and Use Tax Act by reducing the measure of gross receipts from the retail sale of tangible personal property subject to the sales tax.<sup>86</sup> While [NRS 372.365](#) is no longer a part of the Sales and Use Tax Act itself, its provisions contained no reference to a tax deduction of any kind prior to its amendment by enactment of S.B. 485. Therefore, it cannot be argued that at the time the people of the State of Nevada approved by referendum the removal of [NRS 372.365](#) from the Sales and Use Tax Act, the people contemplated that the legislature could later amend that statute by adding a tax deduction for bad debts to it without the people having the constitutional right to vote on it.<sup>87</sup>

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<sup>84</sup> NRS 372.370 provides that taxpayers may "deduct and withhold from the taxes otherwise due . . . 1.25 percent [of the tax] to reimburse [the taxpayer] for the cost of collecting the tax." This provision was originally part of the Sales and Use Tax Act, but was repealed and recodified with voter approval in 1979. *See* Act of May 4, 1979, ch. 286, § 31(2), § 69, 1979 Stat. Nev. 409, 410, 416. The amount of the collection allowance was reduced from 2 percent to 1.5 percent in 1981, and from 1.5 percent to 1.25 percent in 1991 by the legislature. *See* Act of July 5, 1991, ch. 695, § 2, 1991 Stat. Nev. 2293. Since these amendments to NRS 372.370 took place after it was no longer part of the Sales and Use Tax Act, and the amendments did not alter the purpose or subject matter of NRS 372.370 or effectively amend a statute that remains part of the Sales and Use Tax Act, a vote of the people was not necessary.

<sup>85</sup> Raising revenue for distribution to state schools as compared to the Sales and Use Tax Act's purpose of raising revenue for the state general fund.

<sup>86</sup> *See* Minutes of June 27, 1995, meeting of Assembly Committee on Taxation, p. 4.

<sup>87</sup> By comparison, the Sales and Use Tax Act contains several statutory exemptions to the sales tax. Typically, these statutes start by stating "[T]here are exempted from the taxes imposed by this chapter the gross receipts from the sale of . . ." *See, e.g.* NRS 372.265 through NRS 372.335, inclusive. NRS 372.260 defines the phrase "exempted from the taxes imposed by this chapter" to mean "exempted from the computation of the



In order to determine the scope and meaning of S.B. 485, reference to definitions of "retailer" in [NRS 372.055](#), "sale" in [NRS 372.060](#), "gross receipts" in [NRS 372.025](#) and "sales price" in [NRS 372.065](#) are necessary, in addition to [NRS 372.105](#) describing the incidence of the sales tax. [NRS 372.365](#) as amended by S.B. 485 does not stand on its own. Thus, under the rules set forth in *Matthews*, S.B. 485 constitutes an amendment of the Sales and Use Tax Act. Under the proscription of Nev. [Const. art. 19, § 1](#), before such an amendment to the Sales and Use Tax Act can become effective it must be submitted for approval to the vote of the people. Until the people approve the changes made to [NRS 372.365](#) by S.B. 485, the department should not recognize or enforce them.

### CONCLUSION TO QUESTION ONE

The enactment of S.B. 485 in 1995, to the extent it provides for an amendment to [NRS 372.365](#) to become effective July 1, 1997, without a vote of the people approving the amendment, violates art. 19, § 1 of the Nevada Constitution because it has the effect of amending provisions of the Sales and Use Tax Act, a referendum law. The department should not give effect to § 1 of S.B. 485.

### QUESTION TWO

How is the taxpayer and the department to determine when a retailer has reached the point where they are "unable to collect" the sales price or portion thereof, and so may deduct that amount on a subsequent tax return?

### ANALYSIS OF QUESTION TWO

Despite the conclusion reached to Question One, this question remains relevant due to the amendment made to [NRS 374.370](#) by S.B. 485, which is identical to the proposed change to [NRS 372.365](#). See Act of July 5, 1995, ch. 666, § 2, 1995 Stat. Nev. at 2556. The Local School Support Tax Act is not subject to restrictions of art. 19, § 1 of the Nevada Constitution, and may be amended by the legislature without a vote of the people.

There are no guidelines or parameters set forth in S.B. 485 that define the point in time when a retailer has not received a deferred payment due, or the retailer can claim that he cannot collect all or part of the sales price. The Department of Taxation has the authority to adopt regulations that reasonably construe these terms in order to carry out the legislative intent. [NRS 374.725](#). Indeed, it would appear to be crucial that regulations be adopted which provide such guidance, and the sales tax return be modified to show deductions.

In the case of a sale occurring where the retailer allows the purchaser to make deferred payments on the sales price, S.B. 485 appears to allow the retailer to take a deduction for the amount of the deferred payment whenever a payment does not arrive by the due date. Thus, if a payment is due on the last day of the month, and is not received, a deduction may be taken on that month's sales tax return, even if payment is received the next day. For a one day delay in payment, the retailer will receive the benefit of a one month float before paying the tax back, with no interest accruing. This provision appears to be far more lenient than any other state's bad debt deduction, which are normally tied to debts which are entitled to be deducted for federal income tax purposes. See, e.g., Cal. Rev. & Tax Code § 6055 (West 1997).<sup>88</sup> It is questionable whether

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amount of taxes imposed." S.B. 485 does nothing more than provide a mechanism to "exempt" uncollected gross receipts from the computation of the amount of taxes imposed.

<sup>88</sup> This statute states:

the department could adopt regulations that directly tied the deductibility of a bad debt under [NRS 374.370](#) to those debts determined to be worthless and deducted for federal income tax purposes without statutory authority to use such a parameter.

However, the department could devise reasonable restrictions or conditions on when a retailer may take a bad debt deduction. For example, the department could require the retailer to demonstrate it took certain actions in a bona fide attempt to collect the delinquent installment payments before allowing the deduction to give effect to the stated legislative intent that the deduction be limited to "bad debts."

### CONCLUSION TO QUESTION TWO

The department has statutory authority to adopt regulations that provide reasonable restrictions or conditions on when a retailer may take a bad debt deduction. Given the broad language of S.B. 485 and the lack of any standards in the statute itself providing guidance, the department may rely on legislative intent as set forth in the legislative history of S.B. 485 to fashion regulations governing this area.

### QUESTION THREE

Under S.B. 485, may a taxpayer first deduct all of the costs of collection, attorney's fees, accrued interest, or any other expenses from the gross amount recovered from a delinquent purchaser before reporting the recovery to the department?

### ANALYSIS OF QUESTION THREE

S.B. 485 does not specify how a retailer is to report amounts collected in later periods for which a bad debt deduction was taken on a prior return. There is nothing in the legislative history that suggests the legislature contemplated this issue.

Under its statutory power to adopt regulations necessary to administer the provisions of chapter 372, the department should adopt regulations to clarify how retailers are to report bad debt collections. *See, generally,* [NRS 372.725](#). The department could require the amount collected first be credited to gross receipts previously deducted, after the retailer deducts the collection allowance provided by [NRS 372.370](#). The collection allowance would provide the retailer with some compensation for the costs of collection, as was contemplated by the legislature when it enacted this statute.

### CONCLUSION TO QUESTION THREE

Although S.B. 485 does not provide any guidance on this issue, the department has statutory authority to adopt regulations to clarify how retailers are to calculate the amount of gross receipts to report when a bad debt previously deducted is later collected. Given that the legislature has already provided for a collection allowance by statute, the department could provide that the amount collected should first be credited to previously deducted gross receipts, less the statutory collection allowance.

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A retailer is relieved from liability for sales tax which became due and payable . . . , insofar as the measure of the tax is represented by accounts which have been found to be worthless and charged off for income tax purposes. If the retailer has previously paid the tax, he may, under rules and regulations prescribed by the board, take as a deduction the amount found worthless and charged off for income tax purposes. If any such accounts are thereafter in whole or in part collected by the retailer, the amount so collected shall be included in the first return filed after such collection and the tax paid with the return.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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OPINION NO. 97-19 COUNTIES; WELLS; WATER; ZONING; STATE ENGINEER: Under their zoning and police powers, counties may adopt ordinances regulating placement and testing of domestic water wells. However, counties cannot regulate construction of domestic wells because that authority rests with the State Engineer through his regulation of well-drillers.

Carson City, June 2, 1997

Mr. Michael McCormick, District Attorney, Humboldt County District Attorney's Office, Post Office Box 909, Winnemucca, Nevada 89446

Dear Mr. McCormick:

You have requested an opinion on the following:

QUESTION

Whether the Humboldt County Board of Commissioners has the authority to pass ordinances to regulate placement, construction, and testing of domestic wells as part of their authority under zoning laws or the building permit process.

ANALYSIS

Your question concerns an area of Humboldt County known as Grass Valley. The area has experienced substantial recent growth and development, raising concern about contamination of groundwater from septic tanks and other sources. The County Board of Commissioners would like to issue ordinances to regulate placement, construction, and testing of domestic wells in an effort to prevent such contamination and protect water quality.

Counties are political subdivisions of the state. *State ex rel. List v. County of Douglas*, [90 Nev. 272](#), 280, 524 P.2d 1271, 1276 (1974); *County of Pershing v. Sixth Judicial Dist. Ct.*, [43 Nev. 78](#), 84, 181 P. 960, 961 (1914). They possess only those powers which the Legislature has expressly granted to them. *Id.* at 84-85, *Schweiss v. First Judicial Dist. Ct.*, [23 Nev. 226](#), 230-231, 45 P. 289, 289 (1896). A board of county commissioners is regarded as an inferior tribunal of special and limited jurisdiction and can perform only those acts expressly granted by statute. *Caton v. Frank*, [56 Nev. 56](#), 69-70, 44 P.2d 521, 525 (1935). Therefore, the appropriate legal analysis is whether such ordinances are statutorily authorized. Op. Nev. Att'y Gen. No.1 (February 3, 1992).

The legislature has granted counties numerous powers over use and development of land within their borders. Certain of these powers are found in chapters 244 and 278 of the Nevada Revised Statutes.

Chapter 244 confers certain powers and jurisdiction on the counties. [NRS 244.357](#) empowers each board of county commissioners to enact and enforce local police and sanitary ordinances, stating in part, "[e]ach board of county commissioners may enact and enforce such local police and sanitary ordinances and regulations as are not in conflict with the general laws and

regulations of the State of Nevada . . . ." In addition, subject to certain limitations not pertinent to this discussion, [NRS 244.3675](#) authorizes the board of county commissioners to "[r]egulate all matters relating to the construction, maintenance and safety of buildings, structures and property within the county."

Under chapter 278, governing bodies of counties have been given certain planning and zoning powers. [NRS 278.020](#)(1) provides in pertinent part:

1. For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures.

2. Any such regulation, restriction and control must take into account:

(a) The potential impairment of natural resources and the total population which the available natural resources will support without unreasonable impairment; .

..

"Nevada law demands that a county adopt zoning regulations that 'preserve the quality of air and water resources' and 'promote health and general welfare.'" *Serpa v. County of Washoe*, [111 Nev. 1081](#), 1084, 901 P.2d 690, 692 (1995) (quoting [NRS 278.250](#)(2)(a)). The Nevada Supreme Court in the *Serpa* decision stated that county governments are vested with discretion to the extent the county can independently define orderly physical growth and development. Such discretion includes the ability of a county to determine water availability for itself. *Id.* at 1084. The court concluded that county and local governments can place more burdensome restrictions on growth and development as long as those restrictions are consistent with the county's relevant long-term comprehensive plans, Nevada law, and notions of public welfare. *Id.* at 1085.

We conclude that under its zoning and police powers, the Humboldt County Board of Commissioners has the power to pass ordinances regulating placement and testing of domestic wells to promote health and safety. However, the County Board of Commissioners lacks authority to regulate construction of domestic wells. That power resides in the state engineer.

Chapter 534 of the Nevada Revised Statutes applies to underground water and wells. [NRS 534.020](#)(2) states:

It is the intention of the legislature, by this chapter, to prevent the waste of underground waters and pollution and contamination thereof and provide for the administration of the provisions thereof by the state engineer, who is hereby empowered to make such rules and regulations within the terms of this chapter as may be necessary for the proper execution of the provisions of this chapter.

Any person who wishes to sink a well in any basin designated by the state engineer must first apply for and obtain a permit to appropriate the water. [NRS 534.050](#). Domestic wells are exempted from the requirement of obtaining a permit for appropriation of underground water.<sup>89</sup> [NRS 534.180](#)(1) states in part, "this chapter does not apply *in the matter of obtaining permits for the development and use of underground water* from a well for domestic purposes where the draught does not exceed a daily maximum of 1,800 gallons." [Emphasis added.] Further, [NRS 534.030](#)(4) states, "[t]he state engineer shall supervise all wells tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and all wells tapping percolating

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<sup>89</sup> NRS 534.013 defines "domestic use" to include culinary and household purposes in a single-family dwelling, the watering of a family garden, lawn and the watering of domestic animals.

water drilled subsequent to March 25, 1939, *except those wells for domestic purposes for which a permit is not required.*" [Emphasis added.]

While the state engineer does not require permits for appropriation of groundwater for a domestic well, he does regulate the drilling of such wells. Power to regulate construction of domestic wells has been given to the state engineer through his authority to license and regulate well-drillers.

[NRS 534.140](#) gives the state engineer authority to license every well driller in the state and to adopt regulations for well-drilling. A well-drilling license is required to drill a well for water in the state. [NRS 534.160](#)(1). All well-drillers must comply with regulations adopted by the state engineer governing drilling of water wells. [NRS 534.160](#)(2). The regulations concerning drilling and construction of wells are found at [NAC 534.330](#)—450, inclusive. A well-driller must file a notice of intention to drill with the Division of Water Resources before drilling a water well, including domestic wells. [NAC 534.320](#).1. The driller must keep a well-driller's log for all work performed, including domestic wells. [NAC 534.340](#).2(b). The well-driller's log must be filed with the state engineer. [NRS 534.170](#)(2). In addition, the regulations set forth minimum specifications for well casings. [NAC 534.360](#).3. Domestic wells must have a casing no larger than 8 inches in diameter. [NAC 534.400](#).4. The well-drilling regulations require construction to prevent pollution and contamination or waste of ground water. [NAC 534.360](#). Additionally, the state engineer has statutory authority to limit the depth of domestic wells, or prohibit their drilling, in areas where water can be furnished by a water district or a municipality. [NRS 534.170](#)(3)(c)—(d).

In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, it is appropriate to look to the whole purpose and scope of the legislative scheme. *Lamb v. Mirin*, [90 Nev. 329](#), 332-333, 526 P.2d 80, 82 (1974). We have reviewed all provisions contained in chapter 534 pertaining to well-drilling and well construction. Our review does not disclose any provision which clearly indicates domestic wells are exempt from the state engineer's regulation of well-drilling. Additionally, there is no statutory authorization enabling counties to enact their own well construction codes. As noted above, county commissioners are limited to the exercise of only those powers expressly provided for by law or necessarily incidental to carrying those powers into effect. *State ex rel. King v. Lothrop*, [55 Nev. 114](#), 122, 36 P.2d 355, 357 (1934).

While authority to regulate construction of domestic wells lies with the state engineer, the statutes and applicable regulations do not regulate either placement or testing of domestic wells for water quality purposes. There are no general state laws which regulate location or testing of the quality of domestic wells. The Bureau of Health Protection Services in the State Health Division does regulate the location of individual sewage disposal systems (i.e., septic tanks) near wells. [NAC 444.792](#) (2)(c). This does not regulate placement of wells. Under the powers conferred on the counties under [NRS 244.357](#), the county is authorized to enact police and sanitary ordinances which are not in conflict with state law.

### CONCLUSION

The Nevada Legislature has granted counties authority to regulate use and development of land to promote health and safety. In addition, counties are empowered to enact police and sanitary ordinances that are not in conflict with state law. Pursuant to this authority, a county board of commissioners could enact ordinances regulating placement and testing of domestic wells to protect public health. However, a county cannot enact ordinances to regulate construction of domestic wells because that authority rests exclusively with the state engineer.

FRANKIE SUE DEL PAPA  
Attorney General

By: BARBARA B. RISTINE  
Deputy Attorney General

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OPINION NO. 97-20 ELECTIONS; LEGISLATURE; LIEUTENANT GOVERNOR; PUBLIC OFFICERS: Rules of the senate govern the procedure for the Lieutenant Governor to vote in cases of a tie. The lieutenant governor is limited to two terms of office. A statute making substantive changes to the qualifications for the office of Lieutenant Governor would be in conflict with the Nevada Constitution. Other state constitutions reveal that similar qualifications, such as requiring the Lieutenant Governor to be of the same party and on the same ticket as the Governor, are found in the state constitution and are not adopted by statute.

Carson City, June 5, 1997

Ms. Jeannine Coward, Chief of Staff to Lieutenant Governor Lonnie L. Hammargren, Capitol Building, Carson City, Nevada 89710

Dear Ms. Coward:

Your inquiries to Attorney General Del Papa have been referred to me for response. After researching the matter, this office has concluded the following with respect to these issues.

#### QUESTION ONE

What is the procedure for the lieutenant governor to cast a deciding vote while presiding as president of the senate?

#### ANALYSIS AND CONCLUSION TO QUESTION ONE

Pursuant to Nev. [Const. art. 5, § 17](#), the lieutenant governor is the president of the senate, "but shall only have a casting vote therein." In other words, the Lieutenant Governor has the power to cast the deciding vote in cases of a tie. We were unable to find any authority that would answer the question as to how and when he can vote; therefore, we must refer you to the rules of the senate and their interpretation by legislative counsel to resolve these practical questions.

In addition, under the provisions of [NRS 218.110](#), when the lieutenant governor is serving as acting governor or is unable to attend as president of the senate, "the senate shall elect one of its members as president for that occasion." Thus, in the absence of the lieutenant governor, a member of the senate presides.

#### QUESTION TWO

Does the term limit initiative apply to the lieutenant governor?

#### ANALYSIS AND CONCLUSION TO QUESTION TWO

Pursuant to Nev. [Const. art. 5, § 17](#), a lieutenant governor's time, place and manner of election, term of office and *eligibility* for office is the same as that of the governor. With respect to a limitation on the number of terms a lieutenant governor may serve, although the lieutenant

governor serves as the president of the senate, this service does not make the lieutenant governor a member of the senate. Therefore, the recently enacted amendments to Nev. [Const. art. 4, §§ 3 and 4](#) establishing term limits for members of the senate do not apply to the lieutenant governor.

The state term limit ballot question which was passed by the voters in 1996 does not address the office of lieutenant governor. The terms of other constitutional officers, secretary of state, attorney general, state treasurer, and state controller are specifically referenced and subjected to an eight year or two term limitation. Other state officials and members of local governing bodies are limited to twelve years in office.

The explanation to the ballot question notes that the Nevada Constitution already limits the number of terms to be served by the governor to two. *See* Nev. Const, art. 5, § 3, Op. Nev. Att'y Gen. No. 92-14 (Dec. 1992). Since the provisions of Nev. [Const. art. 5, § 17](#) make the lieutenant governor's *eligibility* for office the same as that of the governor, it is clear that a lieutenant governor is limited to two terms of office.

### QUESTION THREE

Must the Nevada Constitution be amended in order to require the lieutenant governor to be of the same political party and elected jointly with the governor, or can this be accomplished by passage of legislation such as SB 347, § 9?

### ANALYSIS AND CONCLUSION TO QUESTIONS THREE

We conclude that these additional qualifications for the position of lieutenant governor must be adopted by constitutional amendment. Although no Nevada case addresses this specific issue you have raised, it is the general rule that a legislature may not adopt additional qualifications for offices created by the state constitution where the constitution contains specific eligibility requirements. In *State ex rel. Stephan v. Johnson*, 795 P.2d 411, 414 (Kan. Ct. App. 1990), the Kansas appellate court noted, quoting from a Kansas Supreme Court decision,

It is the rule that when the constitution of a state creates an office, and names the requirements of eligibility therefor, the legislature has no authority to make additional requirements, nor to provide that one may hold the office who does not have the constitutional requirements. When an office is created by an act of the legislature, that body has authority to name the terms of eligibility, and modify them at will. [Citations omitted.]

In light of this general rule, we believe that a statute making substantive changes to the qualifications for the office of lieutenant governor would be in conflict with the Nevada Constitution, art. 5, § 17. *See Mengelkamp v. List*, [88 Nev. 542](#), 545, 501 P.2d 1032, 1035 (1972) (Only qualifications not in conflict with constitutional provisions may be added by legislative enactment). Review of other state constitutions reveals that similar qualifications, such as requiring the lieutenant governor to be of the same party and on the same ticket as the governor, are found in the state constitution and are not adopted by statute.

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
First Assistant Attorney General

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OPINION NO. 97-21 SCHOOL DISTRICT; BOARD OF TRUSTEES; EXPULSION: Pursuant to [NRS 392.467](#), the board of trustees of a school district may authorize another entity, person or a panel of less than the full board to suspend or expel students. The authority prescribed may be a final decision without appeal to the full board.

Carson City, July 2, 1997

Ms. Johnnie B. Rawlinson, Assistant District Attorney, Clark County, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Ms. Rawlinson:

The Clark County District Attorney, through you, has asked this office for an opinion related to suspension and expulsion of students from the schools of the Clark County School District.

#### QUESTION ONE

May the Board of School Trustees (Board) delegate the duty of deciding a contested student expulsion issue to a committee of less than the full Board?

#### ANALYSIS

Currently, the process used in the Clark County School District for expulsion of students starts with school officials conferring and bringing the matter for a hearing before a three-person panel of school personnel. The decision of this panel may be appealed to a *de novo* hearing before the Board sitting as a committee entitled "Student Expulsion Appeal Hearing Committee." This committee is the entire board and any decision therefore requires agreement of a majority of the Board members. Previously, the committee consisted of only four members and operated with a decision requiring assent of all four members. Four is a majority of the Board. [NRS 386.330\(4\)](#) requires the affirmative vote of the majority for the Board to act regardless of the number in attendance at a meeting.

The Board is considering delegating the decision in a contested expulsion case to a committee of less than the full board. [NRS 392.463](#) requires that each school district prescribe written rules of behavior for pupils and the appropriate punishment. If suspension or expulsion is used as a punishment for violation of the rules, the school district shall follow the procedures in [NRS 392.467](#).

[NRS 392.467](#)(1) and (2) provide as follows:

1. Except as otherwise provided in subsection 4 and 5, the board of trustees of a school district may authorize the suspension or expulsion of any pupil from any public school within the school district.

2. Except as otherwise provided in subsection 5, no pupil may be suspended or expelled until he has been given notice of the charges against him, an explanation of the evidence and an opportunity for a hearing, except that a pupil who poses a continuing danger to person or property or an ongoing threat of disrupting the academic process or who is selling or distributing any controlled substance or is found to be in possession of a dangerous weapon as provided in [NRS 392.466](#) may be removed from the school immediately upon being given an explanation of the reasons for his removal, and pending proceedings, to be conducted as soon as practicable after removal, for his suspension or expulsion.



Subsection 4 relates to truancy and subsection 5 refers to special education students. The crux of the question is the meaning of the statute when it states the board of trustees may authorize the suspension or expulsion of any pupil. "Authorize" means "to grant power or authority to do." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 124 (3d ed. 1992). The act in the question before us is expulsion or suspension of a student. Therefore, the Board may grant the authority to another person or entity to expel or suspend students. The authority granted is, of course, not unfettered; it must be exercised within the due process parameters of [NRS 392.467](#) and the constitutional right of due process.

Review of the legislative history gives further confidence in our conclusion. The current language was added to the Nevada Revised Statutes in 1975. At the time the statute addressing expulsion and suspension of students was codified as [NRS 392.030](#)(1) and provided that "[t]he board of trustees of a school district may suspend or expel or any principal or administrator may suspend from any public school within the school district any pupil who will not submit to reasonable and ordinary rules of order and discipline." Act of April 11, 1975, ch. 713, § 1, 1975 Nev. Stat. 1471. It is noteworthy that formerly the law specifically identified the Board as the entity which could suspend or expel and principals or administrators as the persons who could suspend, but the amended law removed that specificity. The legislative history reveals that the change was motivated by a need to assure due process of law for the student following the Supreme Court decision in *Goss v. Lopez*, 419 U.S. 565 (1975), and the suggestion to the legislative committee by Clark County School District representatives that the bill allow districts flexibility in meeting due process requirements. The bill, as amended, granted that flexibility.

If a committee of trustees is formed to hear the expulsion and is less than the full Board, you question whether the voting of that committee is governed by the rules for voting applicable to the Board. The committee members are not sitting as the Board unless so designated. They are sitting as a committee authorized to make expulsion decisions which does not have to be composed of trustees of the Board. If it is not a committee designated as the Board, it is not governed by [NRS 386.330](#)(4) which would require four affirmative votes. A majority of the votes cast from a quorum of the committee would suffice unless the Board has a different rule for committees appointed by the Board. There may be policy reasons why the Board prefers to designate that the committee act as a meeting of the Board. This opinion does not prevent that designation.

#### CONCLUSION TO QUESTION ONE

The Board of a school district may authorize a committee composed of Board trustees numbering less than the full Board to suspend or expel a student. Such a committee is not necessarily sitting as the Board because the Board may authorize anyone to perform this function. The authority to suspend or expel may be a final decision without appeal to the full Board if that is the prescribed authority given.

#### QUESTION TWO

May the full Board review the decision of the hearing panel composed of school administrators without conducting another hearing before the Board?

#### ANALYSIS

[NRS 392.467](#) does not require that the decision to suspend or expel be made by the Board. See analysis to question one. The Board may authorize the hearing panel of school administrators with the power to make the decision to expel or suspend. The statute does not require an administrative appeal to review that decision nor does it appear to be constitutionally mandated. *Trujillo v. Taos Municipal Schools*, 91 F.3d 160 (10th Cir. 1996). Therefore, if the

Board provides an avenue of appeal to the full Board it is not necessary that it be *de novo*.<sup>90</sup> However, in cases involving students in grades 1 through 6, inclusive, except where the grounds involve possession of a firearm, [NRS 392.466\(4\)](#) does require the Board to review and approve the suspension or expulsion of the student. This statute does not require another hearing before the Board.

### CONCLUSION TO QUESTION TWO

The Board may review the decision of the hearing panel composed of school administrators without conducting another hearing before the Board, provided the Board has authorized the panel to make the decision and that panel affords the student due process.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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OPINION NO. 97-22 PUBLIC WORKS; WAGES; LABOR COMMISSIONER; LABOR: A private project that is constructed or retrofitted to specifications provided by a public agency as part of a plan for the public agency's eventual purchase of the project is a public work under [NRS 338.010\(5\)\(a\)\(1\)](#).

Carson City, August 12, 1997

Mr. Brian Chally, Chief Deputy District Attorney, Douglas County District, Attorney's Office, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Chally:

You have asked whether a retrofit or construction of a building by a private party to the specifications of Douglas County so that the county would subsequently purchase the building after the retrofit or construction would be subject to Nevada's prevailing wage laws. The brief answer is that such a retrofit or construction arrangement would be subject to the prevailing wage laws. Our analysis follows.

### QUESTION

Would a retrofit or construction of a building by a private party to the specifications of Douglas County as part of an agreement by the county to purchase the building from the private party constitute a "public work" under [NRS ch. 338](#) such that Nevada's prevailing wage laws would be applicable to the private party's retrofit or construction work?

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<sup>90</sup> The process which is due the pupil does not necessarily require an administrative appeal to the school board. *Trujillo v. Taos Municipal Schools*, 91 F.3d 160 (10th Cir. 1996) (acknowledging there are no cases establishing a constitutional right to appeal). The Supreme Court describes, for suspensions not exceeding 10 days, the minimum requirements of notice, explanation of the evidence and an opportunity to present the student's side of the story as "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Goss v. Lopez*, 419 U.S. 565, 581 (1975). It is recognized that the more onerous the discipline, the greater the safeguards needed. *Id.* at 583. For this reason it may be advisable to provide for an administrative review for expulsions or lengthy suspensions. See *Draper v. Columbus Public Schools*, 760 F. Supp. 131, 134 (S.D. Ohio 1991) (student granted one informal and two formal hearings before subjected to 27 days expulsion, more than adequate to minimize possibility of mistake or unfairness).

## ANALYSIS

[NRS 338.010\(5\)](#) defines "public work" to mean "any project for the new construction, repair or reconstruction of: (a) A project financed in whole or in part from public money for: (1) Public buildings; . . ." As part of the preparation of this opinion, this office contacted the Nevada Labor Commissioner, Mr. David Dahn, and asked how [NRS 338.010\(5\)\(a\)\(1\)](#) has been historically interpreted regarding matters similar to the Bentley proposal you have described. Mr. Dahn informed us that he and his office have always considered projects such as the Bentley proposal to be public works because the building is being constructed to the county's specifications as part of a purchase arrangement. Mr. Dahn explained his office has always examined the substance of such an arrangement rather than the form of the arrangement, and has taken action against public agencies that have tried to circumvent the prevailing wage laws through lease-purchase arrangements or other such arrangements where the public body controls the end product, will eventually own the end product, pays for the end product with public funds, and the end product is for a clear public purpose.

We agree with your analysis and the Labor Commissioner's that the Bentley proposal mentioned in your letter would be a "public work" under [NRS 338.010\(5\)](#). As you have described the Bentley proposal, Bentley would retrofit or construct on its private land a building specifically for Douglas County to the county's specifications for a county administrative building. Approximately \$9,000,000 of public money would be used to purchase the Bentley-constructed facility. The prevailing wage laws cannot be circumvented by structuring or disguising a public work by having the building constructed by a private party to the public agency's specifications and then turning the building over to the public agency only after construction is completed. Such an arrangement would allow an exception to wholly swallow the rule and would likely render the prevailing wage laws useless.

## CONCLUSION

The Bentley proposal as described in your letter dated June 26, 1997, would constitute a "public work" under [NRS 338.010\(5\)\(a\)\(1\)](#). Therefore, if the Bentley proposal is entered into by Douglas County, the prevailing wage laws in [NRS ch. 338](#) will be applicable to retrofit and construction work on the project and Douglas County would be treated as the awarding body of the project for the Labor Commissioner's purposes.

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

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OPINION NO. 97-23 CRIMINAL LAW; CRIMINAL PROCEDURE; DISTRICT ATTORNEYS; DISTRICT JUDGES; FELONS; JUDGMENTS; PENALTIES; PRISON OR PRISONERS; STATUTES: A district court cannot validly sentence a felon pursuant to a statute not in effect at the time of the offense. Judgments of conviction that do not conform to the statute in effect at the time of the offense are illegal and must be corrected.

Carson City, August 28, 1997

Mr. Robert Bayer, Director, Department of Prisons, Post Office Box 7011, Carson City, Nevada 89702

Dear Mr. Bayer:

The question which has arisen concerns the validity of certain sentences of imprisonment imposed after the July 1, 1995, effective date of S.B. 416, the sweeping "truth in sentencing" legislation that transformed felony sentencing in Nevada from a determinate to an indeterminate structure. Apparently, inmates have been sentenced to maximum and minimum terms of imprisonment contemplated by the sentencing provisions of S.B. 416, even though the felons committed their offenses prior to July 1, 1995. Of equal concern, some inmates, who committed their offenses subsequent to July 1, 1995, have received determinate sentences under the former statutory scheme. You have requested an opinion on the validity of these sentences.

### QUESTION

Whether a Nevada district court can validly sentence a felon pursuant to a statute not in effect at the time of the felony offense.

### ANALYSIS

[NRS 193.130](#) sets forth the indeterminate sentencing structure enacted by S.B. 416 of the 1995 Legislative Session. It provides that almost all felony offenses committed on or after July 1, 1995, must be punished by imposing a minimum and maximum term of imprisonment within prescribed limits.<sup>91</sup> Through "savings clauses" contained in [NRS 193.130](#), the Nevada Legislature clearly expressed the intent that felonies occurring prior to the effective date of the new law should be punished pursuant to the old law.<sup>92</sup>

While examination of legislative history is unnecessary when statutory language is clear and unambiguous, *Acklin v. McCarthy*, [96 Nev. 520](#), 612 P.2d 219 (1980), a review of the legislative history of S.B. 416 reveals nothing contrary to the plain reading of the language of [NRS 193.130](#). The will of the Legislature in enacting a new indeterminate sentencing structure was that the new scheme should apply only to those offenses occurring on or after July 1, 1995.

Nevada case law is relatively well-settled on the issue of applicability of new sentencing laws. Where the new law provides a savings clause like the one in [NRS 193.130](#), the general rule is that the proper penalty to impose is the one in effect at the time of the commission of the offense. *Tellis v. State*, [84 Nev. 587](#), 445 P.2d 938 (1968); *Shepley v. Warden*, [90 Nev. 93](#), 518 P.2d 619 (1974). Conversely, where the legislature clearly intends that an ameliorative amendment to sentencing law has retroactive application, the Nevada Supreme Court has recognized an exception to the general rule. *Sparkman v. State*, [95 Nev. 76](#), 590 P.2d 151 (1979); *Carter v. State*, [95 Nev. 259](#), 592 P.2d 955 (1979). However, that exception has no application to the facts in this matter.

A judgment of conviction and sentence must conform to the punishment prescribed by statute and when a sentence does not conform it is erroneous and must be corrected. *State v. Johnson*, [75 Nev. 481](#), 346 P.2d 291 (1959). Accordingly, sentences in violation of S.B. 416 are

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<sup>91</sup> Sentencing for category A felonies for which the death penalty or life imprisonment may be imposed are governed by specific statute. Further, either intentionally or through oversight, seven felony offenses were not included in the indeterminate sentencing structure of S.B. 416. *See, e.g.*, Unlawful Sale of Firearm to a Minor in violation of NRS 203.310 and Failing to Provide Industrial Insurance (second offense within 7 years) in violation of NRS 616D.200.

<sup>92</sup> In relevant part, NRS 193.130(1) provides "a person convicted of a felony shall be sentenced to a minimum term and a maximum term of imprisonment which must be within the limits prescribed by the applicable statute, *unless the statute in force at the time of commission of the felony prescribed a different penalty.*" (Emphasis added.) Further, in setting forth specific penalties for categories of felonies, NRS 193.130(2) provides "Except as otherwise provided by specific statute, *for each felony committed on or after July 1, 1995. . . .*" (Emphasis added.)

illegal and should be corrected.<sup>93</sup> [NRS 176.555](#) provides that a sentencing court may do so at any time. Moreover, Nevada Supreme Court precedent indicates the correction should occur whether the mistake in rendering judgment works to the extreme detriment of the defendant, *see Warden v. Peters*, [83 Nev. 298](#), 429 P.2d 549 (1967), or the mistake benefits the defendant, *see State v. Johnson, supra*.

There are further sound reasons for requiring correction of illegal sentences in this matter. If a judgment of conviction for an offense occurring prior to July 1, 1995, imposes an indeterminate sentence under the new law more harsh than the defendant should have received under the determinate sentencing law in effect at the time of the offense, the judgment violates the constitutional prohibition against *ex post facto* laws. *Goldsworthy v. Hannifin*, [86 Nev. 252](#), 468 P.2d 350 (1970); *Thompson v. State*, 102 Nev 348, 721 P.2d 1290 (1986). If that same defendant receives an indeterminate sentence less onerous than he should have under the appropriate determinate sentencing statute, application of the wrong law makes him the recipient of leniency not intended by the legislature.

The same holds true for a defendant sentenced for an offense occurring after July 1, 1995. Imposition of a harsh determinate sentence under a former statute when the defendant is eligible for a less onerous indeterminate sentence under existing law, violates the defendant's rights by sentencing pursuant to a void statute.

The legislature is empowered to define crimes and determine punishments, and the judicial branch should encroach upon that domain lightly. *Deveroux v. State*, [96 Nev. 388](#), 610 P.2d 722 (1980). Sentences at issue in this matter are at odds with and impermissibly supplant the will of the legislature expressed in S.B. 416.

While some might argue that where the sentences derive from plea bargains and guilty pleas, defendants waive any challenge to defects in their respective judgments and sentences, such an argument is unpersuasive. A defendant can waive certain rights in the plea bargaining process, *see Cruzado v. State*, 110 Nev 745, 879 P.2d 1195. However, a defendant does not forego the substantive right to challenge the jurisdictional validity of his sentence by pleading guilty. *U.S. v. Caperell*, 938 F.2d 975 (9th Cir. 1991); *see also, Giese v. Chief of Police, Reno*, 87 Nev 552, 489 P.2d 1163 (1971); *U.S. v. Palacios-Casquete*, 55 F.3d 557, (11th Cir. 1995), *cert. den.* 116 S.Ct. 927 (1995); *U.S. v. Burns* 934 F.2d 1157, (10th Cir. 1991), *cert. den.* 112 S.Ct. 1246 (1991); *U.S. v. Shulman*, 940 F.2d 91 (4th Cir. 1991). In accepting guilty pleas, courts are bound to follow all relevant statutory sentencing provisions. *Miller v. State*, 113 Nev., Adv. Op. 78 (June 17, 1997), 941 P.2d 456. The fact that an illegal sentence results from a plea bargain and guilty plea should not insulate it from review and correction. *See, e.g., Hood v. State*, [111 Nev. 335](#), 890 P.2d 797 (1995).

The illegality of the application of a clearly inapposite sentencing law cannot be ignored. The imposition of such sentences, clearly exceeds lawful sentencing authority. Unfortunately, correcting the illegal sentences will require further expenditure of judicial resources.<sup>94</sup>

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<sup>93</sup> In *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996), the Nevada Supreme Court stated, "Motions to correct illegal sentences address only the facial legality of a sentence. An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as "one 'at variance with the controlling statute,' . . ."

<sup>94</sup> However, the procedure for correcting an illegal sentence does not entail relitigation of the entire case. As the Nevada Supreme Court noted in *Edwards, supra*;

A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing.

## CONCLUSION

A Nevada District Court cannot validly sentence a felon pursuant to a statute not in effect at the time of the offense. Thus, the felony sentences of imprisonment which you described are illegal and must be corrected.

FRANKIE SUE DEL PAPA  
Attorney General

By: SCOTT EDWARDS  
Deputy Attorney General

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OPINION NO. 97-24 AGREEMENTS; EUREKA COUNTY; PUBLIC LANDS; FEES;  
WATER; STATE ENGINEER

As of January 23, 2002, Attorney General Frankie Sue Del Papa has formally withdrawn AGO 97-24, dated September 18, 1997, concerning payments for mitigation of water use.

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OPINION NO. 97-25 PSYCHOLOGICAL EXAMINERS, BOARD OF; MENTAL ILLNESS; SUBSTANCE ABUSE; BOARDS & COMMISSIONS: Licensed psychologists may evaluate and treat patients with substance-abuse problems because such conditions are mental/behavioral disorders within the statutory scope of practice for psychologists set forth at [NRS 641.025](#).

Carson City, November 17, 1997

Elizabeth Richitt, Ph.D., President, Board of Psychological Examiners, 275 Hill Street, Suite 246, P.O. Box 2286, Reno, Nevada 89505-2286

Dear Dr. Richitt:

This is in response to the written request of Christa Peterson, Ph.D., preceding president of the Board of Psychological Examiners, requesting an Attorney General's Opinion concerning the scope of practice for psychologists as set forth in chapter 641 of the Nevada Revised Statutes.

#### QUESTION

Are licensed psychologists allowed to evaluate and treat those substance-related disorders listed as mental disorders in the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, Fourth Edition (1994) (DSM-IV)?

#### ANALYSIS

To answer your question, it must be determined whether the evaluation and treatment of substance-related disorders that are listed in the DSM-IV falls within the practice of psychology as defined by Nevada law. If evaluation and treatment of such mental disorders is beyond the scope of practice for licensed psychologists in Nevada, as established by state law, psychologists may not perform such functions in their psychological practices. Conversely, if evaluation and treatment of such mental disorders is within the scope of practice for psychologists, they are authorized to perform such functions.

The authorized scope of practice for psychologists in Nevada is set forth in chapter 641 of the Nevada Revised Statutes.

'Practice of psychology' means the observation, description, evaluation, interpretation or modification of human behavior by the application of psychological principles, methods or procedures to prevent or eliminate problematic, unhealthy or undesired behavior and to enhance personal relationships and behavioral and mental health. The term includes, without limitation, such specialized areas of competence as:

1. Psychological testing and the evaluation of personal characteristics, including, without limitation, intelligence, personality, abilities, interests, aptitudes and neuropsychological functioning;
2. Counseling;
3. Psychoanalysis;
4. Psychotherapy;
5. Hypnosis;
6. Biofeedback;
7. Analysis and therapy relating to behavior;
8. Diagnosis and treatment of mental and emotional disorders, including, without limitation, disorders of habit or conduct;
9. Psychological aspects of physical injury, illness, accident or disability; and
10. Evaluation, therapy, remediation and consultation relating to the academic performance of the patient.

#### [NRS 641.025](#)

As the statutory definition makes clear, the practice of psychology encompasses a broad and varied range of activities by licensees. “[A]ctivities that are part of the psychologists' scientific and professional functions or that are psychological in nature [include] the clinical or counseling practice of psychology, research, teaching, supervision of trainees, development of assessment instruments, conducting assessments, educational counseling, organizational consulting, social intervention, administration, and other activities as well.”<sup>106</sup> Areas of specialization recognized by the Nevada Board of Psychological Examiners include, but are not limited to, clinical psychology, counseling psychology, educational psychology, and industrial psychology. [NAC 641.140](#). Because there is a distinction between the broad scope of practice as defined by state law and the actual practice of individual licensed psychologists, it is helpful to lay some groundwork before addressing the question you presented.

Comparable to a license to practice medicine or law, a license to practice psychology in Nevada is an unrestricted or generic license that does not limit the licensees to particular areas of practice or restrict them from practicing all aspects of the profession.<sup>107</sup> Plastic surgeons, psychiatrists and internists all hold the same license to practice medicine, as do attorneys working in diverse areas of law, such as water, personal injury or adoption law. When individuals hold an unrestricted license, they are entitled to practice their profession in any manner “which is not unprofessional or immoral.” *Morrison v. State Bd. of Medicine*, 618 A.2d 1098, 1099 (Pa. Cm. Ct. 1992). When deciding on psychological techniques, methods or programs to employ when providing psychological services to particular patients and clients, it is the psychologist's “responsibility to ascertain the program's acceptance by the [psychological] community and to exercise professional judgment in the treatment of . . . patients.” *Id.*

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<sup>106</sup> Quoting the Introduction to the Ethical Principles of Psychologists and Code of Conduct promulgated by the American Psychological Association. The APA's Code of Conduct has been adopted by the Nevada Board of Psychological Examiners and incorporated by reference into its Standards of Conduct (APA Code) for Psychologists set forth at NAC 641.

<sup>107</sup> Holders of a medical license may, without restriction, “diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, *by any means or instrumentality*” and to “apply principles or techniques of medical science in the diagnosis or the prevention of *any* such conditions” and to “offer, undertake, attempt to do or hold oneself out as *able to do any of the acts described*.” See NRS 630.020(1), (2) and (4) (definition of “practice of medicine”) (emphasis added). See also NRS 630.160 (authorizing holders of a license to practice medicine); A license to practice law entitles the individual to “practice as an attorney and counselor at law in all the courts of this state.” SCR 74; see also NRS 7.285 (misdemeanor to practice law in Nevada without license.)



Nevertheless, psychologists are required by Nevada law to limit their practice of psychology to their areas of competence as documented by education, training and experience, and are required to declare their areas of competence upon renewal of their licenses. [NRS 641.112, 641.220\(2\); NAC 641.140](#). It is grounds for disciplinary action by the Board, up to and including license revocation, if psychologists fail to limit their practice to areas in which they have acquired competence; if they practice beyond the scope of their competence unless it is emergency; if they fail to maintain competence in conformance with current standards of scientific and professional knowledge; if they use any method or technique of treatment or evaluation for which there is no adequate basis in research; or if they order any treatment not warranted by the patient's condition. See [NAC 641.208](#); see also APA Code §§ 1.04, 1.05 and 1.07 (boundaries of competence, maintaining expertise, basis for scientific and professional judgments).

With the qualification that the scope of practice as defined by state law is broader than the boundaries of competence within which individual psychologists must practice, the factors to consider in determining whether [NRS 641 allows](#) psychologists to evaluate and treat the substance-related disorders listed in the DSM-IV may be set forth as follows:

If substance abuse constitutes a problematic, unhealthy or undesired human behavior; a behavioral, emotional or mental disorder; a disorder of habit or of conduct; a problem of behavioral or mental health; or a psychological aspect of physical injury, illness, accident or disability;

That may be evaluated and/or treated by the application of psychological principles, methods or procedures, including but not limited to psychological testing or evaluation of personal characteristics, personality, abilities or neuropsychological functioning; or by counseling; psychoanalysis; psychotherapy; hypnosis; biofeedback; or analysis or therapy related to behavior;

Then, licensed psychologists may evaluate and treat patients with substance abuse problems because psychologists may engage in any professional conduct encompassed by the definition of the practice of psychology in [NRS 641.025](#).

Most reasonable people would concur that substance abuse is a problematic, unhealthy or undesired human behavior, even those without education or expertise in the field of psychology. More problematical for the layperson, however, is the meaning of specialized and technical terms unique to psychology and other mental health disciplines, such as whether substance abuse is a behavioral, emotional or mental disorder, or a disorder of habit or conduct, and whether it is evaluated and/or treated by the application of psychological principles, methods or procedures. Clearly, more than a layperson's understanding of such professional terminology is necessary to determine whether the practice of psychology, as defined in [NRS 641.025](#), embraces the evaluation and treatment of substance abuse by licensed psychologists.

“The meaning of certain words in a statute [setting forth authorized conduct in a regulated profession] may be determined after examination of the context in which they are used and by considering the spirit of the law.” *State v. Webster*, [102 Nev. 450](#), 453, 726 P.2d 831 (1986). “[T]echnical words and phrases having a peculiar meaning in law are to be understood according to their technical import.” *Application of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535 (1949). If “psychological terms used are of sufficient certainty under that discipline [so] as to be reasonably ascertainable,” those terms will be interpreted in accordance therewith. *Bloom v. Texas St. Bd. of Exam. of Psychologists*, 475 S.W.2d 374 (Tex. Ct. App. 1972) (rev'd on other grounds, 492 S.W.2d 460 (1973)). “In the absence of any reason to the contrary, a word that is ambiguous should receive that meaning which is generally ascribed to it within the community.” *Webster*, 102 Nev. at 453. The spirit of laws regulating learned professions affecting public health, safety and

welfare is to assure that only trained and competent individuals practice the profession. *Id.* at 454; *see also* [NRS 641.010](#) (legislative declaration that psychology is a learned profession and public must be protected from unqualified practitioners and unprofessional conduct). When “the intent of the [professional licensing] statute is to protect the public from unqualified or unscrupulous persons, it should receive a liberal construction” and be interpreted broadly to achieve its purpose. *Brill v. State Real Estate Div.*, [95 Nev. 917](#), 919, 604 P.2d 113 (1979).

In applying the above principles of statutory interpretation, it is significant that there is overwhelming agreement among experts in the United States and worldwide that substance abuse is in fact a type of mental disorder, in particular a behavioral disorder, which is effectively evaluated and treated by the application of psychological principles, methods and procedures. As such, evaluation and treatment falls squarely within the statutory definition of psychology set forth in Nevada law. “As defined by the World Health Organization, alcoholism is a chronic illness that manifests itself as a disorder of behavior.” *See Driver v. Hinnart*, 356 F.2d 761 (4th Cir. 1966). Definitive college level and post-graduate textbooks used in the training of professional psychologists contain separate sections dealing solely with the disorders of substance abuse. *See e.g.*, James C. Coleman, U.C.L.A., *Abnormal Psychology and Modern Life*, (Chapter 12: Alcoholism & Drug Abuse) (5th ed. 1976).

Drug addiction and alcoholism are recognized as disabilities under federal law for purposes of Title XVI of the Social Security Act (42 U.S.C. § 1381 (1991) *et. seq.*) and the Rehabilitation Act (29 U.S.C. § 791 *et. seq.*), and federal courts regularly depend on psychologists as the lead professional and expert witness regarding issues of diagnosis and treatment of substance abuse disorders, of which alcoholism is only one variety. *See e.g.*, *Andrews v. Shalala*, 53 F.3d 1035, (9th Cir. 1995); *Thompson v. Sullivan*, 957 F.2d 611 (8th Cir. 1992); *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. 1991); *Brown v. Heckler*, 713 F.2d 441 (9th Cir. 1983); *Johnson v. Harris*, 625 F.2d 311 (9th Cir. 1980).

Psychologists perform the same function in state courts involving diagnosis and treatment of persons suffering from substance abuse disorders. *See e.g. Susan B. Allen Mem. Hosp. v. Bd. of Comm'n'rs*, 753 P.2d 1302 (Kan. App. 1988); *Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n*, 510 N.E.2d 368 (Ohio 1987); *State v. Fearon*, 166 N.W.2d 720 (Minn. 1969). In some states, the diagnosis and referral to treatment centers of persons suffering from substance abuse disorders must be made by either a psychologist or medical doctor. *See e.g. Susan B. Allen Mem. Hosp.* 753 P.2d at 1305 (under Kansas Alcoholism and Intoxication Act, K.S.A. 65-4001 *et. seq.*, individual must be transported to psychologist or M.D. for examination); *Babcock*, 510 N.E.2d at 370 (disability of addiction must be supported by assessment of qualified professional, such as psychologist or M.D.).

The American Psychological Association (APA), founded in 1892, is the world's largest scientific and professional organization representing psychologists and the major psychological organization in the United States, with over 150,000 members and affiliates.<sup>108</sup> The APA sets standards for the professional training of psychologists, accrediting pre-doctoral and post-doctoral psychology programs at colleges and universities. Graduation from an APA-accredited program, or the equivalent, is required for licensure as a psychologist in Nevada. The APA's Code of Ethical Conduct has been adopted by the Nevada Board and incorporated into state law, as it has by many other state licensing boards. The APA has two divisions devoted to substance abuse disorders, the Division on Psychopharmacology and Substance Abuse and the Division on Addictions, and the APA College of Professional Psychology grants a Certificate of Proficiency in the Treatment of Alcohol and Other Psychoactive Substance Abuse Disorders.

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<sup>108</sup> As of September 1997. (American Psychological Association Research Division).

Psychologists also have an increasingly substantial role nationwide in preparation of substance abuse protocols being developed by the American Society of Addictive Medicine (ASAM) and the federal government's Center for Substance Abuse Treatment (CSAT).<sup>109</sup> Psychologists with the APA are assisting ASAM and CSAT develop the content of treatment improvement protocols (TIPs) for patients with various substance abuse disorders. A psychologist from the APA Division on Addictions chairs one of the panels and will lead the development of a new TIP for the use of Naltrexone in treating alcoholism.<sup>110</sup> Psychologists are also involved in developing the third edition of the ASAM's Patient Placement Criteria (PPC), which has been adopted by the U.S. Department of Veteran Affairs as addiction treatment guidelines for its facilities serving more than 150,000 patients worldwide, and a number of states have also adopted the PPC. Psychologists serve as co-chairs on several of the task forces developing ASAM's new PPC, among them the task forces on Co-Occurring Disorders Criteria; Adolescent Criteria; Level III Residential Inpatient Services Criteria; and Level 0.5, Early Intervention Criteria.<sup>111</sup>

Finally, we must turn to the authoritative source customarily relied on by experts in the field of psychology, which you named in your question: THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Edition, (1994). The DSM-IV is the official nomenclature that classifies mental disorders and sets forth their diagnostic criteria. *See* DSM-IV at xv. Developed and published by the American Psychiatric Association, the DSM-IV was designed for use by psychologists, psychiatrists, other physicians, and other health and mental health professionals. *Id.* Primarily intended as a guide to clinicians, the DSM-IV was also designed to facilitate research and to serve as an educational tool for teaching psychopathology. *Id.* A psychologist served on the six member work group that developed the Substance-Related Disorders section of the DSM-IV.<sup>112</sup> Among the many organizations participating in development of the DSM-IV were the American Psychological Association and the American Psychological Society. *Id.* at xvi. Field trials were sponsored by the National Institute of Mental Health in collaboration with the National Institute on Drug Abuse and the National Institute on Alcohol Abuse and Alcoholism. *Id.* at xix.

The DSM-IV defines a mental disorder as “a clinically significant *behavioral or psychological syndrome or pattern* that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” *See* DSM-IV at xxi (emphasis added).

Substance-Related Disorders make up one of the 16 major diagnostic classes of mental disorders contained in the DSM-IV, and such disorders involve much more than the layman's conception of “substance abuse.” Substance-Related Disorders are those disorders “related to the taking of a drug of abuse (including alcohol), to the side effects of a medication, and to toxin exposure.” *See* DSM-IV at 175-272. There are 13 distinct Substance-Related Disorders listed in the DSM-IV, which are applied to 11 classes of substances, though not all diagnoses apply to each class of substance.<sup>113</sup>

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<sup>109</sup> *See* Gil Hill, *Psychologists Gain Larger Role in Developing Substance Abuse Protocols*, The Practitioner Focus of the APA Practice Directorate, August 1997, at 14-17.

<sup>110</sup> Stephanie O'Malley, Ph.D., Associate Professor of Psychiatry at Yale University School of Medicine.

<sup>111</sup> The psychologists serving as co-chairs of their respective task forces are: Karen Downey, Ph.D., Wayne State University; Sandra Brown, Ph.D., Dept. of Veterans Affairs, San Diego; George DeLeon, Ph.D., Center for Therapeutic Community Research at the Nat'l Development and Research Institutes, Inc., who is also president of APA's Division on Addictions; and William Miller, Ph.D., University of New Mexico.

<sup>112</sup> Peter E. Nathan, Ph.D., is a professor at the University of Iowa in Iowa City.

<sup>113</sup> The 13 Substance-Related Disorders listed in the DSM-IV are divided into two groups: the Substance Use Disorders (Substance Dependence and Substance Abuse) and the Substance-Induced Disorders (Substance Intoxication, Substance Withdrawal, Substance-Induced Delirium, Substance-

As demonstrated above, the overwhelming consensus in the psychological and medical communities is that substance abuse is a type of mental disorder, namely a behavioral disorder, the assessment and treatment of which is clearly within the traditional practice of psychology.<sup>114</sup> In addition, it is important to note that the definition of psychology set forth in [NRS 641 comes](#) directly from the Model Act for Licensure of Psychologists promulgated by the Association of State and Provincial Psychology Boards, whose members include all 50 state psychology licensing boards, the District of Columbia, Guam, and nine Canadian provinces.<sup>115</sup> When the legislature adopts a Model Act, as it has done in this instance, it should be assumed the intent of the Model Act was adopted along with the statute. *See Nevada State Dep't of Motor Vehicles v. Turner*, [89 Nev. 514](#), 517, 515 P.2d 1265 (1973). “In determining legislative intent, the whole act, its object, scope and intent must be examined,” and “the interpretation of the statute by the agency charged with administration of the statute is persuasive.” *Nevada Power Co. v. Public Serv. Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867 (1986).

The Nevada Psychology Board has always interpreted its statutory scope of practice in accordance with the consensus among the psychological and medical communities regarding the nature and scope of the practice of psychology. Where “the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent.” *Hughes Properties v. State of Nevada*, [100 Nev. 295](#), 298, 680 P.2d 970 (1984). When an agency interprets a term to fall within the meaning and intent of its statute, and the agency's construction is within the language of the statute, the interpretation will be respected. *Dep't Human Res. v. UHS of The Colony*, [103 Nev. 208](#), 211, 735 P.2d 319 (1987). [NRS chapter 641](#) provides that psychologists may evaluate and treat mental and behavioral disorders, so to conclude that psychologists are prohibited from working with one type of such disorder simply does not make sense. “[S]tatutory construction should always avoid an absurd result.” *Webster*, 102 Nev. at 453.

While evaluation and treatment of substance abuse disorders is within the statutory scope of practice for licensed psychologists in Nevada, psychologists may not use the title “alcohol and drug abuse counselor,” “substance abuse counselor,” or any similar title unless they obtain a certificate from the Nevada Bureau of Alcohol and Drug Abuse (Bureau). [NRS 458.360\(1\)](#). Similarly, if psychologists want their substance abuse treatment programs to qualify for state or federal funding, or if they want to treat substance abusers undergoing rehabilitation in lieu of incarceration, they must obtain a certificate from the Bureau. *See* [NRS 458.025\(3\)](#), 458.300 and 453.580.

[NRS chapter 458](#), creating the Bureau and setting forth its duties, does not prohibit anyone from evaluating, treating or counseling persons with substance abuse problems.<sup>116</sup> [NRS](#)

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Induced Persisting Demential, Substance-Induced Persisting Amnestic Disorder, Substance-Induced Psychotic Disorder, Substance-Induced Mood Disorder, Substance-Induced Anxiety Disorder, Substance-Induced Sexual Dysfunction, and Substance-Induced Sleep Disorder). The 11 classes of substances listed are: Alcohol, Amphetamines, Caffeine, Cannabis, Cocaine, Hallucinogens, Inhalants, Nicotine, Opioids, Phencyclidine, Sedatives, hypnotics or anxiolytics, and Polysubstance.

<sup>114</sup> It should be noted, however, that treatment of substance abuse disorders may involve modalities outside the scope of psychology in Nevada, such as the prescribing or dispensing of medication therapies.

<sup>115</sup> The Association of State and Provincial Psychology Boards also writes and administers the Examination for the Professional Practice of Psychology, the national examination required for licensure in all U.S. states.

<sup>116</sup> In enacting NRS 458, the Legislature clearly recognized the existence of non-certified substance abuse practitioners, programs and facilities which would not qualify to receive state or federal grant monies. Such “self-supported” entities are given the option to request that the Bureau “certify the facility, its programs and personnel and add them to the list of certified facilities, programs and personnel.” NRS 648.025(4).

[chapter 458](#) prohibits persons from using a specified title, or from receiving state and federal grant monies earmarked for substance abuse programs, unless they are certified by the Bureau. *See* 458.025(3), 458.360(1).<sup>117</sup> On the other hand, [NRS chapter 641](#) prohibits persons from practicing psychology, or using the title “psychologist” or any other similar title, unless they have been issued a license by the Board. [NRS 641.440](#).<sup>118</sup> As such, [NRS chapter 458](#) is a title act, as opposed to a practice act such as [NRS chapter 641](#), and the distinction is not merely one of form.

Practice acts set forth the scope of practice of the profession covered by the act, and licensing is the process by which a government agency grants permission to individuals to practice that profession upon finding they have attained the degree of competency necessary to ensure that the public health, safety and welfare is protected. *See* Randolph P. Reaves, *THE LAW OF PROFESSIONAL LICENSING AND CERTIFICATION* 10 (2d ed. 1993). Title acts do not set forth a scope of practice, and certification is the process by which a government agency grants authority to use a specified title to individuals who have met predetermined qualifications. *Id.* In the words of the 11th Circuit Federal Court of Appeals, a certificate granted under the terms of a title act “is not so much a license to practice as it is a license to speak and advertise.” *Abramson v. Gonzalez*, 949 F.2d 1567, 1573 (11th Cir. 1992).<sup>119</sup> A title act “allows all to practice, but few to speak.” *Id.* Licensed psychologists are not required to obtain a certificate from the Bureau in order to evaluate and treat substance abuse disorders listed in the DSM-IV as long as they do not use any title implying that they are certified substance abuse counselors.

## CONCLUSION

[NRS 641.025](#) sets forth the scope of practice for licensed psychologists in Nevada. The statute provides that the practice of psychology includes diagnosis, evaluation and treatment of behavioral and mental disorders, including, without limitation, disorders of habit or conduct, by the application of psychological principles, methods and procedures. Substance abuse disorders are mental/behavioral disorders that are diagnosed, evaluated and treated by psychologists through application of psychological principles, methods and procedures.

There is overwhelming consensus in the psychological and medical communities that evaluation and treatment of substance abuse disorders is unquestionably within the traditional practice of psychology. The leading governmental and private organizations involved with the practice of psychology—the Association of State and Provincial Psychology Boards and the American Psychological Association—are in agreement therewith. The premier authoritative source customarily relied on by experts in the fields of psychology and medicine—the DSM-IV—also acknowledges the same. Such interpretation regarding the nature and scope of the practice of psychology is in accordance with relevant statutory law and case law in Nevada.

For the reasons discussed above, the scope of practice set forth in [NRS 641 grants](#) authority to licensed psychologists to evaluate and treat those substance-related disorders listed in the DSM-IV.

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<sup>117</sup> NRS 458.360(1) provides that no person “may hold himself out to the public as an alcohol and drug abuse counselor, employ or use the title “alcohol and drug abuse counselor,” “substance abuse counselor” or any similar title in connection with his work, or in any way imply that he is a certified alcohol and drug abuse counselor without being certified as a counselor by the bureau.” NRS 458.360(3) provides that any “person who violates the provisions of subsection 1 is guilty of a misdemeanor.”

<sup>118</sup> Subsections 4 and 5 of NRS 641.440 provide that any person who “represents himself as a psychologist, or uses any title or description which incorporates the word “psychology,” “psychological,” “psychologist,” “psychometry,” “psychometrics,” “psychometrist” or any other term indicating or implying that he is a psychologist, unless he has been issued a license; or [p]ractices psychology unless he has been issued a license, is guilty of a gross misdemeanor.”

<sup>119</sup> Authority cited for definition of title act.

FRANKIE SUE DEL PAPA  
Attorney General

By: RONDA L. MOORE  
Deputy Attorney General

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OPINION NO. 97-26 REAL ESTATE; FEES: Chapter 645 of the Nevada Revised Statutes prohibits paying a referral or finder's fee to an unlicensed person who performs any activity restricted to a licensed broker or salesman; an owner/developer of a housing subdivision is prohibited from paying an unlicensed person any compensation for either soliciting or referring a buyer to the owner's/developer's subdivision.

Carson City, December 9, 1997

Joan Buchanan, Administrator, Real Estate Division, 2501 East Sahara Drive, Las Vegas, Nevada 89158

Dear Ms. Buchanan:

You have requested an opinion of the Attorney General on behalf of the Nevada Real Estate Division regarding whether an owner/developer of a housing subdivision may pay a referral or finder's fee to a person who is not licensed as a real estate broker or salesman.

#### QUESTION

Is an owner/developer (hereafter O/D) of a housing subdivision prohibited from paying a "referral" or "finder's" fee to an unlicensed person who has solicited or referred a buyer to the O/D's subdivision?

#### DISCUSSION

Pursuant to [NRS 645.633](#)(3), the Real Estate Commission may take disciplinary action against any O/D who is guilty of, "Paying a commission, compensation or a *finder's fee* to any person for performing the services of a broker, broker-salesman or salesman who has not first secured his license pursuant to this Chapter. . . ." [Emphasis added.]

Pursuant to this statute, an O/D is prohibited from paying an unlicensed person any compensation for either soliciting or referring a buyer to the O/D's subdivision.

Moreover, according to [NRS 645.260](#), "[a]ny person . . . who, for another, . . . with the intention or expectation of receiving compensation . . . engages in . . . *any single act* . . . contained in the definition of a real estate broker in [NRS 645.030](#) . . . is acting in the capacity of a real estate broker or real estate salesman. . . ." [NRS 645.260](#) (emphasis added). Therefore, an unlicensed person only needs to do *one* act defined within [NRS 645.260](#) to be acting as a broker/salesman. "[NRS 645.030](#) defines a real estate broker as 'a person who, for another, and for compensation or with the intention or expectation of receiving compensation . . . solicits prospective purchasers . . . of real estate . . .'" [NRS 645.030](#)(1)(a).

Accordingly, if an unlicensed person refers or solicits a buyer to a subdivision of an O/D with the expectation of receiving compensation, the unlicensed person has acted as a real

estate broker/salesman, as defined by [NRS chapter 645](#). If the O/D compensates the unlicensed person for referring a buyer to the subdivision, the unlicensed person has engaged in an activity restricted to licensed real estate brokers or salesmen. Therefore, referral and finder's fees paid by an O/D to unlicensed persons are prohibited by Nevada law, and the O/D may be disciplined by the Real Estate Commission for violating [NRS 645.633\(3\)](#).

### CONCLUSION

Chapter 645 of the Nevada Revised Statutes prohibits paying a referral or finder's fee to an unlicensed person who performs any activity restricted to a licensed broker or salesman.

FRANKIE SUE DEL PAPA  
Attorney General

By: CHRISTINE S. MUNRO  
Deputy Attorney General

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OPINION NO. 97-27 IRRIGATION DISTRICT; INDIANS; WATER; WATER DISTRICTS:  
Indian tribe as successor-in-interest to decreed water right holders, is subject to assessments to offset the expense and cost of distributing that water to reservation.

Carson City, December 19, 1997

Mr. Gerald W. Allen, Executive Director, State of Nevada Indian Commission, 4600 Kietzke Lane, Building B, Suite 116, Reno, Nevada 89502

Dear Mr. Allen:

You have requested an opinion of this office concerning the legality of certain payments made by the Temoak Band of the Western Shoshone Tribe to the State of Nevada for water deliveries to the South Fork Reservation for the period extending from approximately 1938 until 1956.

### QUESTION

#### I. ESTABLISHMENT OF THE SOUTH FORK RESERVATION

On March 3, 1925, the United States Congress appropriated \$25,000 "[f]or the purchase of land, with sufficient water right attached, for the Temoak Band of homeless Indians in Ruby Valley, Nevada." Pub. L. No. 68-580, 43 Stat. 1141, 1149 (1925). By February 8, 1941, proclamation of then-Acting Secretary of the United States Department of the Interior A.J. Wirtz, Int. Proc., 6 Fed. Reg. 1203 (1941), the South Fork Indian Reservation was established in Elko County, Nevada. The South Fork band of the Temoak Tribe now occupies this reservation.

The land, with appurtenant water rights, obtained for the benefit of the Temoak Indians was purchased from non-Indians. Before the purchase of the land and appurtenant water rights, the water rights were adjudicated to the land in accord with the procedure set forth in [NRS 533.090-533.320](#). The adjudication proceeding was conducted in the Sixth Judicial District Court in and for the County of Humboldt in a proceeding commonly referred to as the Humboldt River Adjudication. The proceeding resulted in the Bartlett Decree, dated October 20, 1931, and the Edwards Decree, dated October 7, 1935, modifying the Bartlett Decree. Both the Bartlett and

Edwards Decrees were affirmed by Nevada's Supreme Court in *Carpenter v. Sixth Judicial District Court*, [59 Nev. 42](#), 73 P.2d 1310 (1937), *aff'd on rehrg.* [59 Nev. 48](#), 84 P.2d 489 (1938).

## II. THE SOUTH FORK RESERVATION IS SUBJECT TO FEDERAL TRUST PROTECTION

25 U.S.C. § 465 (1988 Supp.) clearly authorizes the Secretary of the United States Department of the Interior "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." Concerning the status of land so acquired, the statute goes on to establish that "[t]itle to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from State and local taxation."

## III. STATE AUTHORITY ON RESERVATION LAND SUBJECT TO FEDERAL TRUST PROTECTION<sup>120</sup>

### A. GENERALLY

The above-quoted language of 25 U.S.C. § 465 (1988 Supp.) clearly establishes that land held in trust for Indian tribes, such as the South Fork Reservation, is exempt from state and local taxation. The statute's language is consistent with the well known and long-established rule that state jurisdiction to impose a property tax on the Temoak Tribe by virtue of its occupation of the South Fork Reservation is preempted. *The New York Indians*, 72 U.S. (5 How.) 761 (1867); *The Kansas Indians*, 72 U.S. (5 How.) 737 (1867).

The above-stated principle does not apply where a state charge is best denominated as an "assessment" or "fee" for services. For instance, in *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977), the court upheld the imposition of that portion of a mobile home license fee determined to be 85 percent tax and 15 percent fee-related. Meanwhile, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 469 n.9 (1976), the tribes did not challenge the vehicle licensing fee at issue. In fact, they expressly disclaimed any immunity from a nondiscriminatory vehicle registration fee imposed by the State of Montana under the facts of that case.

### B. THE STATE'S AUTHORITY

The Temoak Indians, as successors-in-interest to decreed water right holders, have consistently been subject to the provisions of Nevada's water law relative to distribution assessments collected by the county in which the property being served with water is located. *See* [NRS 533.285](#). The assessment is not for the use of the water but is, instead, intended to offset the expense and cost of distributing the water, [NRS 533.295](#), by the state's water commissioners. The state's water commissioners are employed by the state engineer after they are confirmed by the district court with jurisdiction over the water in question. [NRS 533.270](#).

Although the assessments at issue in this matter have not been the subject of any reported litigation, assessments made by irrigation districts for benefits received by landowners within the boundaries of an irrigation district were considered by Nevada's Supreme Court in *In the Matter of Walker River Irr. Dist.*, [44 Nev. 321](#), 195 P. 327 (1921). In that case, the Supreme Court upheld the Board of Directors of the Walker River Irrigation District's procurement of a judgment approving and confirming the district's organization proceedings, and a subsequently procured

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<sup>120</sup> This discussion of state authority on reservation land subject to federal trust protection is necessarily limited by the scope of the question presented.



judgment confirming the steps taken with respect to the apportionment of benefits within the irrigation district. In reaching its opinion, the Court had the opportunity to analyze the nature of irrigation district assessments against land within the district, stating that:

[A]n "assessment" or "special assessment" is not a tax levied upon property according to its value, and is distinguished from the general idea of a "tax," although we concede it owes its origin to the same sources as the taxing power. There is a wide difference in law between a tax and an assessment. In the one case the taxes are assessed against the individual and become a charge upon his property generally. In the other, the assessment, being for the benefits accruing to the specific property, becomes a charge only upon and against it, and liability for the charge is confined to the particular property benefitted. Therefore an assessment or special assessment is not embraced within the meaning of the word "taxation," because the owner of the property assessed gets back the amount of his assessment in the benefits received by his property, and therefore does not bear the burden of a tax.

*Id.* at 335.

The payments made by the Temoak Tribe are directly analogous to the irrigation district assessments at issue in the *Walker River Irr. District* case. They are used for expenses incurred in the administration, operation and maintenance of the particular stream system from which the money is budgeted and collected. This is just as irrigation district assessments are intended to raise sums sufficient to pay the principal of outstanding bonds of the irrigation district, [NRS 539.670](#), such bonds having been originally issued to raise capital to construct projects directly relating to the work of the irrigation district, including its administration, operation and maintenance. These projects clearly result in benefits to land within the district boundaries "presumed to be returned to the owner in [the land's] enhanced value." *Walker River Irr. District*, 44 Nev. at 335.

#### CONCLUSION

For the foregoing reasons, it is the conclusion of this office that the assessments made of the Temoak Tribe under Nevada's water law to offset the expense and cost of distributing decreed water rights to which the Tribe is a successor-in-interest are not taxes. The assessments are, instead, fees to which the Tribe is legitimately made subject and which the Tribe has paid, and must continue legally to pay.

FRANKIE SUE DEL PAPA  
Attorney General

By: DAVID CREEKMAN  
Deputy Attorney General

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OPINION NO. 97-28      REAL ESTATE; AGREEMENTS; ADMIN-ISTRATIVE REGULATIONS; AGENTS: In the absence of any judicial or legislative direction or any statute prohibiting or penalizing such activity, buyer's broker rebates, gifts, or discounts are probably lawful in Nevada real estate transactions. The Nevada Real Estate Division has authority to adopt regulations defining the perimeters of a buyer's brokerage agreement.

Carson City, December 31, 1997

Joan Buchanan, Administrator, Real Estate Division, 2501 East Sahara Drive, Las Vegas, Nevada 89158

Dear Ms. Buchanan:

You have requested an opinion of the Attorney General on behalf of the Nevada Real Estate Division regarding whether rebates to buyers of real estate from their broker or salesperson are prohibited by Nevada law.

Additionally, you have requested an opinion of the Attorney General on behalf of the Nevada Real Estate Division (Division) regarding whether the Division has the authority to adopt regulations delineating the requirements and perimeters of a buyer's brokerage agreement.

### QUESTION ONE

May a buyer's broker give a "rebate" to his or her client following a real estate transaction?

### ANALYSIS TO QUESTION ONE

In the absence of any judicial or legislative direction or any statute prohibiting or penalizing such activity, buyer's broker rebates are probably lawful in Nevada real estate transactions.

Various definitions may be found in the works of general and legal lexicographers. BLACK'S LAW DICTIONARY 1139 (5th ed. 1979) defines a "rebate" as a "discount; deduction or refund of money in consideration of prompt payment. A deduction or drawback from a stipulated payment, charge or rate, (as, a rate for the transportation of freight by a railroad,) not taken out in advance of payment, but handed back to the payer after he has paid the full stipulated sum."

As a noun, "rebate" is defined as meaning remission or payment back; abatement; allowance by way of discount or drawbacks. *Dewey Portland Cement Co. v. Crooks*, 57 F.2d 499, 501 (8th Cir. 1932). "Rebate" has also been defined as an interest in consequence of prompt payment discount, deduction from cost or from a gross amount. See *Clark v. Page Oil Co.*, 38 F. Supp. 384, 385 (1941); *State v. Loucks*, 228 P. 632, 634 (1924).

The noun "rebate" has been held synonymous with "commission," *Oliver Refining Co. v. Aspegren*, 137 N.Y.S. 1057 (1912), and has also been distinguished from "commission." In *Oliver*, the court concluded it is unusual, and quite contrary to the customary method of doing business, for a seller to pay a commission to a purchaser. *Id.* at 1059.

In *Clark v. Page Oil Co.*, 38 F. Supp. 384, 385 (W.D. Pa. 1941), the court stated that a "commission is a percentage or allowance to an agent, and a rebate is a deduction from cost. The proper interpretation of the word as used in the agreement must be determined by extrinsic testimony and the surrounding circumstances." *Id.*

No definitive language exists in chapter 645 of the Nevada Revised Statutes as to whether rebates are prohibited. [NRS 645.280](#) prohibits a licensee from giving any portion of his commission to unlicensed persons. This statute states:

1. It is unlawful for any licensed real estate broker, or broker-salesman or salesman to offer, promise, allow, give or pay, directly or indirectly, any part or share of his commission or finder's fee arising or accruing from any real estate transaction to any person who is not a licensed real estate broker, broker-salesman or salesman, in

consideration of services performed or to be performed by the unlicensed person. A licensed real estate broker may pay a commission to a licensed broker of another state.

2. A real estate broker-salesman or salesman shall not be associated with or accept compensation from any person other than the broker or owner-developer under whom he is at the time licensed.

3. It is unlawful for any licensed real estate broker-salesman or salesman to pay a commission to any person except through the broker or owner-developer under whom he is at the time licensed.

[NRS 645.280](#) neither prohibits nor allows a real estate licensee to give a “rebate” or a gift to the purchaser he or she represents in a real estate transaction after the licensee has received his or her commission. Unlike some other states, there is no mention of the term “rebate” in [NRS 645.280](#). Oregon, Minnesota, and Mississippi have specific language in their real estate licensee statutes prohibiting real estate brokers from paying rebates to an unlicensed person. Oregon Revised Statute 696.290 states, in relevant part:

No real estate licensee shall offer, promise, allow, *pay or rebate*, directly or indirectly, any part or share of the licensee’s commission or compensation arising or accruing from any real estate transaction or pay a finder’s fee to any person who is not a real estate licensee licensed under ORS 696.010 to 696.490, 696.600 to 696.730, 696.800 to 696.855 and 696.995.

ORS 696.290 (emphasis added).

ORS 696.290 is similar to [NRS 645.280](#)(1). However, the Oregon statute specifically prohibits “rebates,” unlike the Nevada statute.

Minnesota has very strong statutory language prohibiting real estate brokers from giving “rebates.” Minnesota Statutes Annotated § 82.19(3) states, in relevant part:

No real estate broker, salesperson, or closing agents shall offer, pay, or give, and no person shall accept, *any compensation or other thing of value from any real estate broker, salesperson, or closing agents by way of commission splitting, rebate, finder’s fees, or otherwise, in connection with any real estate or business opportunity transaction. . . .*

*Id.* (emphasis added.)

Similarly, in Mississippi if a real estate licensee gives a rebate, it can be the grounds for refusing to issue or reinstate a real estate license. Mississippi Code Annotated § 73-35-21(1)(j) states, in relevant part:

(1) The commission may, upon its own motion and shall upon the verified complaint in writing of any person, hold a hearing for the refusal of license or for the suspension or revocation of a license previously issued, or for such other action as the commission deems appropriate. The commission shall have full power to refuse a license for cause or to revoke or suspend a license where it has been obtained by false or fraudulent representation, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

...  
(j) *Paying any rebate*, profit or commission to any person other than a real estate broker or salesperson licensed under the provisions of this chapter.

*Id.* (emphasis added.)

In Florida, a real estate broker may offer and promote a program in which purchasers of real property listed by the broker will receive a discount at a specific retail outlet. The Florida Attorney General's office has concluded that rebates or promotional gifts of this type are not a violation of Florida law governing real estate brokers.

In a 1983 Florida Attorney General Opinion (Fla. AGO 83-48, 1983 WL 163698 (Fla. A.G.)), the Attorney General wrote a response to the following question, "May a real estate broker offer and promote that, if an individual buyer purchases real property listed by said broker, the buyer will receive discounts at a specific retail outlet?" In Florida, a real estate broker is prohibited from sharing his commission with or paying a fee or other compensation to a person not properly licensed as a broker, for the referral of real estate business, clients, prospects, or customers. FL 475.25(h). However, the Florida Attorney General concluded in the absence of any judicial or legislative direction or any statute prohibiting or penalizing such activity that a real estate broker may engage in these types of real estate promotions.

Moreover, the Florida opinion concluded that if the discount is deemed to be in the nature of a gift, neither chapter 475 nor the rules of the Florida Real Estate Commission prohibit a real estate broker from offering, promoting, and eventually giving a gift to a member of the public if that individual purchases a specific property listed with the broker. Based upon this conclusion, it appears Florida does not consider discounts or promotions given by a real estate broker to a buyer to be a referral and therefore, is not prohibited under Florida statutes.

In analyzing Nevada's relevant statutes, one could conclude that under Nevada law rebates are not prohibited because the word "rebate" is not included in [NRS 645.280](#). Legislative intent is the controlling factor in statutory interpretation. *State v. McGuire*, [108 Nev. 182](#), 184, 827 P.2d 821, 822 (1992). A statute that is ambiguous should be construed in light of the legislative intent, reason and public policy. *Sheriff v. Marcum*, [105 Nev. 824](#), 826, 783 P.2d 1389, 1390 (1989). Therefore, the intent of the legislature is the controlling factor in statutory interpretation. When the language of a statute is clear on its face, its intention must be deduced from such language. *Id.*

The Nevada Supreme Court has stated that when the language of a statute is plain and unambiguous, such that the legislative intent is clear, a court should not "add to or alter [the language] to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." *Maxwell v. SINS*, [109 Nev. 327](#), 849 P.2d 267 (1993) (quoting *Cirac v. Lander County*, [95 Nev. 723](#), 729, 602 P.2d 1012, 1016 (1979)). The Court also noted, "[w]e are not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning." *Union Plaza Hotel v. Jackson*, [101 Nev. 733](#), 736, 709 P.2d 1020, 1022 (1985).

The language of [NRS 645.280](#) is plain and unambiguous. Subsection (1) does not include the word "rebate," "gift," "discount," or similar promotion in its list of prohibited activities. If the Nevada Legislature intended to include the giving of rebates, gifts, or discounts as an unlawful activity, it would have included this language as Oregon, Minnesota, and Mississippi did in their statutes. Since the term "rebate" is not included in [NRS 645.280](#), an interpretation similar to the Florida Attorney General's opinion is justifiable. Real estate brokers may give rebates to their clients because this activity is not specifically prohibited under current Nevada law.

Additionally, in a situation in which the broker gives their client a rebate, gift, or discount, the client has not performed any services or activities restricted to only licensed real estate agents. See [NRS 645.260](#) and [NRS 645.030](#) (listing the acts that constitute action in capacity of a broker or salesperson). Only when an unlicensed person does an act that is defined as one that only a broker or salesperson may do is there a prohibition in Nevada law. Therefore, the giving of a rebate, gift, or discount does not fall within the definition of a prohibited act.

### CONCLUSION TO QUESTION ONE

In the absence of any judicial or legislative direction or any statute prohibiting or penalizing such activity, buyer's broker rebates, gifts, or discounts are probably lawful in Nevada real estate transactions.

### QUESTION TWO

Does the Division have the power to or authority to adopt regulations defining the perimeters of a buyer's brokerage agreement?

### ANALYSIS TO QUESTION TWO

The Division has the power or authority to adopt regulations delineating requirements and perimeters of a buyer's brokerage agreement. [NRS 645.190](#) states:

1. The division may do all things necessary and convenient for carrying into effect the provisions of this chapter.
2. The commission or the administrator, with the approval of the commission, may from time to time adopt reasonable regulations for the administration of this chapter. When regulations are proposed by the administrator, in addition to other notices required by law, he shall provide copies of the proposed regulations to the commission no later than 30 days before the next commission meeting. The commission shall approve, amend or disapprove any proposed regulations at that meeting.

Therefore, the Division has been given authority by the legislature to do "all things necessary" to carry into effect the provisions of chapter 645. Additionally [NRS 645.252](#) delineates the duties a licensee owes to his clients. This includes exercising "reasonable skill and care." A regulation would be appropriate. Additionally, [NRS 645.254](#) states that a licensee shall "promote the interests of his client by seeking . . . property at the price and terms stated in the brokerage agreement. . . ."

Further, [NRS 645.193](#)(1) requires the real estate division to prepare and distribute to licensees forms that set forth the duties owed by the licensee who is acting for only one party to a real estate transaction. Therefore, under [NRS 645.190](#), [645.252](#), 645.254 and 645.193(1), the Division has the power to adopt regulations and forms stating the duties owed in a standard buyer's brokerage agreement.

### CONCLUSION TO QUESTION TWO

The Division has the authority to adopt regulations defining the perimeters of a buyer's brokerage agreement.

FRANKIE SUE DEL PAPA  
Attorney General

By: CHRISTINE S. MUNRO  
Deputy Attorney General

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OPINION NO. 97-29 IMPACT FEES; FEES; TAXES: The State of Nevada is exempt from the payment of impact fees and transportation taxes to local governments. The State of Nevada is subject to reasonable fees assessed by utility purveyors for expansion and construction of facilities.

Carson City, December 31, 1997

Eric Raecke, Manager, Public Works Board, 505 East King St., #301, Carson City, Nevada 89701

Dear Mr. Raecke:

You have requested our legal opinion on whether the State of Nevada is subject to certain development fees charged by local governments and public utilities.

#### QUESTION ONE

Is the State of Nevada exempt from payment of impact fees and transportation taxes to local governments?

#### ANALYSIS OF QUESTION ONE

The Nevada Legislature has authorized local governments to charge certain fees and taxes on new development to cover the costs of capital improvement, facility expansion, and improvement of transportation necessitated by the new development.

[NRS 278B.050](#) defines the term “impact fee” as follows: “‘Impact fee’ means a charge imposed by a local government on new development to finance the costs of a capital improvement or facility expansion necessitated by and attributable to the new development. The term does not include a tax for the improvement of transportation imposed pursuant to [NRS 278.710](#).”

[NRS 278B.160](#)(1) provides:

A local government may by ordinance impose an impact fee in a service area to pay the cost of constructing a capital improvement or facility expansion necessitated by and attributable to new development. Except as otherwise provided in [NRS 278B.220](#), the cost may include only:

- (a) The estimated cost of actual construction;
- (b) Estimated fees for professional services;
- (c) The estimated cost to acquire the land; and
- (d) The fees paid for professional services required for the preparation or revision of a capital improvements plan in anticipation of the imposition of an impact fee.

2. All property owned by a school district is exempt from the requirement of paying impact fees imposed pursuant to this chapter.

[NRS 278.710](#)(1) and (4) provide:

1. A board of county commissioners may by ordinance, but not as in a case of emergency, impose a tax for the improvement of transportation on the privilege of new residential, commercial, industrial and other development pursuant to paragraph (a) or (b) as follows:

- (a) After receiving the approval of a majority of the registered voters of the county voting on the question at a special election or the next primary or general election, the board of county commissioners may impose the tax throughout the county, including any such development in incorporated cities in the county. A

county may combine this question with a question submitted pursuant to [NRS 244.3351](#), [365.203](#), 371.045 or 377A.020, or any combination thereof.

(b) After receiving the approval of a majority of the registered voters who reside within the boundaries of a transportation district created pursuant to [NRS 244A.252](#), voting on the question at a special or general district election or primary or general state election, the board of county commissioners may impose the tax within the boundaries of the district. A county may combine this question with a question submitted pursuant to [NRS 244.3351](#).

...

4. The tax imposed pursuant to this section must be collected before the time a certificate of occupancy for a building or other structure constituting new development is issued, or at such other time as is specified in the ordinance imposing the tax. If so provided in the ordinance, no certificate of occupancy may be issued by any local government unless proof of payment of the tax is filed with the person authorized to issue the certificate of occupancy. Collection of the tax imposed pursuant to this section must not commence earlier than the first day of the second calendar month after adoption of the ordinance imposing the tax.

The general and well-established rule is that the state is not subject to taxation. “There is a presumption that the legislature does not intend to subject publicly owned property to taxation by the state and local governments, and that such property is impliedly immune from taxation unless an intention to tax such property is clearly manifested.” Op. Nev. Att’y Gen. No. 96-17 (July, 1996).

In *State v. Lincoln Co. Power Dist.*, [60 Nev. 401](#), 407; 11 P.2d 528, 530 (1941), the court held:

[I]t is stated to be the general rule that in the absence of any constitutional prohibition the state may tax its own property, the presumption is always against an intention to do so, and such property is impliedly immune from taxation unless an intention to include it is clearly manifested; which immunity rests upon public policy and the fundamental principles of government.

Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities and which is held by them for public purposes. COLEY ON TAXATION, 4th Ed. vol. 2, sec. 621.

The meaning of taxation must be kept in view, and that is: a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion.

It was held in *People v. Doe G.* 1,034, 36 Cal. 220, that the constitution and laws on the subject of taxing property refer to private property and persons, not public property of the state. . . .

When public property is involved, exemption is the rule and taxation is the exception.

A transportation tax is by definition a tax. An impact fee is also a tax. *Douglas County Contractors Ass’n v. Douglas County*, [112 Nev. 1452](#), 929 P.2d 253 (1996); *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193 (Wash 1982). If the state is not subject to taxation, neither can it be subject to impact fees and transportation taxes.

Generally, when the legislature has chosen to subject the state to a particular fee, assessment or restriction imposed by a local governing body, it has done so specifically, e.g. [NRS 268.433](#) (state subject to special assessment) and [NRS 278.580\(3\)](#) (state subject to zoning regulations adopted pursuant to chapter 278). Additionally, the absence of an express provision

requiring state compliance has been interpreted as exempting the state from local regulation, e.g. Op. Nev. Att’y Gen. No. 140 (August 1973) (state not subject to local building codes). Clearly, if the legislature intended the State to be subject to a charge or fee imposed by its own political subdivision, it would have been a simple matter for the legislature to so provide. See e.g. *Penrose v. Whitacre*, [62 Nev. 239](#), 243, 147 P.2d 887, 889 (1944). Of course, a local government’s authority to govern is derived exclusively and directly from the state itself, and it possesses only such powers as are expressly granted. *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), 344, 65 P.2d 133, 136 (1937).

Numerous state courts have expressed the principle discussed above in even stronger terms. “The universal rule is that laws in derogation of sovereignty are construed strictly in favor of the state and are [not] permitted to divest it or its government of any prerogatives, unless intention to effect that object is clearly expressed.” *People v. Centro-O-Mart*, 214 P.2d 378, 379 (Cal. 1950) (en banc). “It is a general principle that statutory laws of general application are not applicable to the state unless the legislature in the enactment of such laws made them specifically applicable to the state.” *Big Island Small Ranchers Ass’n v. State*, 588 P.2d 430, 436 (Haw. 1978).

Further, [NRS 278B.230](#)(3) provides, “the impact fee may be collected at the same time as the fee for issuance of a building permit for the service unit or at the time a certificate of occupancy is issued for the service unit . . . .” Similarly, [NRS 278.710](#)(4) provides for collection of the transportation tax before issuance of a certificate of occupancy. Under [NRS 341.145](#), the State of Nevada Public Works Board “has final authority for approval as to the architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping” and therefore is not required to obtain local building permits, submit to inspections by the local building department personnel, or to receive certificates of occupancy from local governments. Since the impact fee statute and transportation tax statute provide for a time for collection that will never occur for a state public works project, it can reasonably be inferred that the legislature never intended for the State to pay impact fees or transportation taxes.

### CONCLUSION TO QUESTION ONE

The State of Nevada is exempt from the payment of impact fees and transportation taxes to local governments.

### QUESTION TWO

Is the State of Nevada subject to fees assessed by utility purveyors for expansion and construction of facilities?

### ANALYSIS OF QUESTION TWO

The rates charged by Nevada’s regulated utilities are subject to approval by the Public Utilities Commission of Nevada (PUC). The Commission’s authority to regulate these utilities is found in chapters 703, 704, and, to a lesser extent, 706 of the NRS. A utility regulated by the PUC must furnish reasonably adequate services at just and reasonable rates. See [NRS 704.040](#). If a utility’s rate is found to be unjust or unreasonable, the PUC may substitute rates which it believes are just and reasonable after a hearing and investigation. See [NRS 704.120](#). Likewise, the Commission has authority to substitute rates which the Commission has found to be unjustly discriminatory or preferential. *Id.* In other words, unless a specific statutory exemption indicates otherwise, a regulated utility is prohibited from charging rates which unfairly discriminate among its customers.



There are very few exemptions from the general principles discussed above. (*E.g.*, see [NRS 704.075](#) which allows gas utilities to enter into special contracts with customers; also, see [NRS 706.351](#) which allows a common carrier to provide free or reduced rates for transportation to certain persons.) There does not appear to be any statute or regulation exempting governmental agencies from fees assessed by utilities for expansion and construction of facilities for a state agency.

The methodology for recovering these fees are found in utility tariffs. Again, these tariffs are subject to review and approval by the PUC, and the rates contained in these tariffs are presumed to be lawful. See [NRS 704.130](#). There is no statute which specifically states that these fees must be limited to direct hook-up and service fees. Tariffs are designed to recover the incremental cost associated with the expansion of facilities. That is, utility hook-up charges should recover only those additional costs of the new facilities required for the expansion. If a customer is dissatisfied with such a cost estimate, the customer may complain to the PUC or petition for a revision to the tariff. The procedures for both processes are found in chapters 703 and 704 of the NRS and NAC.

### CONCLUSION TO QUESTION TWO

The State of Nevada is subject to reasonable fees assessed by utility purveyors for expansion and construction of facilities.

FRANKIE SUE DEL PAPA  
Attorney General

By: JONATHAN L. ANDREWS  
Chief Deputy Attorney General

OPINION NO. 97-30 SALES; USE TAX: Status of Native American Tribal Governments and their colonies, based on both Nevada and Federal Law.

Carson City, December 31, 1997

Michael A. Pitlock, Executive Director, Nevada Department of Taxation, 1550 East College Parkway, Carson City, Nevada 89706

Dear Mr. Pitlock:

The Nevada Department of Taxation (Department) has engaged in a thorough review of all existing exemption letters that the Department has issued to various persons and entities by which the holder of the letter can purchase tangible personal property at retail exempt from the payment of sales tax. In the course of this review, a question has arisen with regard to exemption letters which have been issued to various Indian tribes located in Nevada. Therefore, you have requested an opinion from this office on the following question.

### QUESTION

Are Indian tribes in Nevada exempt from the payment of state sales and use tax on items of tangible personal property they purchase?

### ANALYSIS

The answer to this question depends, in part, on the circumstances surrounding the purchase. As a general matter of state law, the retail sale of tangible personal property in this state is subject to sales tax unless a particular exemption or exception from taxation applies. *See* [NRS 372.105](#), [372.260](#), et. seq. The sales tax is imposed "upon all retailers." [NRS 372.105](#). The tax is required to be collected from the purchaser. [NRS 372.110](#).

[NRS 372.325](#) provides:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

1. The United States, its unincorporated agencies and instrumentalities.
2. Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.
3. The State of Nevada, its unincorporated agencies and instrumentalities.
4. Any county, city, district or other political subdivision of this state.

This list does not include Indian tribes or tribal governments. Accordingly, retail sales of tangible personal property to Indian tribes or tribal governments are not exempt from sales or use tax under [NRS 372.325](#).

In 1989, the legislature recognized that tribal governments may impose a tribal sales tax on retail sales of tangible personal property taking place on the reservation. [NRS 372.800\(1\)](#). In that event, the legislature agreed to provide a credit toward the state sales tax for tribal taxes paid. [NRS 372.805](#). Typically, however, tribal governments provide an exemption from the tribal sales tax for purchases by the tribal government, and in some cases, for purchases by tribal members. *See, e.g.*, the PYRAMID LAKE TRIBAL CODE, tit. 2, Taxation, ch. 220.002. Thus, if the tribal tax code exempts purchases by the tribal government or tribal members from sales tax, the state sales tax is still due under state law, even if the purchase is made on the reservation.

[NRS 372.265](#) provides generally for an exemption from the sales tax for transactions which the State is prohibited from taxing under federal law. Since Indian tribes enjoy a special status as dependent sovereign governments under federal law the primary issue is whether federal law prevents the state from imposing its sales and use taxes on a tribal government's purchase of tangible personal property. It is well settled that absent express congressional authority to the contrary, state and local governments are preempted by federal law from imposing sales tax on the retail sale of tangible personal property to tribal governments or tribal members made on the reservation. *See Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965) [federal Indian Trader statutes preempt state taxation of retail sales to tribal governments and tribal members occurring on the reservation]; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163-4 (1980) [accord]. Preemption similarly applies to the imposition of the State's use tax on a tribal government's or tribal member's storage, use or other consumption of tangible personal property on the reservation.

When the tribal government goes off the reservation, however, the tribal government becomes subject to the laws of the jurisdiction in which it does business. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the United States Supreme Court held that a state could impose its gross receipts and compensating use taxes on a tribal government's operation of a ski resort situated outside the boundaries of the tribe's reservation. In so holding the court stated the general rule that "[A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." *Id.* at 148-9.

It is clear then that federal law does not preempt the Department from subjecting the retail sale of tangible personal property to tribal governments or members that occur outside the

reservation boundaries to sales tax. Therefore, each transaction must be examined to determine whether the sale took place inside or outside the reservation boundaries. In this regard, the provisions of [NRS 372.335](#) may be significant. That statute provides an exemption from sales tax for sales of tangible personal property which "is shipped to a point outside this state pursuant to the contract of sale by delivery by the vendor to such point by means of: (1) Facilities operated by the vendor; (2) Delivery by the vendor to a carrier for shipment to a consignee as such point; (3) Delivery by the vendor to a customs broker or forwarding agent for shipment outside this state."

While a tribal reservation is not a state, *see, Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1988), given the territorial component of the federal preemption of state taxes on tribes and tribal members, this statute may be applied by analogy. Accordingly, if the sale is consummated by delivery of the tangible personal property by the vendor to the tribal government or tribal member on the reservation, state taxation of that transaction is preempted. If delivery to the tribe takes place outside the boundaries of the reservation, the sale is subject to state taxation.

For the convenience of the vendors, the Department has developed and issued a letter of exemption in various circumstances where state law provides an exemption from the sales tax to a particular group or entity. To relieve the vendor of statutory obligation to collect sales tax, the vendor may accept a copy of the letter of exemption from an exempt entity and retain it in his records along with the sales invoice to support the fact that an exempt sale was made. As noted above, the Department has issued letters of exemption to tribal governments located in this state in the past. The Department may continue to do so; however, there is no express obligation since tribal governments are not specifically exempted under state or federal law from paying state sales and use taxes on sales taking place outside the reservation.

If the Department decides to continue to issue letters of exemption to tribal governments, the Department should issue express instructions to the tribal governments that the letter may only be used by the tribal government to purchase tangible personal property which the off reservation vendor is to deliver onto the reservation in accordance with [NRS 372.335](#). The Department should also regularly notify the registered vendors in this state that a letter of exemption issued by the Department to a tribal government may only be accepted if the sale is consummated by delivery of the property onto the reservation pursuant to the contract of sale.

### CONCLUSION

Tribal governments are not specifically exempted under state law from paying sales or use tax on tangible personal property purchased for their own storage, use or other consumption in this state. Federal law only preempts state taxation of retail sales of tangible personal property to tribal governments or tribal members taking place on the reservation, but not sales taking place outside the reservation. Therefore, if the Department chooses to continue to issue letters of exemption to tribal governments, the issuance of letters of exemption should be accompanied by express instructions that the letter of exemption can only be used by the tribal government to purchase tangible personal property for delivery to the tribe on the reservation.

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