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STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701

November 8, 2019

OPINION NO. 2019-01

STATUTORY INTERPRETATION:  
MUSEUMS and HISTORY; PERMIT  
TO EXCAVATE PREHISTORIC  
INDIAN BURIAL SITE ON PRIVATE  
LANDS: NRS 381.196(2) is properly construed to exempt a landowner from the permitting requirement of NRS 381.196(1) when the landowner commences an excavation project on his or her private land for a lawful purpose that is wholly unrelated to the acquisition or study of prehistoric artifacts and human remains.

Myron Freedman, Director  
Nevada State Museum  
600 N. Carson Street  
Carson City, NV 89701

Dear Mr. Freedman:

In your capacity as Museum Director of the Nevada State Museum, you have requested an opinion from the Office of the Attorney General (OAG) regarding the applicability of NRS 381.196 to situations where a planned excavation of private land threatens to disturb a known prehistoric Indian burial site. Subsection 1 of NRS 381.196 requires the landowner under these circumstances to obtain an excavation permit from the Museum Director unless the landowner qualifies for an exemption under subsection 2 of that statute.

You have asked a question concerning the scope of the exemption at NRS 381.196(2), as well as a question about the administrative processes and procedures by which the Museum Director will ultimately balance and protect the respective rights and interests of Indian tribes and private landowners before issuing an excavation permit or recognizing an exemption to the permitting requirement.<sup>1</sup> Additionally, you have inquired about the nature of the various constitutional rights that may be impacted by the permitting process. For practical and public policy reasons, we address below only your question concerning the scope of the exemption at NRS 381.196(2).<sup>2</sup>

### QUESTION

Under what circumstances must a private landowner obtain a permit to excavate private land that is known to contain a prehistoric Indian burial site?

### SHORT ANSWER

Pursuant to NRS 381.196(2), a private landowner whose land is known to contain a prehistoric Indian burial site is exempted from the requirement to obtain an excavation permit from the Museum Director if the landowner's proposed lawful activity "is engaged in exclusively for purposes other than the excavation of a prehistoric Indian burial site." This provision is properly construed to exempt a landowner from the permitting requirement of NRS 381.196(1) when the landowner commences an excavation project on his or

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<sup>1</sup> Although we address below your question concerning the scope of the exemption at NRS 381.196(2), we decline to address processes and procedures because those issues must be vetted and resolved through the rule-making process described in Nevada's Administrative Procedure Act. See NRS 233B.0395 to NRS 233B.120, inclusive. As always, this office stands ready to assist you in formulating and drafting regulations as you progress through the rule-making process.

<sup>2</sup> As you suggest, the subject matter of NRS 381.196 implicates a number of different rights guaranteed by the U.S. Constitution, including property, privacy and equal protection rights guaranteed by the Fourth and Fourteenth Amendments, and religious freedoms guaranteed by the First Amendment. We decline to address these generalized questions by way of a formal, published opinion because this office is better positioned to address questions of this nature on an ongoing basis in reference to concrete factual scenarios. As mentioned in footnote 1, some of these issues may potentially be addressed during the rule-making process in response to public input.



Myron Freedman, Director  
Nevada State Museum  
Page 3  
November 8, 2019

her private land for a lawful purpose that is wholly unrelated to the acquisition or study of prehistoric artifacts and human remains.

### ANALYSIS

NRS 381.196(1) requires a person to obtain a permit issued by the Museum Director when the person excavates "a site on private lands located within this State that the person knows is a prehistoric Indian burial site." However, subsection 2 of NRS 381.196 contains an exception to this requirement:

A person is not required to obtain a permit pursuant to subsection 1 to engage in a lawful activity on private lands, including, without limitation, construction, mining, mineral exploration, logging, farming, ranching or a federally authorized activity conducted in compliance with the National Historic Preservation Act, 54 U.S.C. §§ 300100 et seq., if that activity is engaged in exclusively for purposes other than the excavation of a prehistoric Indian burial site.

In your request, you asked whether a private landowner whose backyard encompasses a known prehistoric Indian burial site must obtain a permit in order to excavate his or her backyard for the purpose of constructing a swimming pool. Assuming the swimming pool project is lawful and not a pretext, in whole or in part, for an archeological dig, the private landowner is exempted under these circumstances from the permitting requirement of NRS 381.196(1).

Construed as a whole, NRS 381.196(1) and (2) require a private landowner to obtain an excavation permit from the Museum Director when the landowner: (i) has knowledge of a prehistoric Indian burial site on his or her property; and (ii) commences or proceeds with an excavation project for the purpose of acquiring or studying prehistoric artifacts and human remains. Without evidence of such a purpose, or evidence that some other stated purpose is a mere pretext for acquiring or studying prehistoric artifacts and human remains, the Museum Director must recognize the applicability of the exemption described at NRS 381.196(2).

"When construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts." *Bldg. & Constr. Trades Council of N. Nev. v. Pub. Works Bd.*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992) (citing *Sheriff v.*

*Morris*, 99 Nev. 109, 117, 659 P.2d 852, 858 (1983)). Determining the legislative intent of the statute is the ultimate goal of statutory interpretation, and the statute's plain meaning is the starting point for making that determination. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When a statute is ambiguous, however, legislative history serves as a guide to legislative intent. *In re Orpheus Trust*, 124 Nev. 170, 175, 179 P.3d 562, 565 (2008).

Here, the relevant statutory text requires a landowner to obtain a permit prior to excavating his or her land when the landowner has knowledge of a prehistoric Indian burial site on the land, NRS 381.196(1), and excavates the land "exclusively for purposes other than the excavation of a prehistoric Indian burial site," NRS 381.196(2). The italicized section of the text, as quoted above, is arguably amenable to two different interpretations when read in isolation. On one hand, the language could be interpreted as a reference to a purpose that is not likely to threaten or disturb a prehistoric Indian burial site. Such an expansive interpretation would effectively require a landowner to secure a permit for any soil removal project with a potential to disturb a burial site. On the other hand, the language in question could be interpreted as a reference to a purpose not involving the acquisition or study of prehistoric artifacts and human remains. This more narrow interpretation would exempt a landowner from the permitting requirement unless the landowner had an archeological purpose for the excavation project. This more narrow interpretation is consistent with the surrounding text, whereas the more expansive interpretation would render the surrounding text superfluous.

Statutory language should not be read in isolation, but rather in context so that surrounding language is not rendered superfluous. *Southern Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). In fact, the full text of NRS 381.196 supports the interpretation that a landowner's activity is exempted from the permitting requirement when the landowner commences a lawful excavation not undertaken for the purpose of acquiring or studying prehistoric artifacts and human remains. As a preliminary matter, NRS 381.196(2) indicates that the landowner must be engaged in a "lawful activity" on his or her private property in order to qualify for the exemption. NRS 381.196(1) further indicates that the permitting requirement is inapplicable unless the subject of the proposed excavation is a "known" burial site. Finally, NRS 381.196(2) states that the lawful activity in question will fail to qualify for the exemption unless it is conducted "exclusively" for a purpose other than the excavation of a burial site.



When interpreted as whole, these statute express a legislative intent to confine the permitting requirement to excavations that include an archeological purpose. If the statute had been intended to require a permit for any type of excavation with a potential to disturb a prehistoric Indian burial site, regardless of its purpose, it would not have established an exemption for “lawful activity” conducted on private property. To the contrary, it would have subjected all types of excavation to the permitting requirement so long as the land were “known” to encompass a prehistoric Indian burial site. In short, there would have been no need to exempt various, unspecified forms of lawful activity.

Moreover, the use of the term “exclusively” contemplates that an excavation may be conducted for more than one purpose and still be exempted from the permitting requirement. Accordingly, NRS 381.196 cannot reasonably be construed to require a permit for an excavation with the general, over-arching purpose of removing soil from land that is known to contain a burial site. Such a broad reading of the statute would disregard the landowner’s specific objective for removing the soil, thus negating the exemption at subsection 2. The legislative history of NRS 381.196 likewise supports this reading of the statute.<sup>3</sup>

### CONCLUSION

The exemption at subsection 2 of NRS 381.196 applies by its own terms to activity conducted for any number of different purposes, any one of which may trigger the permitting requirement of subsection 1 if the purpose

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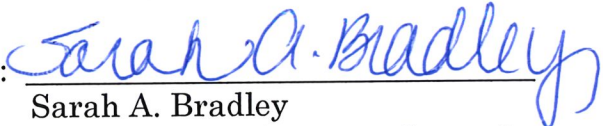
<sup>3</sup> NRS 381.196 is the codification of Senate Bill No. 244 of the 79<sup>th</sup> (2017) Session of the Nevada Legislature. See Act of June 9, 2017, ch. 523, § 6, 2017 Nev. Stat. 3535 (S.B. 244). During a committee meeting at which S.B. 244 was discussed, Senator Goicoechea asked a proponent of the bill, Marla McDade Williams from the Reno-Sparks Indian Colony, about the application of the law when a property owner is engaged in a lawful activity on private or public lands. Senator Goicoechea stated, “To be clear, if you are engaged in a lawful activity on private or public lands, you would not need a permit.” Ms. McDade Williams responded: “That is correct. You would only need a permit if you were conducting a prehistoric excavation.” *Hearing on S.B. 244 Before the Senate Committee on Government Affairs*, 2017 Leg., 79<sup>th</sup> Sess. 7 (April 12, 2017), available at: <https://www.leg.state.nv.us/Session/79th2017/Minutes/Senate/GA/Final/707.pdf>.

Myron Freedman, Director  
Nevada State Museum  
Page 6  
November 8, 2019

is archeological in nature. The permitting requirement likewise applies if the landowner's stated purpose is a mere pretext for acquiring or studying prehistoric artifacts and human remains. However, the mere act of removing soil from property cannot reasonably be defined as the purposeful excavation of a burial site because the exemption would never have any application so long as the knowledge requirement of subsection 1 were satisfied. When properly construed in a manner that gives effect to all of the words within the statute, NRS 381.196 exempts excavation that is conducted for any lawful purpose other than an archeological purpose.

Sincerely,

AARON D. FORD  
Attorney General

By:   
Sarah A. Bradley  
Senior Deputy Attorney General

SB/klr