

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1988

**OPINION NO. 88-1 TAXATION:** A charitable corporation, which holds vacant land only for investment purposes, does not “actually occupy” that land and is not entitled to the property tax exemption contained in [NRS 361.140](#).

Carson City, March 1, 1988

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

Dear Mr. Comeaux:

You have asked for our opinion concerning the proper interpretation of a statutory tax exemption for charitable corporations.

### QUESTION

If a corporation, which is a charitable corporation under [NRS 361.140\(1\)](#), holds property for investment purposes only, does it “actually occupy” that property as required for the property tax exemption granted by [NRS 361.140\(2\)](#)?

### ANALYSIS

[NRS 361.140\(2\)](#) provides:

All buildings belonging to a corporation defined in subsection 1, together with the land *actually occupied* by the corporation for the purposes described and the personal property actually used in connection therewith, are exempt from taxation when used solely for the purpose of the charitable corporation.

(Emphasis added.)

The term “occupy” is defined to mean:

[T]o take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in . . . (citations omitted).

Black’s Law Dictionary (4th ed. 1951) at 1231.

The term “occupied” in tax exemption statutes has been construed to mean that the property must actually be used and physically occupied by the charitable corporation for the intended charitable purpose in order to qualify for the exemption. *See Society of Cincinnati v. Exeter*, 31 A.2d 52, 54 (N.H. 1943). This case involved an old building that had been moved onto land owned by a charitable corporation. At the time the lawsuit was commenced, the charitable society was not actually using the building but was holding it for eventual use for its charitable purposes. The New Hampshire tax statute exempted the real estate of charitable institutions “owned and occupied” by them for their charitable purposes. Applying the statute to the situation at hand, the New Hampshire Supreme Court stated:

The statute contemplates occupancy as more than bare possession. Such possession is not an existing use for the owner’s purposes, even with a plan and purpose of future use

therefor. Clearly, if the building were rented, it would be taxable, and it is no less so while it remains indefinitely idle.

*Id.* at 54.

In *Franciscan Fathers v. Town of Pittsfield*, 89 A.2d 752 (N.H. 1952), Chief Justice Kenison of the New Hampshire Supreme Court, in construing a statute which required that property be “occupied” in order to be eligible for a property tax exemption, observed:

A use which is slight and insignificant is not ‘an occupancy sufficient to warrant a conclusion of use for the Society’s purposes, such as the statute requires.’ . . . Possession, ownership and use of land, which is part of a larger tract, must be more than negligible to give reasonable effect to the demand of the statute that it be occupied (citations omitted).

*Id.* at 756.

It is a well-established rule of statutory construction that effect must be given to every word in a statute. See *Bd. of County Commissioners v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102 (1983) (give meaning to all language; read each sentence, phrase, and word to give meaning in context of the purpose of the legislation) and *One 1978 Chevrolet Van v. County of Churchill*, [97 Nev. 510](#), 512, 634 P.2d 1208 (1981) (no language should be turned to mere surplusage). In interpreting [NRS 361.140\(2\)](#), one must consider not just the word “occupied”; instead, one must consider the phrase “actually occupied.” Black’s Law Dictionary (4th ed. 1951) at 53, states that the word “actual” “is used as a legal term in contradistinction to virtual or constructive . . . occupation.”

A charitable corporation which holds vacant land for investment purposes, at most, constructively occupies that land. By using the phrase “actually occupied” in [NRS 361.140\(2\)](#), the legislature required more than constructive occupancy. This strict reading of the provisions in [NRS 361.140](#) is justified by decisional law. The Nevada Supreme Court has stated:

As a general rule, tax exemptions are strictly construed. There is a presumption that the state does not intend to exempt goods or transactions from taxation. Thus, the one claiming exemption must demonstrate clearly an intent to exempt. Any reasonable doubt about the applicability of an exemption must be construed against the taxpayer (citations omitted).

*Sierra Pacific Power Co. v. Department of Taxation*, [96 Nev. 295](#), 297, 607 P.2d 1147 (1980).

This strict interpretation of tax exemption statutes, coupled with the meaning properly attached to the term “actually occupied,” dictates our conclusion that the tax exemption contained in [NRS 361.140](#) cannot be applied to property held only for investment purposes by a charitable corporation.

## CONCLUSION

A charitable corporation, which holds vacant land only for investment purposes, does not “actually occupy” that land and is not entitled to avail itself of the property tax exemption contained in [NRS 361.140](#).

Sincerely,

BRIAN McKAY  
Attorney General

By: Michael J. Dougherty  
Deputy Attorney General

**OPINION NO. 88-2 REAL ESTATE; FORECLOSURE:** The conduct of nonjudicial foreclosures under deeds of trust is not escrow activity requiring licensure pursuant to the provisions of NRS 645A.

Carson City, March 7, 1988

Mr. R. Lynn Luman, Administrator, Real Estate Division, 201 South Fall Street, Carson City, Nevada  
89710

Dear Mr. Luman:

You have requested an opinion of this office concerning the conduct of nonjudicial foreclosures of deeds of trust by trustees acting pursuant to the provisions of [NRS 107](#). In the situation you have described, a firm is compensated for acting as a trustee in the processing of such foreclosures involving real property located in Nevada.

### QUESTION

Does a person who, for a fee, acts as a trustee under a deed of trust and conducts nonjudicial foreclosures pursuant to the provisions of [NRS 107](#), engage in the business of administering escrows for which a license is required pursuant to the provisions of NRS 645A?

### DISCUSSION

Under the provisions of [NRS 645A](#), The Independent Escrow Agent's Act, hereinafter referred to as "the Act," any person who wishes to engage in the business of administering escrows for compensation must first be licensed by the administrator of the Real Estate Division as an escrow agent or agency. See [NRS 645A.010\(4\)\(5\)](#); [645A.020](#).

An "escrow" is defined in [NRS 645A.010\(3\)](#) as

[A]ny transaction wherein one person, for the purpose of effecting the sale, transfer, encumbering or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by such third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor or any agent or employee of any of the latter.

The Act exempts from its provisions certain financial institutions, attorneys rendering services in the performance of their duties as attorneys at law, and any person doing any act under order of any court. [NRS 645A.015](#). Since none of the exemptions are applicable to the situation you have described,<sup>1</sup> it is necessary to determine whether a trustee under a deed of trust administers an "escrow" when he processes a nonjudicial foreclosure under the provisions of NRS 107.

The legislature's intent in enacting a statute is the controlling factor in its interpretation. *Thompson v. District Court*, [100 Nev. 352](#), 683 P.2d 17 (1984). If a statute is clear on its face a court

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<sup>1</sup> A beneficiary under a deed of trust may select the judicial process for foreclosure. *Nevada Land & Mtg. Co. v. Hidden Wells Ranch, Inc.*, 83 Nev. 501, 435 P.2d 198 (1967). In that case, the foreclosure would take place pursuant to a court order and would, therefore, be exempt from the Act pursuant to NRS 645A.015(4).

cannot go beyond the language of the statute in determining the legislature's intent. *Id.* at 354. Words in a statute having a well-defined meaning at common law are presumed to be used in their common law sense, unless it clearly appears that another meaning was intended. *Moser v. State*, 91 Nev. 809, 544 P.2d 424 (1975). We believe that your question may be answered by reference to the definition of "escrow" set forth in [NRS 645A.010\(3\)](#) and as applied at common law.

[NRS 107.020](#) authorizes the transfer in trust of any estate in real property made after March 29, 1927, to secure the performance of an obligation or the payment of any debt. The parties in a deed of trust are referred to as the grantor, trustee, and beneficiary. See [NRS 107.030](#). [NRS 107.080](#) confers upon the trustee under a deed of trust a power of sale to be exercised after a breach of the obligation and in accordance with the conditions specified in the statute.

The execution of a deed of trust operates as a presently effective conveyance of legal title to the trustee. See 76 Am. Jur. 2d, *Trusts*, § 63, p. 312. An effective conveyance requires an unconditional delivery of title. See *State, By Pai v. Thom*, 563 P.2d 982 (Haw. 1977). In a typical escrow, however, a deed is delivered to the escrow agent with its ultimate delivery to the grantee conditioned upon the occurrence of a specified event, usually the payment of money. *Kunick v. Trout*, 85 N.W.2d 438 (N.D. 1957). The escrow agent acts merely as a conduit for the passing of title. *Id.* at 446. The escrow transaction is a common method of insuring that the parties to the agreement receive the benefit of their bargain. *In Re Estates of Pelc*, 34 B.R. 823 (Bankr. 1983). The conveyance of title is not effective in an escrow until the happening of the specified event and delivery of the deed to the grantee. *Kunick v. Trout*, supra at 447.

The definition of "escrow" set forth in [NRS 645A.010\(3\)](#) contemplates two "deliveries," one to the "third party" and one to the ultimate recipient of the thing delivered in escrow. Although the trustee has agreed to reconvey legal title to the grantor upon the satisfaction of the obligation which the deed of trust secures or to a purchaser at a foreclosure sale in the event of default, the initial conveyance of title to the trustee is not, in our opinion, conditioned in the manner described in [NRS 645A.010\(3\)](#). This conclusion is evident by the legislature's use of the term "delivery" rather than "conveyance."

That the legislature did not intend the Act's provisions to apply to a trustee under a deed of trust is further seen by an application of other parts of the definition of "escrow" to a deed of trust. By use of the terms "written instrument, money, evidence of title to real or personal property, or other thing of value" it appears that only tangible things which are capable of being delivered and physically possessed by the third person will give rise to an escrow. Unlike the trustee in a deed of trust who actually becomes vested with legal title, an escrow agent merely holds "evidence of title."

An escrow agent must also be a "third party" under the Act's definition. At common law, a delivery in escrow could be made only to a third person not a party to the transaction. *State, By Pai v. Thom*, supra, at 987.

'Third person' as used in the definitions of escrow, means a stranger to the instrument, not a party to it, or a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depository to both parties without involving a breach to either (emphasis added).

*A.T. Knopf, Inc. v. Richardson*, 674 S.W.2d 174, 176 (Mo. App. 1984) (emphasis in original); See also Nev. Op. Att'y Gen. No. 84 (October 24, 1963).

A trustee in a deed of trust is not a stranger to the underlying transaction but a necessary party to it. Further, there appears to be no prohibition against the beneficiary in a deed of trust or his attorney acting as trustee. *Donaldson v. Mansel*, 615 S.W.2d 799 (Tex. Civ. App. 1980). A deed of trust would, therefore, not constitute an escrow under the common law definition. We can discern no intent by the legislature to change this aspect of the common law definition of "escrow."<sup>2</sup>

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<sup>2</sup> We note that NRS 645A.090(1)(n) provides for disciplinary action against a licensee who "[h]as failed to disclose in writing that he is acting in the dual capacity of escrow agent or agency and undisclosed principal in any transaction." Although the necessary implication of this provision is that no discipline may be imposed if there is written disclosure in such instances, it does not follow that such a transaction

## CONCLUSION

The conveyance of legal title to a trustee in a deed of trust is not the conditional delivery of evidence of title contemplated by the definition of escrow set forth in [NRS 645A.010\(3\)](#). Further, a trustee, as a necessary party to the deed of trust vested with legal title, is not a third party or escrow agent as defined by the Act, since he is not a stranger to the transaction. The conduct of nonjudicial deed of trust foreclosures is, therefore, not escrow activity requiring licensure under the provisions of NRS 645A.

Very truly yours,

BRIAN McKAY  
Attorney General

By: Douglas E. Walther  
Deputy Attorney General

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**OPINION NO. 88-3 MOTOR VEHICLES; SEARCH AND SEIZURE; CONTROLLED SUBSTANCES:** Use of narcotic detection dog at motor carrier inspection checkpoint is not an unconstitutional search; if a dog “alerts,” certain procedures should be followed.

Carson City, March 29, 1988

Mr. Wayne R. Teglia, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711-0980

Dear Mr. Teglia:

You have requested an opinion concerning the use of a narcotic detection dog at a commercial vehicle enforcement checkpoint.

## QUESTION ONE

May a narcotic detection dog be used at the scene of a commercial vehicle safety inspection checkpoint?

## ANALYSIS

The Nevada Highway Patrol has established checkpoints at various locations in the state at which commercial vehicles are required to stop and submit to size, weight and safety inspections. The Nevada Highway Patrol is authorized to conduct vehicle safety inspections pursuant to [NRS 484.701](#) and size, weight and load inspections pursuant to [NRS 484.755](#).

Special agents are authorized to enter upon and perform inspections of motor carrier vehicles pursuant to 49 C.F.R. section 396.9. This regulation has been adopted as a State of Nevada regulation by [NAC 706.247](#). States are required to certify to the Federal Highway Administrator annually that they are enforcing all state laws respecting maximum vehicle

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would constitute an “escrow” as defined in NRS 645A.010(3). Statutes should be harmoniously construed wherever possible. *Weston v. County of Lincoln*, 98 Nev. 183, 643 P.2d 1227 (1982). We conclude that by its apparent authorization of what essentially would be a two-party transaction, the legislature did not intend to alter the requirement that an escrow agent to which the Act applies be a “third party” or the common law requirement that the “third party” be a stranger to the transaction.

size and weight. Motor carrier checkpoints to inspect for size, weight and safety violations are a commonly and widely accepted practice.

The United States Supreme Court considered the validity of routine checkpoint stops in *United States v. Martinez-Fuerte*, 429 U.S. 543 (1976), a case involving a permanent border patrol checkpoint located near the Mexican border. The Court determined that the routine stopping of vehicles at a properly operated checkpoint was consistent with the fourth amendment to the United States Constitution and that the stops and questioning could be made in the absence of any individualized suspicion that the particular vehicle contained illegal aliens.

Subsequently, in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that roving stops by a police officer for the purpose of checking the operator's driver's license and the vehicle registration were unreasonable under the fourth amendment without at least an articulable suspicion of a violation. However, the Court stated that its opinion did not preclude states from developing methods for spot checks that involve less intrusion or that do not include the unconstrained exercise of discretion. *Id.* at 663. Further, the Court stated:

Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and registry inspection than are others.

*Id.* at 663 n.26.

The primary issue presented by your request is whether the presence, at an otherwise legal motor carrier enforcement checkpoint, of a narcotic

detection dog trained to detect the presence of illegal drugs would constitute an unreasonable search or seizure in violation of the fourth amendment.

Based upon information you have provided, the following assumptions are made a part of this opinion:

- 1) The Northern California area is a major area for growing and distributing Sensimilla marijuana.
- 2) Transportation of large amounts of marijuana requires large transport vehicles.
- 3) Informants have provided information that trucking is a method used to transport illegal drugs.
- 4) The presence of a narcotic detection dog at a checkpoint would not cause a vehicle to be detained for longer than the normal checkpoint inspection nor would the normal practices of the inspection be altered in any way.
- 5) The narcotic detection dog would be on the public right-of-way and remain outside of the vehicle at all times.

The courts have considered the use of narcotic detection dogs on numerous occasions. In *United States v. Place*, 462 U.S. 696 (1983), the Court considered whether the fourth amendment prohibits law enforcement authorities from temporarily detaining personal luggage at an airport for exposure to a trained narcotic detection dog on the basis of a reasonable suspicion that the luggage contained narcotics. Although the Court held that the length of the detention of the luggage on the facts presented exceeded the permissible limits of an investigative stop, it stated that the exposure of the luggage, located in a public place, to a trained canine was not a "search" within the meaning of the fourth amendment. *Id.* at 707.

If based upon an articulable suspicion or reasonable grounds to believe a truck may be carrying illegal drugs, the use of a narcotic detection dog at a motor carrier enforcement checkpoint would fall within the parameters approved in *United States v. Place* and other cases approving the use of trained canines to establish probable cause that a crime was being committed. *See, e.g., United States v. Erwin*, 803 F.2d 1505 (9th Cir. 1986); *United States v. Attardi*, 796 F.2d 257 (9th Cir. 1986); *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984); *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976); *Latham v. Nevada*, [97 Nev. 279](#), 629 P.2d 780 (1981).

Other cases have considered the use of narcotic detection dogs under circumstances where there existed no individualized suspicion that narcotics were present. Random exposure of a narcotic detection dog to luggage located in areas of public or legal access passing through airports has been upheld in some jurisdictions. *See, e.g., State v. Snitkin*, 681 P.2d 980 (Haw. 1984); *People v. Mayberry*, 182 Cal. Rptr. 617, 644 P.2d 810 (1982); *State v. Morrow*, 625 P.2d 898 (Ariz. 1981); *State v. Wolohan*, 598 P.2d 421 (Wash.

1979). Other courts have held that the use of a narcotic detection dog to conduct random explorations without an individualized suspicion was an unreasonable exploratory search. *See, e.g., Garrett v. Goodwin*, 569 F. Supp. 106, 119 (E.D. Ark. 1982); *People v. Williams*, 124 Cal. Rptr. 253 (1975) (airline baggage staging area).

In both the checkpoint cases and the narcotic detection dog cases, the courts have employed a balancing test, weighing the individual's reasonable expectation of privacy, the degree of intrusiveness of the activity and the public interest to be served by the use of a checkpoint or a narcotic detection dog. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (roadblock); *United States v. Place*, 462 U.S. 696 (1983) (narcotic detection dog). Thus, in *Horton v. Goosecreek Ind. School Dist.*, 690 F.2d 470 (5th

Cir. 1982), the Court upheld the use of canines sniffing student lockers in public hallways and automobiles parked on the school parking lot without an individualized suspicion that there were illegal narcotics present, while rejecting the use of the dogs to sniff the students personally. *Id.* at 477.

The reasonableness of a law enforcement activity is determined by balancing its intrusion on the individual's fourth amendment interests against its promotion of legitimate governmental interests. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985). Thus, the government's legitimate interest in enforcing documentation and safety laws permitted the boarding of a vessel on coastal waters or inland waters with ready access to the sea without probable cause or even reasonable suspicion that the vessel was either carrying contraband or was in violation of safety or document regulations. *United States v. Villamonte-Marquez*, 428 U.S. 543 (1976); *United States v. Humphrey*, 759 F.2d 743 (9th Cir. 1985). The governmental interest in stemming the flow of illegal aliens and narcotics across the country's borders outweighed the minimal intrusion of a routine-stop checkpoint located near the Mexican border. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The interest in maintaining student discipline and stemming illegal drug activity in the schools justified the use of narcotic detection dogs to sniff student lockers and automobiles. *Horton v. Goosecreek Ind. School Dist.*, *supra*.

In weighing the degree of intrusiveness of the law enforcement activity, the individual's reasonable expectation of privacy has been given great weight by the courts. In *United States v. White*, 766 F.2d 1328 (9th Cir. 1985), the Court, in upholding an investigative stop at a permanent border checkpoint, stressed that by driving the vehicle over the public highways the defendant undermined her privacy expectation regarding any information which was thereby disclosed about the vehicle. *Id.* at 1330. The Court also

stated that the expectation of privacy in the contents of personal baggage is substantially greater than that in an automobile. *Id.* at 1331 n.2. *See United States v. Chadwick*, 433 U.S. 1 (1977). In *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985), the Court distinguished the heightened expectation that the contents of a closed apartment would remain private from the lesser expectation of privacy in the contents of luggage located in a public place in an airport. Based upon the heightened expectation of privacy, the Court held that a canine sniff at an apartment door constituted an unreasonable search.

In determining whether the use of narcotic detection dogs at motor carrier checkpoints is legal, it is necessary to analyze the specific activities contemplated in light of the fourth amendment principles enunciated by the courts. The contemplated activity involves the random use of narcotic detection dogs at already-existing motor carrier checkpoints. The activity would be conducted, not based upon an individualized suspicion of illegal activity, but upon the generalized information that trucks are used to transport marijuana and other illegal drugs into and across the State of Nevada. Clearly, stemming the distribution of illegal narcotics is a legitimate and an important governmental interest. *United States v. Place*, 462 U.S. 696 (1983).

This governmental interest must be balanced against the degree of intrusion upon fourth amendment rights. First, it appears that the intrusion itself would be minimal. The dog's activities would take place at the checkpoint, would not involve physical entry into the truck and would not cause any lengthier detention of the motor carrier than that caused by the size, weight and safety inspection which would be occurring simultaneously with the dog's sniffing. The dog would remain in the public area outside the truck or trailer and be under the control of the dog handler at all times. Members of the general traveling public would not be affected. Second, the operator of the motor



carrier does not have the same reasonable expectation of privacy as an individual may have in the contents of a dwelling, personal luggage or the trunk of an automobile. Motor carriers are routinely stopped for size, weight and safety inspections. Further, the truck's cargo space is subject to inspection. Federal Highway Administration regulations, adopted as State of Nevada regulations by [NAC 706.247](#), include regulations established for protection against shifting or falling cargo. *See* 49 C.F.R. § 393.100-.106. These regulations apply to trucks, truck tractors, semi-trailers, full trailers and pull trailers and require that these vehicles must, when transporting cargo, comply with the regulations. 49 C.F.R. § 393.100(a). Pursuant to 49 C.F.R. section 369.9 agents are authorized to enter upon and perform inspections of motor carrier vehicles in operation. Therefore, the cargo space of such motor carriers is subject to physical entry and inspection to enforce the regulations dealing with shifting or falling cargo. Under these circumstances, the reasonable expectation of privacy in the contents of a commercial motor carrier is substantially diminished.

Unquestionably, the detention of a motor carrier for a size, weight or safety inspection is a "seizure" within the meaning of the fourth amendment, albeit a reasonable one. The issue is whether or not the courts will determine that an otherwise reasonable detention for the purpose of promoting highway safety is rendered unreasonable by subjecting the vehicle to the sniff of a narcotic detection dog. The governmental interest at stake is important. The expectation of privacy is not great. The intrusion caused by the dog under the circumstances is so minimal as not to constitute a "search." On balance, therefore, given the recent trends in the law, it is the opinion of this office that, under the assumed facts stated herein, the use of narcotic detection dogs at properly established motor carrier checkpoints would not constitute an unreasonable "search" within the meaning of the fourth amendment.

## CONCLUSION

The use of a narcotic detection dog at a properly established motor carrier inspection checkpoint to examine trucks, truck tractors, semi-trailers, full trailers and pull trailers would not constitute an unreasonable search in violation of the fourth amendment under the assumed facts stated herein.

## QUESTION TWO

What is the appropriate law enforcement action in the event a narcotic detection dog "alerts" to possible contraband in a commercial motor carrier?

## ANALYSIS

The United States Supreme Court has recognized an "automobile exception" to the fourth amendment requirement that a valid search warrant must be obtained prior to a search. *United States v. Ross*, 456 U.S. 798 (1982). In *Ross*, the Court approved the search of a vehicle supported by probable cause to believe that the vehicle contained contraband. The authorization to search extended to the trunk of the vehicle and the containers and packages found in the vehicle. *Id.* at 825.

In *California v. Carney*, 471 U.S. 386 (1985), the Court held that the warrantless search of a motor home, based upon probable cause, was within the "automobile exception" to the search warrant requirement, reasoning that the capacity to be quickly moved and the lessened expectation of privacy in a vehicle were the overriding factors. *Id.* at 392-93. The Court stated:

We decline today to distinguish between 'worthy' and 'unworthy' vehicles which are either on the public roads and highways or

situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

*Id.* at 394. Based upon these decisions, a search of a motor carrier and its contents is permissible without a warrant, if there exists such probable cause to search as would otherwise support the issuance of a search warrant.



Thus, the issue presented is whether an “alert” by a narcotic detection dog is, in itself, sufficient to establish probable cause. Most cases approving the issuance of a search warrant based upon a narcotic detection dog “alert” have also involved additional factors to support the issuance of a search warrant. *See, e.g., United States v. Johnson*, 660 F.2d 21 (2nd Cir. 1981); *United States v. Goldstein*, 635 F.2d 356, 362 (5th Cir. 1981). In *Latham v. State*, [97 Nev. 279](#), 629 P.2d 780 (1981), a search warrant was obtained as a result of a canine sniff of a van. The issuance of the search warrant was upheld, although the court noted that the “affidavit indicates that the dog was used as corroboration of the suspicions or preknowledge of the police.” *Id.* at 281.

In *United States v. Waltzer*, 682 F.2d 370 (2nd Cir. 1982), the court stated:

We regard the dog’s designation of the luggage as itself establishing probable cause, enough for the arrest, more than enough for the stop.

*Id.* at 372 (luggage sniff at airport). However, the court emphasized that the narcotic detection dog in question had a record of 100 percent accuracy. *Ibid.* Also, the officer had a reasonable suspicion of illegal activity before subjecting the luggage to the dog’s sniff, thus supporting the finding of probable cause. *Id.* at 373 n.3.

In cases where a narcotic detection dog was used without any prior individualized suspicion that illegal drugs were present, the dog “alert” was either deemed sufficient to establish probable cause in and of itself, *State v. Snitkin*, 681 P.2d 980 (Haw. 1984), or the defendant consented to the search of the luggage following the dog “alert.” *People v. Mayberry*, 182 Cal. Rptr. 617, 644 P.2d 810 (1982). If the dog sniff of a vehicle is alone sufficient to establish probable cause, then a search is permissible without the issuance of a warrant.

However, the law appears to be unsettled as to whether a narcotic detection dog’s “alert” is, in and of itself, sufficient to establish probable cause. Compare *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982) with *United States v. Spetz*, 721 F.2d 1457 (9th Cir. 1983). The Ninth Circuit held in *Spetz* that a validly conducted dog sniff can supply the probable cause necessary for issuing a search warrant only if sufficient reliability is established by the application for the warrant. In the last analysis, the question is whether or not probable cause has been established which would justify a search.

Probable cause to search has been described as a “fluid concept,” generally stated to exist when the facts and circumstances within an officer’s knowledge and experience at the time of the search would warrant a man of reasonable caution in entertaining an honest and strong suspicion that an offense has been committed and that evidence of the offense will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983); *Brinegar v. United States*, 233 U.S. 160, 175 (1949); *Wyatt v. State*, [86 Nev. 294](#), 299-300, 468 P.2d 338, 341-42 (1970); *Stamps v. State*, [83 Nev. 232](#), 234-35, 428 P.2d 187, 189-90 (1967); [NRS 179.035](#) (1987). *See Deutscher v. State*, [95 Nev. 669](#), 681, 601 P.2d 407, 415 (1979) (describing probable cause for arrest). Thus, it is the totality of the circumstances which must be considered.

As noted above, the fact that a vehicle is the place to be searched only means that exigent circumstances exist such that a warrant need not be obtained if there is otherwise probable cause to conduct the search. *California v. Carney*, 471 U.S. at 394. Nevertheless, obtaining a warrant whenever reasonably possible is always a good procedure. Should it subsequently be found that probable cause was lacking, the seizure of any evidence based on the warrant should be insulated from attack if the officer applied for the warrant in good faith on the basis of information he believed to be accurate, even if, in retrospect, a defect is found in the manner in which the warrant was approved. *See Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984). Moreover, an officer participating in a search ultimately determined to have violated the fourth amendment will not be held personally liable in a civil action against him if the officer, in light of clearly established law and the information possessed by the officer, reasonably could have believed that the search was lawful. *Anderson v. Creighton*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 3034, 3040-41 (1987). *But, see Malley v. Briggs*, 425 U.S. 335 (1986) (obtaining search warrant does not provide officer with absolute immunity from civil liability). The fact that an officer applied for and obtained a search warrant makes it more likely that the seizure of the evidence will be upheld or that the officer will be immune from civil liability.

Even though the state of the law may not be clear as to whether a dog “alert” is sufficient to establish probable cause for a search, we do not believe it necessary in all instances for an officer to obtain a search warrant in order to search a vehicle under such circumstances. Rather, we believe the best practice in the first instance would be to seek the consent of the driver to search the vehicle and, when possible, to obtain this voluntary consent in writing on forms readily available. If permission is denied, the officer must evaluate the totality of the facts

available to him in order to determine whether he has probable cause to initiate a search. If the only fact available to him is that the dog alerted, the better practice would be to initiate a warrantless search only if the dog has previously established an exceptional record of accuracy. If such a record has not been established, it would be advisable to conduct a warrantless search only if other knowledge and facts are available to the officer which, in the officer’s judgment, clearly amount to probable cause. If the canine has not established an exceptional record of accuracy, the better practice would be to obtain a search warrant in the absence of a consent to search by the driver.

In those situations where a dog has alerted but the officer is uncertain as to whether he has probable cause, we believe that the dog “alert” would justify at least a brief investigative detention of the vehicle in order to obtain a search warrant. *See United States v. Place*, 462 U.S. at 703-06; *Michigan v. Summers*, 452 U.S. 692, 704-05 (1981); *United States v. Attardi*, 796 F.2d 257, 259 (9th Cir. 1986); *United States v. Large*, 729 F.2d 636, 638-39 (8th Cir. 1984). Officers must comply with time and place limitations applicable to investigative detention of persons because the driver of the vehicle, although technically free to continue to travel, would also be effectively restrained during the detention of the vehicle. *See United States v. Place*, 462 U.S. at 709-10 (ninety-minute detention of luggage unreasonable). Nevada law specifically describes the length and nature of an investigative detention. *See NRS 171.123* (1987) (detention to investigate limited to sixty minutes and immediate vicinity of detention). Therefore, if a search warrant could not be obtained under these circumstances within a short period of time, the vehicle and driver must be released and other options, such as continued surveillance, should be utilized until a warrant is obtained.

## CONCLUSION

A motor carrier is subject to search without a warrant, based upon the vehicle exception to the warrant requirement, when there exists probable cause to believe that it contains contraband. Because of the unsettled state of the law with regard to a narcotic detection dog “alert,” the preferred practice following such an alert would be to obtain the consent of the driver for a search of the vehicle. In the absence of consent, a warrantless search should only be conducted based upon an alert by a detection dog with an established record of exceptional accuracy or an alert by a detection dog with less than such an established record in conjunction with other facts and knowledge available to the officer which clearly establish probable cause. If these elements are missing or the officer is uncertain as to whether he has probable cause, the preferred practice is to obtain a search warrant following the narcotic detection dog “alert” before initiating the search. A sixty-minute investigative detention is authorized by state law. When possible, legal counsel should be contacted for advice on the issue of probable cause.

Sincerely,

BRIAN McKAY  
Attorney General

By: Chan G. Griswold  
Deputy Attorney General

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**OPINION NO. 88-4 CHILDREN; INTERSTATE PLACEMENT COMPACT:** A sending agency must obtain permission from a state which is a party to the ICPC in which it placed or proposes to place a child, before it may terminate its custody; a court must retain jurisdiction of a child when it places the child with a natural parent in another state, party to the ICPC.

Carson City, May 24, 1988

Mrs. Gloria Handley, Chief, Social Services, Welfare Division, 2527 North Carson Street, Capitol Complex, Carson City, Nevada 89710

Dear Mrs. Handley:

You have asked for an interpretation of the Interstate Compact on the Placement of Children (ICPC), particularly as it relates to article V and the fact situations set forth below.

### QUESTIONS

1. Must a sending agency obtain permission from a receiving state when it proposes to terminate its custody of a child which it placed or proposes to place in another state which is a party to the ICPC?
2. When a court places a child with a natural parent who lives in another state, must it retain jurisdiction of the child under the provisions of article V of the ICPC?

### FACTS

There are two situations which prompted the questions posed. The first involved a child who had been in the legal custody of his mother pursuant to the parties' divorce decree, but whose legal custody was transferred to the child's father when the mother moved from the state without permission of the court.

From the time the mother and child moved, the mother continued to have the child with her and had physical custody of the child until that physical custody was interrupted by a court order that awarded physical and legal custody of the child to the Nevada State Welfare Division. When the father learned of the location of his child, he and his present wife came to Nevada to visit the child and seek physical and legal custody of the child. The father proposed to take the child with him to live with him and his wife in a third state, where he had moved after the divorce decree was entered. The juvenile court granted such custody to the father and terminated its jurisdiction without proceeding through the ICPC.

The second situation arises because of the advice of a deputy district attorney to a county welfare department to the effect that the county was not required by the ICPC to obtain permission from the receiving state prior to terminating custody of a child when the placement was not for foster care or preliminary to an adoption.

### ANALYSIS

The statutes in question, which are found at [NRS 127.320](#) to .350, inclusive, should be interpreted in light of the general rules governing statutory construction. It is a well-established rule of statutory construction that effect is to be given, if possible, to every clause and section of the statute. *State v. Logan*, [1 Nev. 110](#) (1865). Additionally, no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such a result can properly be avoided. *Torreyson v. Board of Examiners*, [7 Nev. 19](#) (1871); *Paramount Ins., Inc. v. Rayson & Smitley*, [86 Nev. 644 at 649, 472](#) P.2d 530 (1970); *One 1978 Chevrolet Van v. County of Churchill*, [97 Nev. 510 at 512, 634](#) P.2d 1208 (1981). See also *Department of Motor Vehicles v. Turner*, [89 Nev. 514](#), 517, 515 P.2d 1265 (1973) (it will not be assumed that one part of a legislative act will make inoperative or nullify

another part of the same act if a different and more reasonable construction can be applied), and *K.J.B., Inc. v. Second Judicial Dist. Court*, [103 Nev. 473](#), 745 P.2d 700 (statute should be construed to give meaning to all its parts).

The ICPC is designed to effectuate interstate cooperation in the placement of children for the protection of children. See [NRS 127.330](#), article 1. Article II of the Compact defines the various terms utilized. These definitions are crucial to an appropriate interpretation of the remaining articles of the compact. In particular, the definitions of “placement” and “sending agency” are essential to responding to the questions posed. “Placement” is defined as:

[T]he arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

“Sending agency” is defined as:

[A] party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; *a court of a party state*; a person, corporation, association, charitable agency or other entity which sends, brings or causes to be sent or brought any child to another party state (emphasis supplied).

See [NRS 127.330](#), article II(b) and (d).

Article VIII specifies the limitations on the applicability of the ICPC. The compact does not apply in two specific circumstances. The first is when a relative specified in article VIII(a) is sending or

bringing the child into the receiving state and leaving the child with another such relative or a nonagency guardian. The second situation is when the child is being placed pursuant to another interstate compact. For example, the child may be placed pursuant to the Interstate Company on Juveniles, [NRS 214.010 et seq.](#), rather than through the ICPC. These are the only two placement situations in which the ICPC specifically does not apply.

Articles III and V provide the substance of the ICPC. Article III specifies conditions for placement of children in a receiving state if the placement is for the purpose of foster care or as a preliminary to an adoption article V governs retention of jurisdiction when any placement is made for any purpose.

Article III of the ICPC provides the conditions of placement for the specified purpose of foster care or proposed adoption. Subsection (b) provides that the sending agency shall provide the receiving state with written notice of the intention to send, bring or place the child in the receiving state prior to placement and provides for information which is required to be supplied. By its terms, article III applies only where the child is placed for foster care or as preliminary to an adoption. There is a principle of law, *expressio unius est exclusio alterius*, that is, the expression of one thing is the exclusion of another. See Black’s Law Dictionary. Article III indicates that no advance notice need be sent when a child is placed in the receiving state by a sending agency for purposes other than foster care or adoption. It does not necessarily follow, however, that article V need not be complied with when placement is for other than foster care or adoptive placement.

Article V(a) provides:

(a) The sending agency retains jurisdiction over the child sufficient to determine all matters in relation to the custody,

supervision, care, treatment and disposition of the child as it would have had if the child had remained in the sending agency’s state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. That jurisdiction also includes the power to effect or cause the return of the child or his transfer to another location and custody pursuant to law. The sending

agency continues to have financial responsibility for support and maintenance of the child during the period of the placement. . . .

The terms of article V are not limited to any specific type of placement. Therefore, article V applies to any placement, as defined in article II and quoted supra, made by a sending agency, also defined in article II and quoted supra. "Placement" by definition includes family free care, boarding homes and other child caring agencies and institutions. This definition clearly encompasses more than foster care and placement for adoption. If article V were interpreted to apply solely to foster care and adoptive placements, it would negate the definition of placement and would further be contrary to the stated purpose of the Act. As indicated previously, all portions of a statute must be given effect so as not to render any portion of a statute mere surplusage if at all possible. This is done by interpreting article V as applicable to all placements by sending agencies to receiving states, regardless of purpose.

The above interpretation of article V is supported by decisions of the few courts that have considered the issue. In *Dept. of Health and Rehab. Serv. v. J.M.L.*, 455 So.2d 571 (Fla. App. 1984), the court held that the order of the court placing custody of the children in their grandparents who were residents of Georgia, and relinquishing jurisdiction over the

children violated the ICPC. The court remanded to the trial court and ordered it not to make any out-of-state placement except in compliance with the provisions of the ICPC.

In *In Re Jason Adam Linn*, 312 S.E.2d 648 (N.C. 1984), the court vacated the order of the trial court which had held that the ICPC did not apply because the mother was physically present in the courtroom and had further ordered that the Guilford County Department of Social Services be relieved of the legal and physical custody of the minor child and restored custody to the mother. The Supreme Court remanded the case to the North Carolina Court of Appeals for further remand to the District Court, Guilford County, for proceedings in accordance with the ICPC. See also *In the Interest of T.W.S., a child, v. Dept. of Health and Rehab. Serv.*, 466 So.2d 387 (Fla. App. 1985) (the court decided that the ICPC had been violated by placing custody of the child with its grandparents in New York and terminating custody by the Department).

In light of the above analysis, discussion now turns to the two specific factual situations presented. In the first case presented, the child was placed with his non-resident father by the court. The father then took the child to the state of the father's residence. The court is included in the definition of a sending agency and is, therefore, subject to the ICPC. Additionally, the court caused the child to be brought to another party state by placing the child with a non-resident father. The placement was with a parent who had not had physical custody of the child for several years and who had no track record with respect to caring for the child. In this situation of a placement by the court ("sending agency") with the child's parent who lives in another state party to the compact, the court has arranged for the care of the child in a family free home. There is nothing in the term "family free home" which indicates that the home of any particular family or family

member is to be excluded from the definition. Article X of the compact provides that its terms are to be liberally construed to effectuate the propose [purpose] of the compact. The purpose of the compact is to ensure a suitable environment for a child and promote the protection of the child. In this vein, in order to safeguard the physical and mental well-being of a child placed with its father for the first time in a number of years, it is necessary that the court retain jurisdiction over the child so that it may require the child's return if something is wrong in the parent's home.

The Attorney General of North Carolina has issued an opinion which supports the opinion of this office relative to the placement of children with out-of-state parents without compliance with the ICPC. See 52 N.C. A.G. Rpts. No. 2, 26 April 1983. See also 61 Cal. A.G. Ops. 535, Opinion No. CV 78-45, December 8, 1978, which is in accord and contains an excellent discussion of the compact.

The second factual situation involves the question of whether a court needs the concurrence of the receiving jurisdiction before it may terminate its jurisdiction over the child in any case where the child is sent to or caused to be brought into the receiving state by the juvenile court or by a welfare agency.

The analysis of the situation where a child is placed with a parent resident in another state which is a party to the compact applies with equal force to the situation where the child is not placed with a parent.

If the child had remained in the sending state, custody would not have been terminated absent a viable placement in the state. It is worth noting that ordinarily when the Welfare Division replaces a child with a parent, with the approval of the court, there is a period of supervision before the court will terminate the legal custody of the child with the

Welfare Division. The purpose for this period of supervision is the protection of the child and to insure speedy removal from the parent's home should the placement become detrimental to the child. This is the very same purpose that is served by article V of the ICPC. The wording of article V indicates that, in the case of placement of a child in another state which is a party to the compact, the sending agency retains jurisdiction until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state. To construe article V as not requiring the concurrence of the appropriate authority of the receiving state is to read those words right out of the statute. Therefore, if the child has not been adopted, attained majority or become self-supporting, it is necessary to obtain the concurrence of the receiving state before terminating the jurisdiction of the court or the custody of the Welfare Division or other agency with legal custody of the child when the child is sent to or brought into or caused to be sent to or brought into the jurisdiction of a state which is party to the compact. For a general discussion of the need to have the sending agency retain jurisdiction over the child, see *The Interstate Compact on the Placement of Children*, Juvenile Justice Vol. 26, No. 2, p. 41, May, 1975, National Council of Juvenile Court Judges.

### CONCLUSION

When a child is sent or brought, or is caused to be sent or brought, into another state which is party to the ICPC, it is necessary for the sending agency (the court, the Welfare Division, or another agency which sends or brings or causes to be sent or brought the child into the other state) to retain jurisdiction and custody under article V of the ICPC until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state.

A court is a sending agency when it places a child in the custody of a parent who resides in another state which is a party to the compact and, therefore, under such circumstances may not terminate its jurisdiction without the concurrence of the receiving state unless the child is adopted, attains majority or become self-supporting.

Very truly yours,

BRIAN McKAY  
Attorney General

By: Nancy Ford Angres  
Deputy Attorney General

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**OPINION NO. 88-5 COLLECTION AGENCIES; JUDGMENTS:** Judgments obtained in name of collection agency on claims transferred or assigned for collection held in trust for creditor who owns beneficial interest therein.

Carson City, May 31, 1988

Mr. Burns Baker, Deputy Administrator, Financial Institutions Division, 406 East Second Street, Carson City, Nevada 89710

Dear Mr. Baker:

In 1987 the Nevada Legislature added [NRS 649.333](#) to provisions governing the licensing and regulation of collection agencies. The statute requires collection agencies to maintain a signed contract with each of its customers which must include, among other things, “[t]he rules governing the return of accounts, as established by regulations adopted by the commissioner.” [NRS 649.333\(3\)](#). As a result of hearings held by the commissioner to receive comments on proposed regulations governing the return of such accounts, a question has arisen regarding the ownership of judgments obtained by collection agencies on behalf of their clients.

## QUESTION

When a collection agency obtains a judgment against a debtor in its own name on a claim transferred or assigned to it for collection, does the creditor/assignor retain an ownership interest in the judgment sufficient to demand its return?

## ANALYSIS

A collection agency subject to regulation pursuant to the provisions of [NRS 649](#) “[i]ncludes all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the

collection of or in soliciting or obtaining *in any manner* the payment of a claim owed or due or asserted to be owed or *due to another* (emphasis added).” [NRS 649.020\(1\)](#). One of the stated purposes of the licensing law is to “[e]stablish a system of regulation for the purpose of ensuring that persons using the services of a collection agency are properly represented.” [NRS 649.045\(2\)\(b\)](#). Persons to which [NRS 649 applies](#), therefore, are those collecting debts in a representative capacity.

Prior to the enactment of [NRS 649.333](#), [NRS 649 contained](#) no provision requiring a written contract between a creditor and a collection agency. Nor does the chapter address the manner in which claims or debts are initially transferred to the agency for collection. A collection agency to which [NRS 649 applies](#) includes persons engaged in the collection of claims “in any manner.” [NRS 649.020\(1\)](#). We note, therefore, that the status of a collection agent in a particular instance is governed by general principles of contract law. Although the creditor and collection agent are free to structure their contractual relationship in any lawful manner, we believe your question may be answered by reference to the following two situations.

First, the creditor may simply authorize and appoint the collection agency as his agent to seek payment of the creditor’s claim, transferring no interest in the claim itself and retaining control over the means employed in its collection. An agent is a fiduciary with respect to the matters within the scope of his agency. 3 Am. Jur. 2d, *Agency*, § 210, p. 713. He has a duty to account for any funds or property coming into his possession. 3 Am. Jur. 2d, *Agency*, § 212, p. 716. An agent receiving title to property in his own name will, therefore, be considered as holding the property in trust for his principal. *West v. Humphrey*, [21 Nev. 80](#), 25 P. 446 (1890); 3 Am. Jur. 2d, *Agency*, § 222, p. 723. Although we question the propriety of a collection

agent seeking a judgment in his own name when no legal or equitable title to the creditor’s claim has been transferred or assigned to him,<sup>1</sup> any judgment so obtained would be considered as held in trust for the creditor. The creditor would, therefore, retain the beneficial interest in the judgment although legal title remained with the collection agency.

In the second situation, a creditor will assign his claim to the collection agent for purposes of collection. Such assignments appear to be implicitly authorized by provisions of [NRS 649 governing](#) the transfer or assignment of claims upon termination or abandonment of the collection agency’s business. *See*

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<sup>1</sup> If the creditor transfers no interest in the claim itself but merely authorizes the collection agent to seek its payment, the creditor would be the real party in interest required to prosecute such an action in his or her own name. *See* Nevada Rules of Civil Procedure, Rule 17(a); *Certified Collectors, Inc. v. Lesnick*, 570 P.2d 769 (Ariz. 1977). In addition, courts have concluded in some jurisdictions that a collection agency maintaining an action in its own name is engaging in the unauthorized practice of law. *See* 15A Am. Jur. 2d, *Collection and Credit Agencies*, § 7, p. 196; cases collected at 27 A.L.R. 3d 1152.



[NRS 649.375](#)(3). In this case, the collection agent is considered to be a trustee of an express trust and the real party in interest entitled to sue on the claim in his own name.<sup>2</sup> *Castleman v. Redford*, [61 Nev. 259](#), 124 P.2d 293 (1942). An assignee of a claim for collection holds legal title to the claim which is sufficient to enable him to maintain an action in his own name, but the creditor/assignor retains the equitable interest in the claim. *Rauer's Law and Collection Co. v. Higgins*, 174 P.2d 450 (Cal. 1946). A fiduciary relationship exists between the creditor/assignor and the collection agent requiring the collection agent to discharge his duties with the strictest fidelity and good faith towards the creditor. *Elam v. Arzaga*, 10 P.2d 805 (Cal. 1932); *McNeal v. Steinberger*, 135 P.2d 490 (Okla. 1943). A creditor who has assigned a claim to a collection agency for collection only is, therefore, the true owner of a judgment obtained on the claim by the agency. See *Gibbs v. Giering*, 183 So.2d 459 (La. 1966).

By virtue of the representative capacity in which it acts, a collection agency which obtains a judgment against a debtor in its own name holds legal title to the judgment in trust for the creditor who owns the beneficial interest. The creditor's right to demand the assignment of legal title to the judgment back to him depends, in our opinion, on the agreement of the parties. Cf. *Gibbs v. Giering*, supra, at 462 (provision of agreement requiring creditor to pay full

collection commission upon termination of relationship did not entitle collection agent to withhold reassignment of judgment until commission had been paid).

Unless the agency is coupled with an interest, the principal may generally terminate the relationship at will, even where he has agreed not to revoke the power conferred. *Peacock v. American Agronomics Corp.*, 422 So.2d 55 (Fla. App. 1982). An "interest" in the agent sufficient to make the agency irrevocable must be in the subject matter of the agency power conferred, not in the proceeds that will arise from the exercise of the power. *Id.* at 58; 3 Am. Jur. 2d, *Agency*, § 65, p. 567. In *Peacock*, the manager of an owner's citrus groves was held not to hold a power coupled with an interest by virtue of the right to receive a percentage of the sale of the fruit:

[T]he citrus production and marketing agreement did not create an agency coupled with an interest. They did not give Agronomics a proprietary interest in the fruit; they merely gave Agronomics the right to receive a commission out of the proceeds of the sale of the fruit.

*Peacock*, supra, at 58.

Although we recognize the right of the parties to provide otherwise, we understand that the most common method of compensating collection agencies for their services is to grant them the right to retain as a commission a percentage of any money actually collected in payment of the claim. Such a right is not, in our opinion, a sufficient interest to make the agency one coupled with an interest and, therefore, irrevocable. In this situation, the creditor has the power to terminate the collection relationship and demand return of the judgment, although he may subject himself to a claim for damages if the termination constitutes a breach of the collection agreement. *Peacock*, supra, at 57.

The Nevada Legislature has provided that collection agencies must maintain a signed contract with each of their customers which must include "[t]he rules governing the return of accounts, as established by regulations adopted by the commissioner." [NRS 649.333](#)(3). For the reasons expressed, we believe that this provision applies to judgments obtained by the collection agency in its own name on the accounts transferred or assigned to it for collection. Further, the legislature appears to have removed any doubt as to whether a creditor has the power to demand the return of claims or accounts so transferred. We believe the legislature intended customers of collection agencies to have the right, conditioned by contractual provisions adopted in accordance with the commissioner's regulations, to terminate the collection relationship and obtain return of the claims previously transferred or assigned.

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<sup>2</sup> Many courts have concluded that the prosecution of such actions does not constitute the unauthorized practice of law on the basis that specific statutes authorize the assignment of claims for collection and that such assignees are the real parties in interest entitled to maintain suit thereon in their own name. See, e.g., *Cruz v. Lusk Collection Agency*, 580 P.2d 1210 (Ariz. App. 1978); *Messer v. Carter*, 578 P.2d 788 (Or. 1978); *LeDoux v. Credit Research Corporation*, 125 Cal. Rptr. 166 (Cal. 1975).

## CONCLUSION

By virtue of the representative capacity in which it acts, a collection agency which obtains a judgment against a debtor in its own name holds legal title to the judgment in trust for the creditor who owns the beneficial interest. The creditor has the right to demand the return or reassignment of a judgment so obtained pursuant to the provisions of its collection agreement with the collection agency. The provisions of that agreement must be consistent with the provisions of [NRS 649.633](#) and the regulations adopted pursuant thereto.

Very truly yours,

BRIAN McKAY  
Attorney General

By: Douglas E. Walther  
Deputy Attorney General

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**OPINION NO. 88-6 LIENS:** Manufactured Housing Division must transfer mobile home title regardless of the existence of an [NRS 108 lien](#).

Carson City, June 15, 1988

Ms. Joan Clements, Administrator, Manufactured Housing Division, Frontier Plaza, Room 203, Carson City, Nevada 89701

Dear Ms. Clements:

You have requested an opinion of this office concerning the division's duties when transferring title to a mobile home which has a lien against it pursuant to the provisions of [NRS 108](#). The problem which is of concern to you involves the situation where the purchaser of a used mobile home, having already paid for the home, comes to your office to request that the title to the mobile home be transferred. Through your staff, the purchaser may discover, for example, that there is a lien against the home by the keeper of the mobile home park in which the mobile home is situated.

Before answering your specific questions, it is helpful to review the various statutes regarding the division's duties concerning the issuance of mobile home titles and the rules concerning statutory liens against mobile homes.

The provisions contained in [NRS 489.501](#) through 489.581 outline the requirements to be followed by the division when issuing a certificate of ownership for a mobile home. There are various documents that must be provided to the division before the division can issue a certificate of ownership. For example, in the case of a used mobile home, there must be a dealer's report of sale or, if the seller is a private party, there must be a properly endorsed certificate or statement. [NRS 489.511](#) and [489.521](#). In addition, the county

assessor of the county in which the mobile home was situated at the time of sale must endorse the certificate. [NRS 489.531](#). Once the division receives the necessary documentation, the division must issue a new certificate of ownership. [NRS 489.541](#).

Chapter 108 of the NRS contains numerous subsections regarding statutory liens. Sections 108.267 through 108.360 of the NRS contain the provisions regarding liens on mobile homes. These sections describe who may enforce a lien, the monetary limitations of certain liens and how to obtain satisfaction of a lien. There are notice requirements that must be complied with by the person claiming the lien against a

mobile home, including a provision in [NRS 108.310](#) that requires the lien holder to provide notice of the lien to the manufactured housing division. In addition, in order to enforce a lien against a mobile home for unpaid rent or utilities, the lienholder is directed by [NRS 108.315](#) to obtain the name and address of every security holder from the manufactured housing division. Other than the foregoing, there is no other mention of the manufactured housing division in [NRS 108](#), and there is absolutely no mention of [NRS 108 liens](#) in [NRS 489.501](#) through 489.581.

### QUESTION ONE

May the division issue a new title to a purchaser of a used mobile home even though there is an [NRS 108 lien](#) against the home?

### ANALYSIS

[NRS 489.541](#)(1) states “[u]pon receipt of the documents required by the division, the division *shall* issue a certificate of ownership.” (Emphasis added.) In a recent Nevada Supreme Court case, the court held that the clerk of the district court has a ministerial duty to accept and file documents. As long as the papers to be filed are in acceptable form, the clerk

has no authority to pass on the validity of the documents. *Bowman v. Eighth Judicial Dist. Ct.*, [102 Nev. 474](#), 728 P.2d 433 (Nev. 1986). The same rationale appears to be applicable to the division. The division must issue a certificate of ownership for a mobile home upon the presentation by the purchaser of the proper documents. It is a purely ministerial act and the division has no discretion in the matter.

Had the legislature intended that the division would exercise its judgment when transferring title to a mobile home when there is a [NRS 108 lien](#) on the home, the legislature would have provided for that in the statutes. *Cf. Clark County Sports Enter., Inc., v. City of Las Vegas*, [96 Nev. 167](#), 606 P.2d 171 (1980) (had the legislature intended to exclude certain property from taxation, it would have specifically so provided by language to that effect).

By not providing for any discretion by the division when the division is issuing a new certificate and there is an outstanding lien on a mobile home, it must be concluded that the division is required to transfer the certificate of ownership to the new purchaser.

### CONCLUSION

Upon presentation of the proper documents, the division must issue a certificate of ownership to the purchaser of a used mobile home which is encumbered by an outstanding lien. The division has no authority to determine the validity of a lien. If there is any question regarding the lien’s validity, the owner of the mobile home may contest the lien pursuant to [NRS 108.350](#).

### QUESTION TWO

Is the purchaser of a used mobile home bound by a valid lien?

### ANALYSIS

Generally speaking, a lien is binding on all persons who acquire the property with actual notice of the lien or who have constructive notice of the lien because of its recordation. 51 Am. Jur. 2d *Liens* § 14 (1970). Unlike other liens which may require the lienholder to retain possession of the property, a lienholder who possesses a lien pursuant to the provisions of [NRS 108.270](#) through 108.360 need not retain possession of the property, and the lien is not destroyed upon sale of the property. [NRS 108.280](#). *Cf. Ahlswede v. Schoneveld*, [87 Nev. 449](#), 488 P.2d 908 (1971) (possession is essential to the creation and the preservation of liens under the common law).

In the situation you have described, where the division has notice of the lien, the purchaser of a used mobile home will take the home subject to the lien.

### CONCLUSION

The purchaser of a used mobile home will be bound by a valid lien.

### QUESTION THREE

Is the division required to notify the new owner of an outstanding lien against a mobile home?

### ANALYSIS

The purpose of a lien recordation statute is to protect the lienholder's interest in the property by ensuring that the purchaser will be on notice of the lien and, as a result of that notice, the lien will be enforceable. *Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359 (Tex. Ct. App. 1963).

While the Nevada Revised Statutes do not explain what the division is supposed to do with the information it receives concerning liens, common sense would dictate that the information should be accessible to anyone who requests it. If recording statutes are meant to give notice to would-be innocent purchasers, then it follows that the division should provide any information in its possession regarding liens on mobile homes to anyone who requests that information. In addition, statutes must always be construed to avoid absurd results. *Welfare Div. v. Washoe Co. Welfare Dept.*, [88 Nev. 635](#), 503 P.2d 457 (1972). To construe the statutes to mean that the division should receive information regarding liens and not tell anybody about them would produce an absurd result which should be avoided.

Unfortunately, in the situation you have described, the purchaser of a used mobile home usually does not perform a title search prior to purchasing the home. You might consider including a warning on the certificate of ownership which states something to the effect that there may be outstanding liens against the mobile home which do not appear on the face of the certificate and that interested parties should contact the division for further information.

### CONCLUSION

The division is required to release information regarding a lien against a mobile home to any person who requests such information.

### QUESTION FOUR

Does a lien against a mobile home ever expire if the lienholder does not proceed with the steps provided in [NRS 108 to](#) collect the money which may be due him?

### ANALYSIS

Unlike a mechanic's lien which has a duration of six months pursuant to [NRS 108.233](#), there is no specific time limit regarding the duration of a lien against a mobile home. *Ewing v. Fahey*, [86 Nev. 604](#), 472 P.2d 347 (1970). This is not to say that the owner of a mobile home is without a remedy if the lienholder is derelict in enforcing his lien. The owner may proceed, for example, to contest the validity of the lien pursuant to [NRS 108.350](#). *See id.* at 608. In any event, there is nothing in the statutes that provides for the automatic expiration of a lien against a mobile home.

### CONCLUSION

A lien against a mobile home does not automatically expire.

Very truly yours,

BRIAN McKAY  
Attorney General

By: Despina Hatton  
Deputy Attorney General

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**OPINION NO. 88-7 SECURITIES:** Out-of-state broker-dealers must qualify to do business in this state prior to being issued a license by the securities division.

Carson City, June 5, 1988

The Honorable Frankie Sue Del Papa, Secretary of State, Capitol Building, Carson City, Nevada 89710

Attention: Sherwood N. Cook

Dear Ms. Del Papa:

This is in response to your request for advice concerning whether out-of-state broker-dealers must qualify to do business in Nevada with the Secretary of State and the penalties for failure to do so. In your letters you presented five inquiries for consideration by this office.

#### **BACKGROUND**

Before transacting any business in the State of Nevada, a foreign corporation must file with the Secretary of State the following:

(1) A certificate of corporate existence issued not more than 90 days before the date of filing by an authorized officer of the jurisdiction of its incorporation setting forth the filing of documents and instruments related to the articles of incorporation, or the governmental acts or other instrument or authority by which the corporation was created . . .

(2) A statement executed by an officer of the corporation, acknowledged before a person authorized by the laws of the place where the acknowledgment is taken to take acknowledgments of deeds, setting forth:

(I) The name and address of its resident agent in this state, who must be a natural person residing in, or another corporation with its principal office located in this state;

(II) As of a date not earlier than six months before the date of filing, the authorized capital stock of the corporation, the number of par value shares and their par value, and the number of no-par-value shares, as set forth in the articles of incorporation as last amended; and

(III) A general description of the purposes of the corporation.

[NRS 80.010](#)(1)(a).

#### **QUESTION ONE**

(a) Is a certificate of registration as a foreign corporation necessary before an out-of-state broker-dealer can register to do business in this state?

(b) Is a broker-dealer who is registered in this state, but has no branch office open, required to obtain a certificate as a foreign corporation before it can do business in this state?

(c) May a broker-dealer have a sales representative in this state, but no branch office, and still do business in this state without registering as a foreign corporation?

In your letters you presented these as three separate questions. However, because they generally make the same inquiry, they have been consolidated into one question.

### ANALYSIS

The key factor in analyzing the above questions is whether a foreign corporation is “doing business” in the State of Nevada. The Nevada Supreme Court has

held that a foreign corporation engaged in a “single piece of business in the state is not ‘doing business’ in the sense contemplated by the statute [NRS 80.010].” *Pacific States Security Co. v. District Court*, [48 Nev. 53](#), 57, 226 P. 1106, 1107 (1924). *See also In re Las Vegas Hilton Hotel*, [101 Nev. 489](#), 706 P.2d 137, 139 (1985) (appellants’ attendance at a convention in a Las Vegas hotel does not constitute doing business). To require a foreign corporation to become qualified it must transact “some substantial part of its ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligations.” *Id.* at 492, 706 P.2d at 139 (quoting *Pacific States*, 48 Nev. at 57, 226 P. at 1107).

Based upon the facts given, there are currently two out-of-state broker-dealers known to be operating branch offices in Nevada who either have failed or refused to become qualified to do business in this state. Because these firms are operating branch offices in Nevada they are transacting a substantial part of their ordinary business on a continuous basis in this state and must file the certificate required under [NRS 80.010](#) (hereinafter “certificate of good standing”).

Whether an out-of-state broker-dealer is “doing business” in this state is a factual question. A single transaction in one year is probably not enough; five transactions per month for three months during a one-year period may be; ten to fifteen transactions per month over a one-year period is probably enough.

### CONCLUSION

Whether an out-of-state broker-dealer must qualify to do business in Nevada depends upon the level of activity it conducts in this state and its continuousness. Factors to consider could include the location

of a branch office in the state, the number of sales representatives located here and the level of their activity.

### QUESTION TWO

Does the Securities Division (“Division”) have authority to take enforcement action against out-of-state broker-dealers, already licensed by the Division, but not qualified to do business in this state?

### ANALYSIS

The penalties for a foreign corporation that fails to file a certificate of good standing are set forth in [NRS 80.210](#). The penalties include: (1) a fine for the corporation and for each person who acts as an agent of the corporation within this state, in an amount not less than \$500.00; and (2) a prohibition against the foreign corporation from commencing, maintaining, or defending any action or proceeding in any court in this state *until* the corporation becomes qualified to do business in Nevada. [NRS 80.210](#).

The procedure for enforcing the above-mentioned penalties is as follows: When the Secretary of State learns that a corporation is doing business in violation of [NRS 80.010](#), she or he reports it to the Governor. As soon as possible, the Governor shall instruct the district attorney of the county where the corporation

has its principal place of business or the attorney general, or both, to institute legal proceedings. [NRS 80.210\(3\)](#).

### CONCLUSION

The Division does not have any independent authority to take action against an out-of-state broker-dealer who is already licensed by the Division but has not filed a certificate of good standing with the Secretary of State. The penalties and procedures for failure to comply are clearly set forth in [NRS 80.210](#) and these govern any violation of [NRS 80.010](#).

### QUESTION THREE

Does the Securities Division have authority to require an out-of-state broker-dealer to qualify to do business in this state as a prerequisite to obtaining a broker-dealer license?

### ANALYSIS

An applicant for licensing as a securities broker-dealer must: (1) file an application; (2) file a consent to service of process pursuant to [NRS 90.770](#); and (3) pay the applicable fees set forth in [NRS 90.360](#), [NRS 90.350\(1\)](#) and (2). By regulation, the Division requires broker-dealer applicants to file, if necessary, a certificate of good standing with the Secretary of State. [NAC 90.330](#) (1988).

A broker-dealer licensing application must contain the information the administrator “determines by regulation to be necessary and appropriate to facilitate the administration of [chapter 90 of NRS].” [NRS 90.350\(1\)](#). This requirement is inapplicable if the applicant is registered with the U.S. Securities and Exchange Commission (hereinafter “SEC”) or the National Association of Securities Dealers, Inc. (hereinafter “NASD”), and the administrator has access to that information through the central registration depository. [NRS 90.350\(2\)](#). Where an applicant is registered with either the SEC or the NASD, the administrator, by order, may require additional information. [NRS 90.350\(2\)](#). Generally, the information filed with the SEC or NASD is sufficient for licensing purposes. Uniform Securities Act (1985) sec. 205 comment 1, 7B U.L.A. 41 (West Supp. 1987).

One of the fundamental purposes of state securities law is to achieve a high standard of business ethics in the securities industry. *See, e.g., Chelsea Associates v. Rapans*, 376 F. Supp. 929, 939 (E.D. Michigan 1974), *aff'd*, 527 F.2d 1266 (6th Cir. 1975). *Accord, SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Therefore, we believe the administrator can request an out-of-state broker-dealer to become qualified to do business in this state prior to issuing a broker-dealer license. In the case of a firm not registered with either the NASD or the SEC, the information is appropriate to facilitate administering the state securities law by insuring that the firm complies with applicable state law. [NRS 90.350\(1\)](#). Where the firm is registered with the NASD or SEC, the administrator, by order, may require additional information, including the certificate of good standing, also for the purpose of insuring compliance with applicable state law and ethical business practices. [NRS 90.350\(2\)](#). The failure to become qualified constitutes a ground for denial of the application, because the applicant has failed to fully comply with the provisions of the Nevada Securities Act or a regulation adopted pursuant thereto. [NRS 90.420\(1\)\(b\)](#).

### CONCLUSION

The Securities Division may refuse to license an out-of-state broker-dealer who has failed, where required, to qualify with the Secretary of State pursuant to [NRS 80.010](#).

Sincerely,

BRIAN McKAY  
Attorney General



By: J. Kenneth Creighton  
Deputy Attorney General

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**OPINION NO. 88-8 EDUCATION; HANDICAPPED; SCHOOL DISTRICTS:** School districts are primarily responsible for educating handicapped children who reside in the district. If school district cannot provide a child with a free appropriate public education for his handicap, state Department of Education becomes responsible for educating him. A hearing officer may order an educational agency to reimburse the parents of handicapped student for private educational costs if services should have been provided by the educational agency. Attorney's fees may be awarded to the prevailing party in a due process hearing. The eleventh amendment bars an action for damages against the department in federal court. Although damages are inconsistent with goals of the EHA and probably would not be assessed in state court, the Department could be ordered to reimburse the parents of a handicapped child for educational expenses in state court.

Carson City, July 15, 1988

Ms. Marcia Reardon, Deputy Superintendent, Nevada Department of Education, Capitol Complex, Carson City, Nevada 89710

Dear Ms. Reardon:

You have sought the advice of this office in response to a series of questions regarding the state department of education's responsibilities and liabilities in the area of special education.

#### QUESTION ONE

Do federal and state law impose primary fiscal and administrative responsibility for the provision of educational services to handicapped children in Nevada upon the local school district or upon the state Department of Education?

#### ANALYSIS

Chapter 388 of the NRS requires that the board of trustees of each local school district in the state make "such special provisions as may be necessary for the education of handicapped minors." [NRS 388.450\(2\)](#). If a school district does not have a program suitable to the needs of a particular handicapped student, the board of trustees can apply to the state Department of Education to arrange for an out-of-district educational placement for the student pursuant to chapter 395 of the NRS. *See* [NRS 395.001](#)-.060. State fiscal support for district special education programs is provided by legislative appropriation via the state distributive school fund for the district's special education program units and for special education discretionary units awarded by the state board of education. *See* [NRS 387.1211](#)-.1233, [388.450\(1\)](#). Fiscal support for out-of-district placements made by the state superintendent of public instruction pursuant to chapter 395 comes from the budget of the state Department of Education. The Department is responsible for payment of expenses for the education and care of handicapped minors needing such placements under section [395.050\(2\)](#) of the NRS.

Thus, under state law, the primary provider, who is responsible for educational programs for handicapped students residing in a particular district and for paying the cost of the programs from its portion of the state distributive school fund, is the local school district. When a board of trustees certifies that a handicapped student cannot be appropriately educated within the district and applies for an out-of-

district placement for the child, the state assumes the primary responsibility of assuring that the child receives an education commensurate with his needs and abilities, as well as the obligation to pay for it.

As we have stressed in past opinions in the area of special education, state law must be construed to harmonize with the requirements of federal law on the subject, since such harmony is a prerequisite for receipt of federal special education funds. *See* 20 U.S.C. § 1412. Those states which desire to receive federal monies available to them under the Education of the Handicapped Act (EHA), 84 Stat. 175, as amended, 20 U.S.C. §§ 1400 to 1485, must promulgate policies which guarantee that all handicapped children have the right to a free appropriate public education and must file plans with the Secretary of Education detailing how the policies will be implemented. 20 U.S.C. §§ 1412(1), 1413(a).

A state's obligation to provide special education services directly to handicapped students is addressed at 20 U.S.C. § 1414(d), which provides:

Whenever a state educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such

manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

In 1986, the Ninth Circuit Court of Appeals upheld a federal district court ruling based on section 1414(d)(3) which ordered the State of California to provide educational services to a handicapped student directly whenever, in any individual case, if determined that a local educational agency was unable or unwilling to maintain free appropriate public education programs for the student. *Doe v. Maher*, 793 F.2d 1470, 1491-92 (9th Cir. 1986). The ruling of the court of appeals on that point was recently affirmed by the United States Supreme Court in *Honig v. Doe*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 592 (1988).

Under the court's decision in *Maher* as affirmed, a state, while "not obliged to intervene directly in an individual case whenever the local agency falls short of its responsibilities in some small regard," has an affirmative obligation to act in a case where certain criteria are present. 793 F.2d at 1492. The criteria which must be present are: "The breach must be significant. . . , the child's parents or guardian must give the responsible state officials adequate notice of the local agency's noncompliance, and the state must be afforded a reasonable opportunity to compel local compliance." *Id.* Even under a conservative reading of this language, in order to harmonize state law with federal law, it is probable that the state department of education's responsibility for the direct provision of special education services could be extended to include a child for whom the local school district has not filed an application for chapter 395 benefits, if a factual situation which met the *Maher* criteria existed.

## CONCLUSION

Under state law, a local school district is primarily responsible for the provision of special education services to handicapped students residing in the district and for the payment for those services, except when there is not an appropriate program for a particular handicapped child available in the district. In such a case, when the district board of trustees applies to the state superintendent of public instruction for out-of-

district educational placement under chapter 395 of NRS, the state Department of Education becomes primarily responsible for the provision of, and payment for, services. As a matter of federal case law, the state's responsibility to directly provide special education services to a handicapped student could arise in the right factual situation even prior to an application under chapter 395 being filed by a local school district.

## QUESTION TWO

What is the appropriate impartial due process hearing procedure to be followed by the parent or guardian of a handicapped child who has been placed by the superintendent of public instruction in an out-of-district educational placement pursuant to the provisions of chapter 395 of NRS?

## ANALYSIS

By federal regulation, state educational agencies which participate in federal funding for special education are responsible for insuring that "each public agency" establishes and implements certain procedural safeguards, including due process hearings. See 34 C.F.R. § 300.501. The state educational agency which submits the annual program plan that qualifies the state for federal funding is a "public agency" as that term is used in section 300.501 by virtue of 34 C.F.R. section 300.2(b)(1). The state Department of Education is the state educational agency in Nevada

and is responsible for the preparation and submission of the annual program plan. Therefore, it is subject to the procedural safeguards required by federal law.

An impartial due process hearing may be initiated whenever the public agency "proposes to initiate or change" or "refuses to initiate or change" the identification, evaluation, or placement of a handicapped child or the provision of a free appropriate public education to the child. 34 C.F.R. §§ 300.506(a), 300.504(a)(1) and (2). The case is heard by an impartial hearing officer who may not be "an employee of a public agency which is involved in the education or care of the child," or have "a personal or professional interest which would conflict with his or her objectivity in the hearing." 34 C.F.R. § 300.507(a). Interestingly enough, an individual who otherwise qualifies to conduct a hearing under the above standards will not be considered an employee of the agency and disqualified "solely because he or she is paid by the agency to serve as a hearing officer." 34 C.F.R. § 300.507(b).

The Department of Education has established written procedures for the conduct of impartial due process hearings. These procedures apply to local school districts and to any other "agency—public or private—providing educational services to handicapped children." See Nev. Department of Educ., *Procedures Manual for: Impartial Due Process Hearing, Administrative Appeal/Review, Complaint Resolution* 5 (1981). We have reviewed the text of these procedures and can see no reason why the same basic format for due process hearings which is utilized for parent disagreements with local school districts cannot be used for parent disagreements with the state department as well. The state department is a public agency which must implement procedural safeguards as required by federal law. Further, the Department may pay the hearing officer's fee without compromising his impartiality or transforming him into an employee of the Department. Thus, the Department could use the same

pool of hearing officers it has established to hear disputes involving local school districts to resolve complaints concerning the Department's out-of-district placements as well.

## CONCLUSION

The appropriate due process hearing procedure to be followed in cases involving a handicapped child who has been placed by the superintendent of public instruction in an out-of-district educational placement pursuant to chapter 395 of NRS is the same procedure currently used to resolve parent disagreements involving local school districts.

## QUESTION THREE

As part of a due process proceeding, may a hearing officer order an educational agency to reimburse the parents or guardian of a handicapped student for private placement costs?

### ANALYSIS

Our review of circulated decisions from administrative proceedings under the Education of the Handicapped Act has disclosed a plethora of cases in which hearing officers ordered educational agencies to reimburse parents or guardians of handicapped children for expenses they incurred in privately educating their children. As a practical matter, a decision by a due process hearing officer ordering reimbursement of private placement costs would almost always be litigated in federal district court or state trial court as part of the appeal process under 20 U.S.C. § 1415(e).

It is a general rule under the EHA that a public educational entity is not responsible for the cost of privately educating a handicapped child who has been unilaterally removed from an appropriate placement in public school by his parents or guardian during the

administrative hearing process. *See School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 373-74 (1985). 20 U.S.C. § 1415(e)(3) states:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

This provision, commonly referred to as the “stay-put provision,” imposes a duty not to alter the educational status quo of the child during a due process proceeding and negates the parents’ right to recover private tuition costs incurred as a result of their doing so unless the original placement is found to be inappropriate.

As an exception to the general rule, reimbursement of private educational costs is deemed appropriate if the services paid for by the parents should have been provided in the first instance by the public educational agency as part of the child’s free appropriate public education. *Id.* at 371. In *Burlington*, the court opined that such a retroactive reimbursement of educational expenses, made on a case by case basis, was not a damage award, but rather an appropriate remedy clearly contemplated by the EHA and within the authority of the reviewing court. *Id.* at 370-371. Thus, we conclude that a hearing officer could order reimbursement of private educational costs paid by the parents of a handicapped child as part of a due process hearing decision, and a court might sustain such an order in certain cases.

### CONCLUSION

A due process hearing officer may order an educational agency to reimburse the parents or guardian of a handicapped student for private placement costs if it is determined that such costs should have been paid by the educational agency as part of the student’s free appropriate public education. Such an order would be subject to appeal to federal district court or state court for review and enforcement.

### QUESTION FOUR

May attorneys’ fees be awarded the prevailing party in a due process proceeding and, if so, who is liable for paying them?

### ANALYSIS

The United States Supreme Court, in the case of *Smith v. Robinson*, 468 U.S. 992 (1984), held that attorneys' fees were not available under the EHA to a party who prevailed on a constitutional claim to a publicly financed special education. Two years later, Congress amended the EHA to allow a federal district court, in its discretion, to award "reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party" in any action or proceeding brought under section 1415 of the act. 20 U.S.C. § 1415(e)(4)(b). Section 1415 establishes the right of an aggrieved party to appeal a final due process hearing decision to a federal district court or a state trial court.

Federal district court decisions issued since the enactment of the attorneys' fees provision in 1986 have concluded that parents who prevail in a due process proceeding may subsequently bring a separate action in federal court to recover attorneys' fees, even without seeking judicial review of the decision from the due process proceeding. *See Unified School*

*District v. Newton*, 673 F. Supp. 418 (D. Kan. 1987); *Counsel v. Dow*, 666 F. Supp. 366 (D. Conn. 1987); *Moore v. District of Columbia*, 666 F. Supp. 263 (D. D.C. 1987); *Burpee v. Manchester School District*, 661 F. Supp. 731 (D. N.H. 1987); *Prescott v. Palos Verdes Peninsula Unified School District*, 659 F. Supp. 921 (C.D. Cal. 1987); *Michael F. v. Cambridge School Department*, No. 86-2532-C (D. Mass. March 5, 1987). Thus, under the EHA, attorneys' fees can be awarded a parent or guardian who is a prevailing party in a court appeal of a due process proceeding under 20 U.S.C. § 1415(e)(2), or, as set forth in the above decisions, as a result of an independent civil action following a final due process decision which was not appealed.

Attorneys' fees are awarded to the prevailing party in an action and assessed against the losing party. If the parents or guardian of a handicapped child were the prevailing parties in a due process proceeding challenging an out-of-district placement of a handicapped child by the state Department of Education and the Department did not appeal the decision under 20 U.S.C. § 1415(e)(2), the parents could file an action for recovery of attorneys' fees from the Department under the rule laid out in the cases cited above. Or, if the Department did appeal the decision, but lost, the parents could request attorneys' fees without having to file a separate action. Should a judge, in his discretion, feel that an award of attorneys' fees is warranted, he could assess them against the Department in accordance with the terms of the EHA. *See* 20 U.S.C. § 1414(e)(4). Such an award may be made against the state, notwithstanding the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678, 695-98 (1978).

## CONCLUSION

Under 20 U.S.C. § 1415(e)(4), attorneys' fees may be awarded to the parents or guardian of a handicapped child who are the prevailing parties in a due

process proceeding. The fees may be recovered through a separate action in federal district court if the final due process decision was not appealed, or as part of a judgment in an appeal from the due process decision pursuant to 20 U.S.C. § 1415(e)(2). The losing party is responsible for payment of attorneys' fees to the prevailing party.

## QUESTION FIVE

Is a due process proceeding against the state Department of Education an available remedy to a school district which has applied for chapter 395 benefits for a handicapped child, but has had its application rejected due to lack of state funds?

## ANALYSIS

As already discussed in question two, an impartial due process hearing under the EHA may be initiated on a proposal "to initiate or change" or a refusal "to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." 34 C.F.R. §§ 300.506(a), 300.504(a)(1) and (2). Following the rendering of a decision by the hearing officer, a review by the state educational agency is available in cases where the hearing was conducted by a public

agency other than the state educational agency. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.510. Once the decision from the hearing or the review becomes final, an aggrieved party to the proceeding “shall have the right to bring a civil action with respect to the complaint presented . . . in any State court of competent jurisdiction or in a district court of the United States . . .” 20 U.S.C. § 1415(e)(2).

The purpose behind these procedural safeguards is the protection of the substantive right to a free appropriate public education which the EHA confers on handicapped students. *See* 20 U.S.C. § 1415(a). *Accord Board of Education v. Rowley*, 458 U.S. 176

(1982). It is the interests of the children which the Act seeks to vindicate, not the interests of the agencies charged with the responsibility of educating them. *See* 20 U.S.C. § 1415(b). *Cf. Colin K. v. Schmidt*, 536 F. Supp. 1375 (D. R.I. 1982), *aff'd* 715 F.2d 1 (1st Cir. 1983); *Blomstrom v. Massachusetts Department of Education*, 532 F. Supp. 707 (D. Mass. 1982). For this reason, we do not believe that a due process hearing against the state Department of Education is an available remedy to a school district in a situation where the Department rejects a district’s application for chapter 395 benefits due to budgetary constraints.

In our research, we have reviewed numerous administrative decisions from due process hearings across the country. None of them involves two public educational agencies disputing the appropriateness of a child’s placement without the child or his parents being a party to the dispute. While we are aware that in certain situations the educational entity is responsible for initiating a due process proceeding against the child and his parents in order to avoid fiscal responsibility for an independent evaluation, there is simply no precedent for a district initiated due process proceeding in the fact situation presented here.

Our conclusion does not mean that a district is totally without any recourse in a situation where its application for benefits is denied. Nor can we dispositively say that a situation will never arise where a due process proceeding involving only two educational agencies will not be warranted due to some unique factual circumstance. On the facts presented here, however, we need not resolve these questions and conclude only that a due process proceeding pursuant to the EHA is not available to a school district whose application for chapter 395 benefits has been rejected by the state Department of Education.

## CONCLUSION

A due process proceeding against the state Department of Education is not an available remedy to a school district which has applied for chapter 395 benefits for a handicapped child, but has had its application rejected due to lack of state funds. Our conclusion on this point is based on the present state of decisional law in this area. We recommend that administrative decisions from due process hearings be monitored to see if a remedy of this nature becomes an emerging trend in the law.

## QUESTION SIX

Is the state Department of Education liable to a handicapped child in need of an out-of-district educational placement where it is unable to effect such a placement due to budgetary constraints?

## ANALYSIS

Recently, demands upon the state Department of Education’s budget for out-of-district educational placements under chapter 395 have outpaced the availability of funds. Although the Department has been able to obtain additional funds through the legislature which should pay for the chapter 395 program through fiscal year 1989, you nonetheless are concerned that the Department might find itself in the position of being unable to place a handicapped child in an appropriate out-of-district educational program due to lack of funds.

By its receipt of federal funds for special education programs, the State of Nevada has voluntarily chosen to comply with the terms of the EHA and has obligated itself to ensuring that handicapped children in this state have access to a free appropriate public education. An appropriate education is not necessarily an ideal education, however. In the words of the United States Supreme Court in *Board of Education v. Rowley*:

Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

458 U.S. 176, 203-04 (1982).

This then is the level beneath which the states must not fall. State budgetary constraints are deemed by courts to be relevant in determining how best to offer an appropriate free education to all those who are entitled to one. *See Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 517 (6th Cir. 1984); *Pinkerton v. Moye*, 509 F. Supp. 107, 112-13 (D. Va. 1981). But budget limitations may not be used simply to excuse the total failure to provide such an education. Although decided prior to Congress' enactment of the EHA, the language of the District Court for the District of Columbia in the landmark decision of *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972) remains the best explanation of an educational agency's responsibilities in this area:

[T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its

financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child.

*Id.* at 876.

Having concluded that budgetary constraints do not bar a claim that the state Department of Education failed to comply with the requirements of the EHA in the administration of the chapter 395 program, we turn now to the question of what kind of relief is available to a handicapped child who is denied an out-of-district educational placement due to a shortage of funds.

In *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), the Ninth Circuit Court of Appeals held that the Eleventh Amendment of the United States Constitution, which prohibits a suit in federal court against a state or its officials by private parties trying to impose a liability which must be paid from public funds in the state treasury, shielded the State of California from damage liability under the EHA. Utilizing a three step test laid out by the United States Supreme Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the court concluded: (1) that the State of California had not waived its general immunity to suit in federal court, (2) that Congress did not unequivocally express in the EHA its intent to abrogate California's sovereign immunity, pursuant to the

enforcement provisions of section five of the Fourteenth Amendment, and (3) that the EHA does not manifest a clear intent to condition a state's receipt of federal benefits on the state's waiver of its constitutional immunities. 793 F.2d at 1494. This issue was not appealed to the United States Supreme Court in *Honig v. Doe*; therefore, the court's ruling in *Maher* stands as the controlling decision on the point in the Ninth Circuit, of which Nevada is a part.



In *Kerr Center Parents Association v. Charles*, 842 F.2d 1052 (9th Cir. 1988), the court considered again the question of the EHA and a state's Eleventh Amendment immunity. Following the line of reasoning used in *Doe v. Maher*, the court concluded that unless the State of Oregon, itself, had waived its general immunity, a judgment compelling the state to provide funds for educational services could not stand under the Eleventh Amendment of the United States Constitution. *Id.* at 1059. Thus, unless a state, of its own violation [volition], can be said to have waived the general immunity accorded it by the Eleventh Amendment, an award of damages against it is barred in federal court.

While the State of Nevada has waived its immunity to suit in state court, it has not waived its immunity to suit in federal court under the Eleventh Amendment. [NRS 41.031](#)(3) provides that "[t]he State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States." From this language, we conclude that an assessment of damages against a state educational agency would be barred in federal district court by the Eleventh Amendment.

In a state court proceeding, the Eleventh Amendment would not be available to the state Department of Education as a defense. The general rule, however, is that a damage remedy, per se, is not consistent with the goals of the Education of the Handicapped Act, and that the "appropriate relief" authorized by 20 U.S.C.

§ 1415(e)(2) should be prospective in nature. *See Marvin H. v. Austin Independent School District*, 714 F.2d 1348, 1356 (5th Cir. 1983); *Powell v. DeFore*, 699 F.2d 1078, 1081-82 (11th Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205, 1213 (7th Cir. 1981).

As noted in the analysis of question three above, however, courts may order reimbursement of private placement costs which have been paid by the parents or guardian of a handicapped child, but which appropriately should have been paid by the educational entity. Such awards, in the view of the United States Supreme Court, are not damages, but merely a means of assuring that a child's free appropriate public education is indeed free. *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 370-71 (1985). State court case law on this point is limited, but generally follows the same line of reasoning. *See White v. State of California*, 195 Cal. App. 3d 452 (Cal. Ct. App. 1987). Although the question, to our knowledge, has not been considered by a Nevada state court, we believe that the line of reasoning utilized by federal courts and the California Court of Appeal in *White* would probably be utilized by a district court in deciding a case before it. Thus, while the state Department of Education might not be liable for tort damages in a state court proceeding involving a failure to provide an out-of-district educational placement for a handicapped child, the Department could still be ordered to reimburse the parents for the cost of the child's education regardless of its financial position.

## CONCLUSION

The Eleventh Amendment of the United States Constitution bars an action for damages against the state Department of Education in federal court. In a state court proceeding, it appears doubtful that the Department would be assessed damages, since the general rule is that a damage remedy is inconsistent with the goals of the EHA and that appropriate relief under section

1415(e)(2) of the Act is prospective in nature. In a proper fact situation, however, the Department could be ordered to reimburse the parents or guardian of a handicapped child for their expenses in placing the child out-of-district themselves.

## QUESTION SEVEN

Is the state Department of Education obligated to continue payment for an out-of-district placement of a handicapped child during the pendency of a due process proceeding based upon the Department's inability to fund the placement?

## ANALYSIS

As discussed in the analysis of question three, 20 U.S.C. § 1415(e)(3), the “stay-put provision” imposes a duty on the educational agency not to alter the educational placement of the child during the pendency of a due process proceeding. The child remains in his then current placement at the expense of the party who made the placement while the matter is being heard.

As we pointed out in question five, budgetary constraints are not a valid defense to an educational agency’s failure to provide a free appropriate public education. That reasoning seems to be equally applicable here. While the Department could propose to change the educational placement of a handicapped child who is being educated out of the district pursuant to chapter 395 to a less expensive, but appropriate, placement in an effort to stretch its financial resources, it is nonetheless bound by the “stay-put provision.” Therefore, if a due process proceeding is initiated by the parents or guardian of the child challenging the state Department’s proposal, the Department may not plead fiscal constraints as justification to stop paying for the current placement during the pendency of the proceeding.

### CONCLUSION

The state Department of Education is obligated to continue to pay for the out-of-district placement of a handicapped child during the pendency of a due process proceeding, regardless of the fact that the Department’s budgetary constraints form the core of the dispute to be resolved at hearing.

Sincerely,

BRIAN McKAY  
Attorney General

By: Melanie Foster  
Deputy Attorney General

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**OPINION NO. 88-9 SECURITIES:** In certain circumstances securities investigators may have to give constitutional warnings to witnesses prior to interviewing or questioning them.

Carson City, September 12, 1988

The Honorable Frankie Sue Del Papa, Secretary of State, Capitol Building, Capitol Complex, Carson City, Nevada 89710

Attention: Sherwood N. Cook  
Deputy Secretary of State

Dear Ms. Del Papa:

This is in response to your request for advice concerning whether the investigators employed by the Securities Division in the office of the Secretary of State (hereinafter “Division”) are required to give any warnings of certain constitutional rights to persons that they interview or question during the course of an investigation.

### BACKGROUND

Several of the enforcement cases currently being investigated by the Division appear to involve violations of the antifraud provisions of the Uniform Securities Act (hereinafter “Securities Act”) or the Nevada Commodity Code (hereinafter “Commodity Code”) for which criminal penalties may be sought by

the Division. During the investigation of these cases, several witnesses may be interviewed or questioned. At the conclusion of the initial investigation it is possible that one or more of these witnesses may be charged criminally under the criminal provisions of the Securities Act or the Commodity Code.

The Division's investigators are not peace officers and the Nevada Legislature has not conferred such powers upon them. The Division is the governmental agency responsible for enforcing both the Securities Act and the Commodity Code.

## QUESTION

When and under what circumstances, if any, are the investigators of the Division required to give warnings regarding certain constitutional rights, specifically *Miranda* warnings, to persons interviewed or questioned during an investigation?

## ANALYSIS

### A. *Investigating Powers:*

With respect to investigations, the Securities Act provides, in relevant part:

1. The administrator may make any investigation, within or without this state, as he finds necessary to determine whether a person has violated or is about to violate this chapter or any regulation or order of the administrator. . . .

...

3. For purposes of an investigation or proceeding under this chapter the administrator . . . may administer oaths and affirmations, subpoena [subpoena] witnesses, compel their attendance, take evidence and require the production, by subpoena [subpoena] or otherwise, of books, papers, correspondence, memoranda, agreements or other documents or records which the administrator determines to be relevant or material to the investigation or proceeding.

[NRS 90.620](#)(1) and (3) and [91.300](#)(1) and (3) (nearly identical).

### B. *Criminal Sanctions:*

Both the Securities Act and the Commodity Code make it a felony, upon conviction, for any willful violation of a provision of either statute. [NRS 90.650](#)(1) and [91.340](#)(1)(a). The Commodity Code also makes it a felony for any willful violation of a regulation or an order of the administrator. [NRS 91.340](#)(1)(b). Under the Securities Act, a violation of certain administrative orders is a misdemeanor. [NRS 90.650](#)(2).

### C. *Privilege Against Self-Incrimination:*

The Fifth Amendment to the United States Constitution provides, *inter alia*, that no person "shall be compelled in any criminal case to be a witness against himself. . . ." This privilege has been extended to state proceedings. *Malloy v. Hogan*, 378 U.S. 1 (1964).

The United States Supreme Court has held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To protect the defendant's privilege against self-incrimination and to give the defendant notice of this privilege, the Supreme Court has prescribed that certain now familiar warnings be given to the defendant prior to any custodial interrogation. These include the rights to remain silent and to have counsel present if he or she so desires. *Miranda*, 384 U.S. at 468-70. State action is also a prerequisite to the application of this constitutional protection. See J. Nowak, R. Rotunda and J. Young, *Constitutional Law* ch. 14 (2d ed. 1983).

The three main components of *Miranda* are: (1) law enforcement; (2) custody; and (3) interrogation.

#### 1. Law Enforcement:

The decision in *Miranda* is primarily “aimed against the ‘potentiality for compulsion’ . . . found in custodial interrogation initiated by police officers.” *Schaumburg v. State*, [83 Nev. 372](#), 374, 432 P.2d 500, 501 (1967) (citations omitted); *Miranda*, 384 U.S. at 444 (custodial interrogation means “questioning initiated by law enforcement officers after a person has been taken into custody. . . .”) See *State v. Ferrette*, 480 N.E.2d 399, 402 (Ohio 1985) (investigators for state lottery commission not required to comply with *Miranda* because they “had no statutory duty to enforce the laws of this state nor were they vested by statute with the power to arrest”).

The issue of whether the investigators are considered law enforcement personnel for purposes of *Miranda* is a close one. The administrator and staff of the Division are state employees, but they are not peace officers as defined under [NRS 169.125](#). The definition of the term “peace officer” is limited to those enumerated in [NRS 169.125](#), or, if omitted, to those who have been given peace officer status under another statute. See Nev. Op. Att’y Gen. 79-21 (October 12, 1979).

The fact that the Division’s investigators are not peace officers under Nevada law is not, however, dispositive of the issue of whether witnesses must be Mirandized prior to any questioning. The investigators are agents of the State of Nevada and the administrator, and part of their function is to obtain information from witnesses which may be used in prosecuting a person for violating the provisions of the Securities Act or Commodity Code or orders or regulations of the administrator. The Division is responsible for conducting all investigations under both statutes and these investigations may ultimately lead to a criminal prosecution. Consequently, the investigators are not exempt from the *Miranda* rule simply because they are not peace officers. See

*People v. Accavallo*, 291 N.Y.S.2d 972 (1968) (*Miranda* rule applicable to agents of state Department of Labor even though they were not peace officers). There is scant authority concerning interrogation by state or local governmental authorities. Recently, the Nevada Supreme Court held in *Walker v. State*, [102 Nev. 290](#), 720 P.2d 700 (1986) that *Miranda* was applicable to the questioning of a defendant in prison by a “correctional classification officer,” commonly referred to as a unit counselor, whose duty it is to “investigate offenses by inmates and to sit on disciplinary committees.” *Id.* at 701. Moreover, at the federal level, the United States Supreme Court has held that *Miranda* is applicable to agents of the Internal Revenue Service because “tax investigations frequently lead to criminal prosecutions . . . [and] the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.” *Mathis v. United States*, 391 U.S. 1, 4 (1968).

## 2. Custody:

The *Miranda* rule requires warnings to be given only when the defendant is in custody. Custodial interrogation means questioning “after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444 (footnote omitted). It is not limited, however, to the police station. *Id.* at 467. The Court has further stated that “the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.” *In re Gault*, 387 U.S. 1, 49 (1967). See *Oregon v. Mathiason*, 429 U.S. 492 (1977) (defendant not in custody when he voluntarily went to police station for questioning and following a one-half hour interview left the station without hindrance).

The majority view in the lower federal courts is that an objective standard should be used. The issue is whether a reasonable person would believe himself to be in custody under the circumstances of the case. See, e.g., *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971); *United States v. Bekowies*, 432 F.2d 8 (9th Cir. 1970); *Lowe v. United States*, 407 F.2d 1391 (9th Cir. 1969); *United States ex rel. DeRosa v. Superior Court of N.J.*, 379 F. Supp. 957 (D. N.J. 1974); see also *People v. Arnold*, 426 P.2d 515 (1967) (under the circumstances would a reasonable person believe he was not free to leave). Three general factors that can aid in determining whether a person is in custody are: (1) whether the witness could have voluntarily left the scene of questioning; (2) whether the person was being questioned as a suspect or merely a witness; and (3) whether the witness voluntarily and freely accompanied the police or interviewer to the place of questioning. *State v. O’Keefe*, 617 P.2d 938, 940 (Or. 1980). More specific factors include:

[T]he language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual.

*United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981).

A voluntary appearance at the Division's offices or a voluntary interview conducted by the investigator at a witness's place of business or home cannot be construed as having the witness in custody. See *Beckwith v. United States*, 425 U.S. 341 (1976) (*Miranda* does not apply to an interview of a person in his home [noncustodial questioning] during a tax investigation even though he is clearly the focus of an inquiry aimed at criminal tax fraud). Two cases have held that questioning in the agent's office is

not custodial. *Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967). Also, testimony compelled by an administrative subpoena probably does not amount to custody. See *Dosek v. United States*, 405 F.2d 405 (8th Cir. 1968), *cert. denied*, 395 U.S. 943 (1969) (defendant was not in custody when he gave testimony to SEC investigators pursuant to an administrative subpoena. The SEC investigators did, however, advise the defendant of certain constitutional rights). In most instances persons interviewed by the Division will not be in custody.

### 3. Interrogation:

Finally, even if a person is considered to be in custody, not every question posed in a custodial setting is equivalent to interrogation or its functional equivalent, thus requiring the defendant to be Mirandized. *Booth*, 669 F.2d at 1237. The test is whether "the police should have known that a question was reasonably likely to elicit an incriminating response." *Id.* at 1238. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the suspect") (footnotes omitted). If the investigation and interviews are routine and not accusatory, *Miranda* warnings are not required to be given. *State v. Heffran*, 384 N.W. 2d 351 (Wis. 1986). Volunteered statements, of course, are not usually considered interrogation. *Miranda*, 384 U.S. at 478; *State v. Billings*, [84 Nev. 55](#), 436 P.2d 212 (1968). Also, *Miranda* does not apply to general on-the-scene questioning. This type of questioning is devoid of coercion and lacks any compulsion. *State v. Tellez*, 431 P.2d 691 (Ariz. 1967).

## CONCLUSION

Although the investigators of the Division are not peace officers under Nevada law, this factor alone does not resolve the issue of whether the investigators must follow the *Miranda* rule in questioning or interviewing witnesses. Resolution of this issue turns on whether the witness is in custody and is being interrogated by the investigator. These are factual and legal questions which can be resolved by applying the above-mentioned factors on a case-by-case approach.

If you have specific questions concerning any particular case or proposed interview, you should consult with your legal counsel or, in his absence, the chief of the criminal division of the attorney general's office.

Sincerely,

BRIAN McKAY  
Attorney General

By: J. Kenneth Creighton  
Deputy Attorney General

**OPINION NO. 88-10 ETHICS; CANDIDATES; FINANCIAL DISCLOSURE; [NRS 281.561](#):** A candidate for the office of United States Senator need not file a financial disclosure statement. A public officer who resigns his office before the sixth month prior to the expiration of his term need not file a financial disclosure statement.

Carson City, September 12, 1988

Mr. Carl F. Dodge, Chairman, Commission on Ethics, Secretary of State's Office, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Dodge:

You have requested advice from this office regarding the following:

#### QUESTION ONE

Must a candidate for the office of United States Senator from Nevada file a financial disclosure statement pursuant to [NRS 281.561](#)?

#### ANALYSIS

[NRS 281.561](#) requires "[e]very candidate for public office and every public officer" to file statements of financial disclosure with the Secretary of State for review by the Commission on Ethics at the specific times enumerated in the statute.

The term "public officer," as it is used in [NRS 281.411](#) to [281.581](#), inclusive, is defined as "a person elected or appointed to a position which is established by the constitution of the State of Nevada, a statute of this state or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty." See [NRS 281.431](#) and [281.4365](#).

The office of United States Senator is established by the United States Constitution, art. I, section 3, not the constitution or statutes of this state. Therefore, a candidate for the office of United States Senator does not fall within the definition of "public officer" as that term is used in [NRS 281.411](#) to [281.581](#), inclusive. Since the office of United States Senator is not a public office for purposes of [NRS 281.561](#), a candidate for that office need not file a statement of financial disclosure under [NRS 281.561](#)(1).

#### CONCLUSION

A United States Senator from Nevada is not a public officer for purposes of [NRS 281.561](#) and, therefore, a candidate for that office is not required to file a statement of financial disclosure with the Secretary of State for review by the Commission on Ethics.

#### QUESTION TWO

If an elected public officer resigns, is removed or otherwise vacates his office prior to the sixth month before the expiration of his term, must he file an end-of-term statement of financial disclosure?

#### ANALYSIS

[NRS 281.561](#) requires a public officer who holds an elective position to file an end-of-term financial disclosure in one of two instances:

(1) If he is running for election or reelection to a public office, he must file a statement of financial disclosure no later than the 10th day after the last day to qualify as a candidate for the office [[NRS 281.561](#)(1)]; or

(2) If he is not running for election to a public office, he must file a statement of financial disclosure during the sixth month before the expiration of his term [[NRS 281.561\(3\)](#)].

We have already addressed in Question One, *supra*, the situation in the first instance and have concluded that since the Governor is running as a candidate for the office of United States Senator, a public office created by the United States Constitution, he need not file a statement of financial disclosure pursuant to [NRS 281.561\(1\)](#).

In the second instance, [NRS 281.561\(3\)](#), by its own terms, does not require the Governor to make an end-of-term filing, since such a filing is due “during the sixth month before the expiration of his term.” The sixth month before the expiration of his term would be June 1990. If the Governor were elected to the office of United States Senator from Nevada in the 1988 general election, he would not be holding the office of Governor in June 1990, the required time for filing the statement of financial disclosure.

The Attorney General of Nevada has previously addressed a similar situation in Nev. Op. Att’y Gen. No. 216 (July 12, 1977). The Attorney General concluded that “[i]t is the opinion of this office that public officers who resign their offices prior to the last six months of their terms need not file financial disclosure statements under the Ethics in Government Law.” *Id.* at 31. This conclusion was based upon the following analysis: A term of office is fixed by law and cannot be reduced by a voluntary resignation. The act and time of filing depends upon the term of office fixed by law. A filing cannot take place, unless on a purely voluntary basis, before the six months period to the expiration of a fixed period of time set for the holding of a public office. If a public officer resigns his office prior to that date, then he is no

longer serving the term for which the filing is required, and he need not file a financial disclosure statement. *Id.* at 29-30.

Although the 1977 opinion of the attorney general was based upon the language in [NRS 281.561\(3\)](#) which required a public officer to file a statement of financial disclosure *within* “*six months* before the expiration of his term” and now that language has been amended to require the filing of a financial disclosure statement “*during the sixth month before the expiration of his term,*” the analysis and conclusion of that opinion still apply here (emphasis added).

As we stated in 1977, the office of the attorney general cannot legislate. It is within the province of the legislature to provide for the filing of a statement of financial disclosure upon resignation, removal or vacancy in a public office if the legislature perceives that such disclosure is necessary to enhance the people’s faith in the integrity and impartiality of public officers.

### CONCLUSION

[NRS 281.561](#) does not require public officers who resign their offices before the sixth month prior to the expiration of their terms to file a financial disclosure statement with the Secretary of State for review by the Commission on Ethics.

Sincerely,

BRIAN McKAY  
Attorney General

By: Jennifer Stern  
Deputy Attorney General

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**OPINION NO. 88-11 HOUSING AUTHORITIES:** A county housing authority is not exempt from local government police and health ordinances which are not in conflict with applicable state law.

Carson City, October 4, 1988



Bryan A. Lowe, Esquire, 1900 East Flamingo Road - Suite 282, Las Vegas, Nevada 89119

Dear Mr. Lowe:

You represent the Clark County Housing Authority (the "Housing Authority") and have requested our opinion concerning the applicability of title 27 of the Clark County Code (the "county ordinance") to a mobile home park operated by your client.

### FACTS

The Housing Authority operates a mobile home park for senior citizens. The Board of County Commissioners of Clark County has adopted an ordinance which became effective on March 31, 1988, regarding the operation of mobile home parks in Clark County. It is the position of the Housing Authority that the mobile home park which they operate is not subject to this county ordinance.

The mobile home park in question is located in an unincorporated portion of the Las Vegas Valley. This mobile home park was constructed, in part, with some \$302,485 which the Board of County Commissioners authorized the expenditure of from a federal community development block grant pursuant to a written agreement entered into between the county and the Housing Authority on June 15, 1982.

Although it is not stated in your opinion request, we assume that the concern prompting your inquiry arises from provisions in the county ordinance, such as section 27.06.055, which prohibit discrimination

because of age within mobile home parks subject to the provisions of this ordinance. Apparently, the mobile home park operated by the Housing Authority would be in violation of the county code section just cited if it continues to operate as a mobile home park for senior citizens only.

### QUESTION

Is the mobile home park operated by the Housing Authority exempted from the provisions of the county mobile home park ordinance?

### ANALYSIS

You take the position that the Housing Authority's mobile home park for senior citizens need not comply with the provisions contained in the county ordinance because the Housing Authority is given substantial statutory autonomy through provisions like [NRS 315.490](#). That section states:

No provision of law with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Your client takes the position that the provision just quoted preempts the application of ordinances, like this county ordinance, to the senior citizens mobile home park operated by the Housing Authority.

We have reviewed all of the provisions contained in chapter 315 of the NRS which constitute the enabling legislation creating the Housing Authority. In addition, we have reviewed the provisions of chapter 461A of the NRS which pertain to mobile homes and parks. Our review of the provisions in both chapters does not disclose any provision which clearly indicates that the Housing Authority is exempt from the county ordinance.

The review described in the preceding paragraph is appropriate. 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 legislature scheme. *Lamb v. Mirin*, [90 Nev. 329](#), 332-33, 526 P.2d 80 (1974). There is nothing in chapter 315 of NRS which indicates that the Housing Authority is exempt from normal health and safety legislation passed by other political subdivisions, such as this county ordinance. Additionally, we find no statutory authorization in chapter 315 of NRS which would enable the Housing



Authority to pass its own basic health and safety code applicable to its projects to the exclusion of other ordinances like that passed by the County. Therefore, we do not see justification for your broad conclusion that the County has been preempted from applying its ordinance to a mobile home park project operated by your client.

The lack of any statutes in chapter 315 of NRS which authorize the Housing Authority to adopt its own health and safety code is significant for another reason as well. The Housing Authority is, by statute, “a public body corporate and politic, exercising public and essential governmental functions.” [NRS 315.420](#). In our opinion, the Housing Authority is a public quasi-corporation. These civil divisions of the state possess only a portion of the powers, duties and liabilities of corporations. *Schweiss v. First Judicial District Court*, [23 Nev. 226](#), 231, 45 P. 289 (1896). The Housing Authority is similar to a county in this regard, and, like a county, is limited to the exercise of only those powers as are specially provided for by law or necessarily incidental to carrying those powers into effect. *State ex rel. King v. Lothrop*, [55 Nev. 405](#), 408, 36 P.2d 355 (1934); *Hoyt v. Paysee*, [51 Nev. 114](#), 122, 269 P.2d 607 (1928); *County of Pershing v. Sixth Judicial District Court*, [43 Nev. 78](#), 85, 181 P. 960 (1914). Therefore the legislature’s failure to authorize the Housing Authority to adopt its own health and safety code reinforces our

conclusion that this public regulatory function is to be performed by another public entity. In this circumstance, it is the County that has been designated to adopt these types of codes. [NRS 244.357](#).

The construction that must be applied to [NRS 315.490](#) does not support the conclusion that the Housing Authority is exempt from the provisions of the county ordinance. When the language of a statute is plain and no legislative purpose would be served by deviating from it, there is no room for statutory construction. *Breen v. Caesars Palace*, [102 Nev. 79](#), 87, 715 P.2d 1070 (1986). [NRS 315.490](#) merely insures that the Housing Authority may carry out its statutory powers regarding real and personal property, such as those codified in [NRS 315.460](#), without resorting to, or restriction by, other statutory provisions, such as [NRS 244.281](#) to [244.283](#), which pertain to the sale or lease of real property owned by a county. The plain meaning of the text contained in [NRS 315.490](#) does not justify the conclusion that the Housing Authority is exempt from the county ordinance.

It is a well established canon of statutory interpretation that legislation is to receive a compatible or harmonious construction whenever possible. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982). The position adopted by your client places unnecessary tension between the provisions of chapter 315 of NRS, the provisions of chapter 461A of NRS and the related county ordinance. A harmonious construction of the provisions just referred to requires that the provisions of the county ordinance apply to the Housing Authority’s mobile home park to the extent provided in the ordinance and, more importantly, to the extent permitted by applicable state law.

Clark County Code section 27.06.055 prohibits a person from refusing to sell or rent or otherwise make available a mobile home lot to any person because of age. In addition, this same section prohibits a person from publishing any notice or advertisement

regarding the sale or rental of a mobile home lot that indicates any preference, limitation or discrimination based on age. Apparently, a provision like the one just cited may cause the Housing Authority some difficulties in operating the senior citizens mobile home park under existing management practices. If this assumption is correct, we note that Clark County Code section 27.10.030 provides that a mobile home park owner may apply for a variance from the requirements of the county ordinance by making a written application to the county’s zoning division. The administrative flexibility built into the county ordinance by provisions like the one just cited indicates to us that this ordinance will not impermissibly interfere with the Housing Authority’s operation of the senior citizens’ mobile home park.

## CONCLUSION

The Housing Authority is not exempt from public health and safety legislation like this county ordinance because the legislature has not shown an intent in chapter 315 of NRS to allow the Housing Authority to occupy this particular field to the exclusion of all other local regulation. There is nothing in chapters 315 and 461A of NRS that indicates that the county ordinance is contrary to either chapter. Additionally, the rules of statutory construction requiring that statutes like [NRS 315.490](#) be given their

plain meaning and be interpreted harmoniously require that chapters 315 and 461A of NRS, as well as title 27 of the Clark County Code, be construed together to give effect to the language of all their provisions to the extent possible.

If there are certain provisions of the county ordinance, like Clark County Code section 27.06.055, which may not be compatible with the operation of the Housing Authority's senior citizens mobile home park, the county ordinance provides a means by which a variance from those provisions can be obtained in

accord with Clark County Code section 27.10.030. Given the contract between the Housing Authority and the County dated June 15, 1982, it appears an appropriate variance will be granted.

Sincerely,

BRIAN McKAY  
Attorney General

By: Scott W. Doyle  
Deputy Attorney General

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**OPINION NO. 88-12 COLLECTION AGENCIES:** Six-month residency requirement in [NRS 649.105\(2\)](#) violates privileges and immunities clause of U.S. Constitution and is unenforceable.

Carson City, October 7, 1988

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

Dear Mr. Walshaw:

You have requested an opinion of this office concerning the residency requirement imposed on applicants for collection agency licenses. In light of a recent judicial declaration that a similar requirement imposed on applicants for real estate licenses violates the privileges and immunities clause of the United States Constitution, you have asked the following:

**QUESTION**

Does the requirement of [NRS 649.105\(2\)\(a\)](#) that an applicant for a collection agency's license be a resident of the State of Nevada for at least six months before the application violate the privileges and immunities clause of the United States Constitution?

**ANALYSIS**

[NRS 649.105\(1\)](#) requires an applicant for a collection agency license to file with the commissioner of financial institutions, concurrently with the application, a bond in the sum of \$25,000. Section 2 of this statute requires that the principal on the bond be the applicant "who must have been a resident of the State of Nevada for a least six months before the application." Although [NRS 649.085](#), which describes the qualifications of an applicant, does not contain a residency requirement, one cannot obtain a license without a bond and cannot obtain a bond without having been a resident for at least six months. Nonresidents are therefore flatly prohibited from receiving a license and are excluded from the operation of a collection agency in Nevada. *See also* Nev. Op. Att'y Gen. No. 223 (May 6, 1965).

The privileges and immunities clause of the United States Constitution provides in pertinent part:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. article IV, section 2, clause 1.

We believe the answer to your question is controlled by the Supreme Court's decision in *New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L. Ed.2d 205 (1985). In *Piper*, the Court invalidated, on privileges and immunities grounds, a rule of the New Hampshire Supreme Court which required applicants for admission to the state bar to be residents of New Hampshire or file a statement of intent to reside there. Noting that the clause was intended to create a national economic union, the Court, quoting from *Toomer v. Witsell*, 334 U.S. 385 (1948), stated that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Piper* at 280.

Having concluded that the practice of law is a right protected by the privileges and immunities clause, the Court went on to discuss whether the residency requirement violated the clause, noting that its protection is not an absolute:

The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in

treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective [citation omitted]. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

*Piper* at 284. The Court in *Piper* held that none of the reasons advanced by the state to justify its refusal to admit nonresidents to the bar met the test of "substantiality" and that the means chosen did not bear the necessary relationship to the state's objective. *Id.* at 285.

The Court first found that there was no evidence to support the state's claim that nonresidents would be less likely to keep abreast of local rules and procedures, noting that, unless a lawyer has, or anticipates, a considerable practice in New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues:

Because it is markedly overinclusive, the residency requirement does not bear a substantial relationship to the State's objective. A less restrictive alternative would be to require mandatory attendance at periodic seminars on state practice.

...

New Hampshire's 'simple residency' requirement is underinclusive as well, because it permits lawyers who move away from the State to retain their membership in the bar. There is no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the State.

*Id.* at 285, n.19.

The Court also rejected the notion that nonresident bar members would be less likely to behave ethically, noting that nonresidents would still be subject to New Hampshire's rules and discipline. The Court found more merit to the state's assertion that a nonresident member of the bar at times would be unavailable for court proceedings, but concluded that this type of problem did not justify the exclusion of all nonresidents from the state bar:

One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire. Furthermore, in those cases where the nonresident counsel will be unavailable

on short notice, the State can protect its interests through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

*Id.* at 286-87.

The final reason advanced by the state in *Piper* to support its residency requirement was that nonresident members of its bar would be disinclined to do their share of *pro bono* and volunteer work. In rejecting this argument, the Court noted that the state could require resident and nonresident alike to represent indigents or perhaps to participate in formal legal-aid work. *Id.* at 287.

In the wake of *Piper*, lower courts have consistently held that the blanket exclusion of nonresidents from engaging in business in a particular state violates the privileges and immunities clause. *See, e.g., Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985) (insurance consultants); *State v. Shunneson*, 743 P.2d

1275 (Wyo. 1987) (fish and game outfitters); *Stanley v. Missouri State Bd. of Law Examiners*, 616 F. Supp. 142 (D.C. Mo. 1985) (attorneys).

Turning to the residency requirement set forth in [NRS 649.105\(2\)](#), we believe that those persons wishing to engage in the debt collection business are entitled to the protections afforded by the privileges and immunities clause. The right to pursue one's chosen livelihood is one of the most fundamental privileges protected by the clause. *State v. Shunneson*, *supra*, at 1277; *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984).

With that in mind, it is difficult to conceive of any court failing to apply the holding and reasoning of the *Piper* decision to invalidate Nevada's blanket exclusion of nonresidents from the debt collection business. The legislature's declared purpose in enacting the provisions of [NRS 649 was](#) to:

- (a) Bring licensed collection agencies and their personnel under more stringent public supervision;
- (b) Establish a system of regulation for the purpose of insuring that persons using the services of a collection agency are properly represented;
- (c) Discourage improper and abusive collection methods; and
- (d) Insure adequate, efficient and competitive collection agencies for each community's convenience.

[NRS 649.045\(2\)](#).

As in *Piper*, the state's concern that nonresidents would be less likely to keep abreast of local rules, practices and customs would likely be considered an

insufficient reason for the exclusion. Those concerns would be deemed adequately addressed by existing laws intended to ensure the competency of those operating collection agencies in Nevada. The nonresident would have to possess the same professional and personal qualifications required of Nevada residents. *See Piper*, 470 U.S. at 284, n.16. Similarly, there is no reason to assume that the resident licensee would be less likely to behave ethically. As noted in *Piper*, the standards of conduct required by law would apply to residents and nonresidents alike.

Furthermore, less restrictive means are available to ensure that a licensee's nonresident status does not frustrate the State's objective of regulating the debt collection business in the public interest. The state could, for example, require as a condition of licensure the appointment of the commissioner as the nonresident licensee's agent for service of process. *See State v. Shunneson*, 743 P.2d 1275, 1278 (Wyo. 1987). In addition, we believe the state could properly require that a nonresident maintain an office in this state for the operation of his collection business and that records of Nevada collection actively be maintained here.<sup>1</sup> *See Matter of Arthur*, 415 N.W.2d 168 (Iowa 1987); *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 429 (4th Cir. 1987) *aff'd* 487 U.S. \_\_\_, 108 S.Ct. 2260, 101 L. Ed.2d 56 (1988); *Cf.*

<sup>1</sup> The requirement of [NRS 649.355\(2\)](#) that a licensee maintain a separate bank account in a bank located in this state would also ensure some continuing contact with the state by the nonresident licensee.

*Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862-65 (4th Cir. 1985) (full-time practice requirement of Virginia rule applicable to attorneys does not constitute economic protectionism in violation of commerce clause).

In light of the *Piper* decision, we are constrained to conclude that none of the reasons which might properly be offered for discriminating against nonresidents are substantial enough to justify their blanket exclusion from the debt collection business in Nevada.<sup>2</sup> The residency requirement does not bear the necessary relationship to the state's objective in regulating the business in the public interest, considering the availability of less restrictive means of achieving that objective. We conclude, therefore, that the requirement of [NRS 649.105\(2\)\(a\)](#) that an applicant for a collection agency license be a resident of the State of Nevada for at least six months before the application violates the privileges and immunities clause of the United States Constitution.

### CONCLUSION

The right to pursue one's chosen livelihood, including the right to engage in the debt collection business, is one of the most fundamental privileges protected by the privileges and immunities clause of the United States Constitution. A state may not discriminate against a nonresident in pursuit of his livelihood unless the reasons for doing so are substantial and the discrimination bears a close relationship to the state's objective. The interest of the State of Nevada in regulating the collection business in the public interest does not justify a blanket exclusion of all nonresidents from engaging in the business, considering the availability of less restrictive means for accomplishing that objective.

The residency requirement set forth in [NRS 649.105\(2\)\(a\)](#) therefore violates the privileges and immunities clause of the United States Constitution and is unenforceable.

Very truly yours,

BRIAN McKAY  
Attorney General

By: Douglas E. Walther  
Deputy Attorney General

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### OPINION NO. 88-13 GAMING; TRANSFER OF LOCATION OF LICENSED OPERATION:

A state gaming licensee must apply for a new gaming license prior to transferring its gaming operation from one establishment to another.

Carson City, October 14, 1988

Mr. Michael D. Rumbolz, Chairman, State Gaming Control Board, 4220 South Maryland Parkway, Las Vegas, Nevada 89158

Dear Mr. Rumbolz:

You have requested an opinion from this office regarding the following:

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<sup>2</sup> We note that erecting barriers to nonresident collection agencies for the purpose of protecting resident licensees from competition is not a substantial reason for discriminatory treatment and in fact is the kind of economic protectionism which the privileges and immunities clause was designed to prevent. *Piper*, 470 U.S. 274, 285, n.18.

## QUESTION

Must a state gaming licensee apply for a new gaming license when it transfers its gaming operation from one establishment to another?

## ANALYSIS

This question was addressed in a previous Attorney General's Opinion. *See* Nev. Op. Att'y Gen. No. 387 at 393-94 (May 26, 1958). The author of that opinion correctly observed that certain sections of the Nevada Gaming Control Act are "powerfully indicative of the intention that the license is issued only for the particular location initially authorized." *Id.* at 394.

We agree with that observation. [NRS 463.200\(2\)\(b\)](#) provides that "[t]he application for a license shall include . . . [t]he location of his place or places of business." [NRS 463.200\(2\)\(b\)](#) (1987). Section 463.260(1) provides that "[a]ll licenses issued under the provisions of this chapter shall be posted by the licensee and kept posted at all times in a conspicuous

place in the establishment *for which issued* until replaced by a succeeding license." [NRS 463.260\(1\)](#) (1987) (emphasis added).

The Nevada Gaming Commission regulations are even more "powerfully indicative of the intention that the license is issued only for the particular location initially authorized." Nev. Op. Att'y Gen. No. 387 at 394 (May 26, 1958). Regulation 3.010 provides that "[t]he board may recommend that an application for a state gaming license be denied, and the commission may deny the same, if the board or the commission deems that the *place or location for which the license is sought* is unsuitable for the conduct of gaming operations." Nev. Gaming Comm'n Reg. 3.010 (1988) (emphasis added). Regulation 4.050 provides that "a separate application is required for each establishment for which a gaming license is sought, irrespective of the ownership of such establishment, as defined in [NRS 463.0169](#)." Nev. Gaming Comm'n Reg. 4.050 (1988). Section 463.0169 of the NRS, which was added to the Nevada Gaming Control Act in 1967, defines "licensed gaming establishment" as "*any premises licensed* pursuant to the provisions of this chapter wherein or whereon gaming is done." [NRS 463.0169](#) (1987) (emphasis added). This statute was added to the Act after the 1958 opinion of this office.

The Nevada Gaming Commission was not established until 1959, but Regulations 3.010 and 4.050 were in effect, in substantially similar form, as regulations of the Nevada Tax Commission, at the time the previous Attorney General's Opinion addressing this issue was written. Rules and Regulations of the Nev. Gaming Control Bd. & Tax Comm'n 3.010, 4.040 (Feb. 22, 1956). Nevertheless, the author of that opinion failed to consider Regulations 3.010 and 4.050 in reaching his conclusion that "there is no basis in the law for the requirement that the licensee whose qualifications

have already been established must obtain a new license." Nev. Op. Att'y Gen. No. 387 at 394 (May 26, 1958). In light of the "powerfully indicative" provisions of the Nevada Gaming Control Act and the Nevada Gaming Commission Regulations, and especially Regulation 4.050 which specifically requires a separate application for each "establishment," we cannot agree with the conclusion reached in the previous Attorney General's Opinion.<sup>1</sup>

Even in the absence of Regulation 4.050, we would find that a new license is required when a gaming operation is transferred from one establishment to another. The Board and Commission balance various factors, including the location of the proposed gaming operation, in determining whether to grant a gaming license. An application for a gaming license must include the location of the proposed gaming operation. [NRS 463.200\(2\)\(b\)](#) (1987). Moreover, pursuant to Regulation 3.010, the Board and Commission are specifically empowered to consider the suitability of the location in determining whether to grant a gaming license.

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<sup>1</sup> In a previous unpublished opinion, this office concluded that a transfer of a state gaming license violated Regulation 4.050. Memorandum from Mark Lerner to John A. Godfrey at 1 (June 6, 1984).

The author of the previous opinion stated that “[w]e are not saying here that the location has no bearing upon the issuance of a license or of its continuance, but rather that the license is primarily personal with the individual; that principally it is the person and not the place that is being licensed.” Nev. Op. Att’y Gen. No. 387 at 394 (May 26, 1958). While we agree that the suitability of the individuals and entities seeking licenses is usually of greater

significance than the suitability of the proposed location, the suitability of the location is one of the factors which the Board and Commission weigh in making their determinations. The alteration of any factor, including location, may be sufficient to tip the scales against licensing. Thus, the Board and the Commission must be given a new opportunity, in the form of an application for a new license, to balance all of the appropriate factors.

### CONCLUSION

The Nevada Gaming Control Act and the Nevada Gaming Commission regulations are “powerfully indicative of the intention that [a state gaming license] is issued only for the particular location initially authorized.” Nev. Op. Att’y Gen. No. 387 at 394 (May 26, 1958). Regulation 4.050 specifically requires separate applications for each establishment. Nev. Gaming Comm’n Reg. 4.050 (1988). Finally, the Board and Commission delicately balance a number of factors, including the suitability of the proposed location, in determining whether to issue a state gaming license. Any change in location may be sufficient to alter that balance and tip the scale against the granting of a gaming license. Thus, a state gaming licensee must apply for a new gaming license prior to transferring its gaming operation from one establishment to another. To the extent that Attorney General Opinion No. 387, issued May 26, 1958, is inconsistent with this conclusion, that opinion is hereby overruled.

Sincerely,

BRIAN McKAY  
Attorney General

By: Scott Scherer  
Deputy Attorney General

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**OPINION NO. 88-14 BLOCK GRANTS; COMMUNITY SERVICES, OFFICE OF:** Decisions of state officials in administering the Community Services Block Grant Program are protected discretionary acts and are immune from suit pursuant to [NRS 41.032\(2\)](#).

Carson City, December 8, 1988

Ms. Jean Ford, Director, Nevada Office of Community Services, 1100 East William Street, Suite 117  
Capitol Complex, Carson City, Nevada 89710

Dear Ms. Ford:

You have asked this office to advise the Nevada Office of Community Services (“NOCS”) of potential tort liability to the state as administrator of a federal block grant program.

### QUESTION

Is the State of Nevada vicariously liable in tort for acts of delegate agencies that receive funds under the Community Services Block Grant Program?



## BACKGROUND

The Community Services Block Grant (“CSBG”) Program is one of seven block grant programs established in the Omnibus Budget Reconciliation Act of 1981 (“The Act”), as amended October 30, 1984, and as set forth at 42 U.S.C. sections 9901 to 9912. The Act provides statutory authority to the U.S. Secretary of Health and Human Services (“Secretary”) to make grants to states “to ameliorate the causes of poverty in communities within the State.” 42 U.S.C. § 9901. The Act further sets forth minimal federal requirements that the state agrees to comply with as part of the grant program. State statutory authority and requirements governing CSBG programs are set forth at [NRS 428.355](#) to .395.

A state must submit an application to the Secretary in order to receive CSBG funds. The governor, as the chief executive officer of the state, must provide assurances in the grant application that CSBG funds will be used for the purposes set forth in 42 U.S.C. sections 9904(c)(1) to (11). Further, state administrative expenses must not exceed 5 percent of the federal allotment or \$55,000, whichever is greater, and eligible entities must be allocated not less than 90 percent of the grant. 42 U.S.C. § 9904(c)(2)(A)—(B).

Nevada Office of Community Services is the state agency designated by statute to administer the CSBG program in Nevada. [NRS 428.365](#)(1). The Director of NOCS (“Director”) must report to the interim finance committee on CSBG money allocated in the previous fiscal year and the progress of the program in the current year. [NRS 428.365](#)(2). Funds are distributed to the 17 Nevada counties through an eligible entity in each county. *See* [NRS 428.365](#)(4). Eligible entities are defined at 42 U.S.C. § 9902(1) and in Nevada consist of the following:

1. Economic Opportunity Board of Clark County (Community Action Agency);
2. Community Services Agency of Washoe County (Community Action Agency);
3. Consolidated Agencies for Human Services in Mineral County (Limited Purpose Agency); and
4. Balance-of-state agencies where the county board of commissioners are designated as the eligible entity.

A base amount of the CSBG allotment is allocated to each eligible entity. [NRS 428.375](#)(4). Any remaining funds are distributed to all the eligible entities in proportion to the population in the county whose income is at or below the federally defined poverty level. *Id.*

NOCS is responsible for monitoring the eligible entities and delegate (authorized) agencies to ensure compliance with state assurances and federal requirements. Monitoring includes establishing fiscal control and fund accounting procedures to document the proper disbursement and accounting of federal funds for audit purposes. *See* 42 U.S.C. §§ 9904(c)(9) and 9904(f). NOCS does not, however, direct the eligible entities to provide or conduct specific activities in the local communities.

The eligible entities implement the CSBG program at the local community level by conducting local community activities or by funding delegate agencies to provide services. An application that includes a detailed description of the proposed use of the grant must be submitted by the eligible entity to NOCS. [NRS 428.375](#)(5). The application is reviewed and approved or denied based on criteria established by the director. [NRS 428.385](#)(1). Eligible entities may approve applications by delegate agencies if they are compatible with the objectives of state plans and federal requirements to ameliorate the causes of poverty in that community. [NRS 428.385](#)(2).

Public comments on a state plan for the proposed use and distribution of CSBG money for the next federal fiscal year may be presented at a public hearing held by the interim finance committee before June 1 of each year. [NRS 428.375](#)(1). The plan must include intended use and distribution of CSBG funds. *Id.* Review procedures by the director and eligible entities for applications and work plans of delegate agencies must also be included in the state plan. *Id.* The review procedures must provide the delegate agency an opportunity to make a presentation of its proposal. [NRS 428.375](#)(2).

## ANALYSIS

In 1965, the Nevada legislature waived sovereign immunity for tortious or negligent acts of the state, any agency of the state, and any political subdivision



of the state. See [NRS 41.031](#). This waiver of immunity is qualified, however, by [NRS 41.032](#) and immunity is retained for discretionary governmental acts. *State v. Webster*, [88 Nev. 690](#), 693, 504 P.2d 1316 (1972). [NRS 41.032](#) provides, in pertinent part:

[N]o action may be brought under [NRS 41.031](#) or against any immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:

...

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . .

The substance of the provision that retains discretionary act immunity in [NRS 41.032\(2\)](#) is identical to that of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1965). *Frank Briscoe Co., Inc. v. County of Clark*, 643 F. Supp. 93, 97 (D. Nev. 1986). The Nevada Supreme Court, like the federal courts, refers to the stage at which the governmental decision or act occurs to determine if immunity is waived. *Harrigan v. City of Reno*, [86 Nev. 678](#), 681, 475 P.2d 94 (1970).

Discretionary acts usually are made at the planning or policy stage. *Id.* at 680; *Webster*, 88 Nev. at 693. Such acts require personal deliberation, decision, and judgment. *Travelers Hotel v. City of Reno*, [103 Nev. 343](#), 741 P.2d 1353, 1354 (1987); *Parker v. Mineral County*, [102 Nev. 593](#), 595, 729 P.2d 491 (1986). Tort liability will not arise even where such discretion is abused. *Hagblom v. State Dir. of Motor Vehicles*, [93 Nev. 599](#), 604, 571 P.2d 1172 (1977). On the other hand, operational acts or decisions involve the actual construction or operation of a project. *Harrigan*, 86 Nev. at 681. A public entity is obligated to exercise due care and to act reasonably once the decision is made to perform an operational function. *Webster*, 88 Nev. at 693. The state, its agencies and employees

are subject to liability where negligent acts occur in the operational phase of a decision. *Hagblom*, 93 Nev. at 604.

The distinction between discretionary and operational functions is sometimes obscure because operational acts involve some exercise of discretion. *State v. Silva*, [89 Nev. 911](#), 914, 478 P.2d 591 (1970); *Hagblom*, 93 Nev. at 604. However, limitations upon the waiver of immunity are to be strictly construed, and only where discretion alone is involved is there immunity from suit. *Silva*, 86 Nev. at 914.

In our letter opinion dated September 18, 1985, we concluded that as state administrator, NOCS may apply for federal CSBG funds, receive the allotment, use a certain percentage for administration costs, make grants to eligible entities, and must ensure compliance with federal and state statutory requirements. An inherent and obvious conflict exists if NOCS were to serve as both the state administrator and as an eligible entity. As such, NOCS is not entitled to receive funds as an eligible entity; therefore, it may not determine the specific services to be provided nor conduct local community services block grant activities. *Id.*

Determination of whether certain acts are discretionary or operational in nature requires an analysis of the state's involvement in the CSBG program. The court in *Hagblom* recognized that administrative acts, such as promulgating regulations and the manner of conducting internal agency investigations are immune discretionary acts of the agency. *Hagblom*, 93 Nev. at 604. Thus, the administrative decisions made by state officials to participate in the federal CSBG program and to formulate regulations and criteria to administer the CSBG program in Nevada are discretionary governmental functions and fall within the purview of immunity provided in [NRS 41.032\(2\)](#).

A state agency's administrative decision not to provide security or to deny special permits is a discretionary governmental function. See *Bruttomesso v. Las Vegas Metro. Police*, [95 Nev. 151](#), 153, 591 P.2d 254 (1979); *Travelers Hotel*, 741 P.2d at 1354-55. Similarly, NOCS's determination of which proposed activities meet federal and state requirements involves the personal deliberation, decision and judgment of state officials. Various factors must be balanced in order to determine whether CSBG funds may be used for certain activities. This determination is an immune discretionary function as that term is used in [NRS 41.032\(2\)](#). However, federal fiscal and civil liability may attach to NOCS if the Secretary

determines that CSBG funds were approved in violation of federal requirements. *See* 42 U.S.C. §§ 9905(a), 9906 and 9908.

An eligible entity also enjoys discretionary act immunity for administrative determinations of what local services to provide and what agency is to conduct the activity. These decisions also include the determination of whether to fund a delegate agency. The activity becomes operational in nature, however, once an affirmative decision is made to conduct the activity.

The State is obligated to exercise due care and act reasonably once an affirmative decision is made to provide services or conduct local community activities. *See Harrigan*, 86 Nev. at 681; *Foley v. City of Reno*, [100 Nev. 307](#), 309, 680 P.2d 975 (1984). NOCS may not perform operational acts because of the inherent conflict that would exist in acting as the administrator of the CSBG program and receiving funds as an eligible entity. Thus, no standard of reasonableness or duty to exercise due care is imposed upon NOCS for services rendered by an eligible entity.

In *Foley*, the court held that once a decision was made to construct an intersection and to install the crosswalk, the city was obligated to exercise due care

“to make certain that the intersection met the standard of reasonable safety for those who chose to use it.” *Foley*, 100 Nev. at 309. The CSBG program becomes operational in nature once affirmative decisions are made to conduct local community services or activities. Due care must be exercised to insure that standards of reasonable safety are met for individuals who receive benefits of the CSBG program. Thus, tort liability may arise for negligent acts of eligible entities and delegate agencies at the community level for activities funded by the CSBG program.

An eligible entity may be liable for negligent acts of a delegate agency if the entity assists the agency in conducting local community activities. Damages for tortious conduct are limited to \$50,000 where the acting entity or agency is an agency or political subdivision of the state. [NRS 41.035](#). This limitation on damages is not applicable, however, where the acts are performed by a non-state entity.

Eligible entities and delegate agencies may desire to obtain insurance for potential liability that may arise in conducting local community activities. Eligible entities may require delegate agencies to obtain insurance for projects where the entity makes an affirmative act because of potential tort liability. However, the decision to obtain or require insurance is an administrative decision of the funding eligible entity.

## CONCLUSION

NOCS is not vicariously liable in tort for acts of delegate agencies that receive CSBG funds. The administration of the CSBG program is a discretionary governmental function and is protected from tort liability by [NRS 41.032](#). NOCS does not determine what activity the delegate agency is to provide, nor the manner in which it is to be performed. Therefore, no tort liability for operational acts may be imposed on NOCS for local community activities. Tort liability may attach only to operational acts of the State. The

CSBG program becomes operational in nature when the eligible entities and delegate agencies perform affirmative acts to conduct local CSBG activities. A duty exists for these entities and agencies to exercise due care in conducting local community activities. Thus, eligible entities and delegate agencies may be liable for injuries that arise from a breach of this duty.

Sincerely,

BRIAN McKAY  
Attorney General

By: Cheri K. Emm  
Deputy Attorney General

**OPINION NO. 88-15 CONFIDENTIALITY; CHILD ABUSE AND NEGLECT; CRIMINAL LAW:** Information reported in accordance with [NRS 432B concerning](#) child abuse remains confidential after the death of the abused child and can never be released to anyone other than the parties and persons named in the chapter.

Carson City, December 14, 1988

Mr. Wayne Teglia, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Teglia:

You have asked our advice and response to the following:

### QUESTION

Do the reports, information, investigation, and other data reported, created and discovered in accordance with chapter 432B of the NRS, for the protection of children from abuse and neglect, remain confidential after the death of the abused child?

### ANALYSIS

In 1985, the 63rd session of the Nevada State Legislature considered and passed Assembly Bill 199 for the protection of children from abuse and neglect. Assembly Bill 199 was subsequently codified, in part, as chapter 432B of the NRS.

Section 432B.220 requires that specified persons discovering evidence of child abuse or neglect must immediately make a report to an agency which provides protective services for children or to a law enforcement agency when there is reason to believe that a child has been abused or neglected. [NRS 432B.220](#)(1) (1987). The section specifically details the persons

who must make those reports. The law requires physicians, attorneys and other professionals to make these reports even though such information may be confidential due to various testimonial privileges accorded these professionals. *See generally* [NRS ch. 49](#) (1987). As such, [NRS 432B.250](#) prohibits these persons from invoking the testimonial privileges granted under chapter 49 of the NRS, so that they can comply with the reporting requirements of the statute.

In order to encourage that such confidential or otherwise privileged information be reported to the appropriate agency, such information is rendered confidential by the act. Section 432B.280 specifically provides:

1. Reports made pursuant to this chapter, as well as records concerning these reports and investigations thereof, are confidential.
2. Any person, law enforcement agency or public agency, institution, or facility who willfully releases data or information concerning such reports and investigations, except:
  - (a) Pursuant to a criminal prosecution relating to abuse or neglect of a child; and
  - (b) To persons or agencies enumerated in [NRS 432B.290](#), is guilty of a misdemeanor.

[NRS 432B.280](#) (1987). Thus, information reported under this statute can only be disseminated to certain specified agencies and individuals under the act. Section 432B.290 provides for release of data or information under the act under specific circumstances to a very select group of persons or agencies including:

1. The treating physician;
2. A person authorized to place a child into protective custody;

3. The agency responsible for the treatment of a child, victim or adult perpetrator;
4. A district attorney or law enforcement officer who requires the information in connection with an investigation or prosecution;
5. A court;
6. A researcher;
7. The child's guardian ad litem;
8. A grand jury;
9. A protective service agency;
10. A child protection team;
11. A parent or guardian of child victim (in certain cases);
12. The child when he reaches 18;
13. A licensing agency; or,
14. A state or local officer with written consent of parent.

The law does *not* provide for the release of any such information to newspapers, reporters or other members of the media. As is the intent of the act, the statute limits the release of such information to a very select number of persons and agencies. The question remains, however, whether such information can be released to agencies or persons not enumerated in [NRS 432B.290](#) once the child in question has died.

The Nevada Supreme Court has never considered the question of the confidentiality of the reports made in compliance with this act. The legislative history of the act does, however, lend some minimal guidance as to its interpretation.

The Joint Senate and Assembly Committees on the Judiciary, in consideration of A.B. 199, never discussed the sections concerning confidentiality which became [NRS 432B.280](#) and [432B.290](#). The Senate Committee on the Judiciary, in its consideration, however, did briefly discuss the issue of confidentiality. Christina Wise, Deputy Director of the Department of Human Resources, testified in support of the bill on April 25, 1985. The Committee minutes reflect in part:

Ms. Wise stated, 'section 26 sets forth that reports are confidential and that any willful release of that information will result in a misdemeanor, which is in current statute.' Senator Wagner asked, 'has there been any problem with this provision on keeping those reports confidential, the ones that have been compiled to this date . . . ?' Mr. Stone answered, 'I've never heard of one being released.' Ms. Wise continued, 'section 27 enumerates who may receive those reports. This section has not been specifically changed from what is in current statute, except for subsection (n), page 8, line 17, 'with written consent of the parent, any state or local officer or legislator authorized to investigate the activities or programs of an agency, if the identity of the reporting party is kept confidential, and that officer, legislator, or member of the family is not involved in that report.'

Senate Committee on the Judiciary, Child Welfare Act, Legislative History 85-3, A.B. 199 of the 63rd session at 271-72 (April 25, 1985).

The only legislative history is that the Senate Committee on the Judiciary had no notice of any such confidential information ever being released and it was their intent that, except for the specific instances enumerated by the statute, the information not be released.

In support of passage of the act, Jerry Nims, a psychologist, gave the committee a copy of an article from the *Family Law Quarterly*. See Robert Weisberg and Michael Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform, *Family Law Quarterly*, vol. XVIII, no. 2 at 143-212 (Dec. 1984) [hereinafter cited as Weisberg & Wald]. The article in question speaks

directly to the issue of the nondisclosure of information provided under child abuse reporting statutes. The article makes the distinction between evidentiary privileges, such as attorney-client communications and doctor-patient communications, and nondisclosure laws. While testimonial privileges only generally apply in the courtroom setting, nondisclosure laws apply both inside and outside of court proceedings. *Id.* at 145.

Chapter 49 of the NRS provides that information provided to certain professionals under certain circumstances is privileged from revelation in a court of law. These include the lawyer-client privilege, the accountant-client privilege, the doctor-patient privilege, the marriage and family therapist-client privilege, social worker-client privilege, the confessor-confessant privilege, certain news media privileges and the husband-wife marital privileges. [NRS 49.015-.405](#) (1987). Again, those privileges extend only to the revelation of the privileged information in a court of law. The law of privileges focuses on the relationship between professional persons, and their clients. The intent is that the client or patient can disclose information relevant to their medical care or legal representation with the knowledge that the information will not be disclosed to third parties or somehow used against them. Weisberg & Wald, *supra*, at 157. These testimonial privileges can be waived by the patient or client. For a general discussion of the law of privileged communications, *see generally McCormick On Evidence* at 151 to 223 (2d ed. 1972).

Nondisclosure statutes must be distinguished from testimonial privileges, however, as their intent and scope is completely different. Nondisclosure laws focus on a different relationship than testimonial privileges:

Nondisclosure laws focus on the confidential information that people must give these institutions in order to obtain their services; the laws aim to protect this

information from indiscriminate disclosure that might prove harmful or embarrassing to the recipient of these services to reduce the collection and distribution of this confidential information to the minimum required by the agency or institution in providing its service.

Weisberg & Wald, *supra*, at 166. Nondisclosure laws, therefore, have their primary effect *outside* litigation, which is to prevent the disclosure of confidential information by the receiving agency to other persons, agencies or institutions.

A nondisclosure law, where applicable, will unequivocally operate to bar an employee of the receiving agency from disclosing information about child abuse and neglect, other than information required under a mandatory reporting law, to a child protection agency engaged in the preliminary investigation without any immediate plans to go to court.

*Id.* at 166.

Additionally, a distinction has to be made between the enforcement of testimonial privileges and nondisclosure laws. Testimonial privileges prevent the disclosure of the information in a court of law, while nondisclosure laws are generally enforced by civil or criminal penalties such as the penalty contained within [NRS 432B.280](#), making the unauthorized disclosure of the reported information a misdemeanor.

Lastly, while a client or patient may waive the protection of a privilege by allowing the information to be disclosed to a third party, someone protected by a nondisclosure law will not usually be deemed to have waived that protection except by some formal method authorizing disclosure established by statute or regulation. Weisberg & Wald, *supra*, at 167. In this case, the disclosure of the information is limited to those parties and persons listed within [NRS 432B.290](#).

Under the act, the involved juvenile could have received that information once she reached her majority and then released it. She personally had no other right to its content, nor could she authorize its dissemination to persons or parties outside of [NRS 432B.290](#). The nondisclosure law makes the *information itself* privileged and does not protect just the confidential relationship between parties, such as the attorney-client or doctor-patient privilege.

In *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987), the United States Supreme Court considered a Pennsylvania statute whereby child abuse reports were rendered confidential. In that case, a criminal defendant claimed that he was entitled to review reports of child abuse filed with the welfare department in defense of his conviction for involuntary sexual intercourse, rape, incest, and corruption of a minor. The welfare department had declined to release those records based upon the confidentiality statute. Even in light of a criminal defendant's right to confront his accuser, the court held that the defense counsel was not entitled to examine confidential information in the file. The court held that failing to disclose the

confidential information in the file did not violate the confrontation clause of the sixth amendment. The Court explained its decision:

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. If the CYS [Children and Youth Services] records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because often there are no witnesses except the victim. A child's feelings of

vulnerability and guilt, and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse shall also be more willing to come forward if they know their identities will be protected. Recognizing this, the Commonwealth, like all other states [footnote omitted] has made a commendable effort to assure victims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential information had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because the trial court may not recognize exculpatory evidence. Neither precedent nor common sense require such a result.

*Id.* at 480 U.S. 60, 107 S.Ct. at 1003-04.

Even when tested against the right to confront one's own accusers, the United States Supreme Court held defense counsel could not review those confidential records. Given the state's compelling interest in preventing child abuse and maintaining the confidentiality of that information, the State of Nevada, like the rest of the states, has made such information confidential and available only to certain designated persons and parties. This is not a testimonial privilege which may be waived or which may be extinguished upon the death of the privileged person, but is a nondisclosure law which prohibits the release of the information itself. The information, investigations and reports made in terms of [NRS 432B.220](#) are confidential and can only be released to the persons specified in [NRS 432B.290](#). This information remains

confidential regardless of the death of the child in question. As such, anyone willfully releasing such information has committed a misdemeanor in accordance with [NRS 432B.280\(2\)](#).

## CONCLUSION

Chapter 432B of the NRS provides for the protection of children from abuse and neglect. Certain persons and agencies are required under the terms of [NRS 432B.220](#) to provide the appropriate state agency with information regarding suspected child abuse. In order to encourage the reporting of that information, the statute makes it confidential and limits its disclosure to a statutorily listed set of persons and agencies. Persons are encouraged to report child abuse knowing that the information will *always* remain confidential. The persons making the report and the names of the children considered remain confidential and protected from general dissemination to the public regardless of whether the child victim is alive.

Sincerely,

BRIAN McKAY  
Attorney General

By: Kevin G. Higgins  
Deputy Attorney General



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**OPINION NO. 88-16 WATER; STATE WATER PERMITS; COLORADO RIVER COMMISSION; SOUTHERN NEVADA WATER SYSTEM:** State water permits are not legally required for original appropriation of Colorado River water under federal law. Nor are such permits required for entities having water delivery contracts with the Colorado River Commission. The Colorado River Commission is authorized under [NRS 533.372\(2\)](#) and 538.171(2) to approve or disapprove applications for state permits for subsequent appropriations of Colorado River water.

Carson City, December 13, 1988

Mr. Jack L. Stonehocker, Director, Colorado River Commission, 1515 East Tropicana Avenue, Suite 400, Las Vegas, Nevada 89119

Dear Mr. Stonehocker:

You have requested the opinion of this office on various questions regarding the appropriation of Colorado River water under [NRS 533.325](#) to .445, inclusive.

#### QUESTION ONE

Is the Colorado River Commission required to apply for and receive a permit from the State Engineer to appropriate Colorado River water under its contracts with the Secretary of the Interior?

#### ANALYSIS

A similar question was put to the Attorney General in 1972 by Mr. Roland D. Westergard, then State Engineer, and now Director of the State Department of Conservation and Natural Resources. His question asked whether the United States Supreme Court opinion and decree in *Arizona v. California*, 373 U.S. 546 (1963), and 376 U.S. 340 (1964), eliminated the

requirement that persons desiring to appropriate water from the Colorado River comply with the provisions of Nevada's water laws, [NRS 533.325](#) to [533.435](#), inclusive. *See* Nev. Op. Att'y Gen. No. 107 (December 14, 1972). The Attorney General's answer to that question is relevant to our analysis today.

For over half a century—since 1935—the Colorado River Commission has been empowered to:

. . . receive, protect and safeguard and hold in trust for the State of Nevada all water and water rights, and all other rights, interests or benefits in and to the waters of the Colorado River . . . held by or which may accrue to the State of Nevada under . . . any Act of Congress of the United States . . . .

[NRS 538.171\(1\)](#). In 1928 the Congress had enacted the Boulder Canyon Project Act, 43 U.S.C. sections 617 to 617t, which allocated 300,000 acre-feet of Colorado River water per year to the State of Nevada for consumptive use within the state. On March 30, 1942, the Secretary of the Interior and the Colorado River Commission, acting pursuant to [NRS 538.171\(1\)](#), entered into a contract for the delivery of Nevada's share of the water. Since that time, portions of this share have been allocated to various initial users within southern Nevada under tri-party contracts signed by the Secretary of the Interior and the Colorado River Commission. *See* [NRS 538.171\(2\)](#). All of these contracts, including the Commission's March 30, 1942, contract, as amended, were entered into by the Secretary of the Interior pursuant to section 5 of the Boulder Canyon Project Act.

Under [NRS 533.325](#) any person who desires to appropriate any of the state's public waters—which includes water from the Colorado River—must obtain a permit from the State Engineer. With respect to Colorado River water, [NRS 533.372\(2\)](#) requires the

approval of both the State Engineer and the Colorado River Commission before a permit may be issued. (See Question No. 3 below.) In his 1972 opinion to the State Engineer, the Attorney General found that a literal reading of “this broad discretionary authority in these two state agencies to approve or disapprove water appropriation from the Colorado River” would conflict directly with federal law. Nev. Op. Att’y Gen. No. 107 at 120 (December 14, 1972).

Reviewing the United States Supreme Court’s opinion and decree in *Arizona v. California*, supra, the Attorney General pointed out that in section 5 of the Boulder Canyon Project Act, as interpreted by the Supreme Court, Congress gave full and complete authority to the Secretary of the Interior through his section 5 contracts “to effectuate the original division of [Colorado River] waters through the making of contracts for its delivery,” and that in doing so, “the secretary is not bound by or required to follow state law.” Nev. Op. Att’y Gen. No. 107 at 120 (December 14, 1972). The Court had used strong and sweeping language in its conclusion: “But where the secretary’s contracts, as here, carry out a Congressional plan for the complete distribution of water to users, *state law has no place.*” 373 U.S. at 588 (emphasis added).

Several years after the Attorney General issued Opinion No. 107, the United States Supreme Court affirmed and clarified that conclusion:

In *Arizona v. California*, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate reclamation project on the Colorado River. After reviewing the legislative history of the Boulder Canyon Project Act, 43 U.S.C. § 615 *et seq.*, the Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary’s power to determine with whom and on what terms water contracts would be made.

*California v. United States*, 438 U.S. 645 at 674, 675 (1978) (footnotes omitted).

In footnote 28, the Court recalled that the Special Master in *Arizona v. California* had agreed with the states’ contention that the Boulder Canyon Project Act could not interfere with the rights they had at the time of its enactment “either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders.” The Court, however, had disagreed with the Special Master and rejected the states’ claim as it regarded the waters of the Colorado River. *California v. United States*, supra, at 675. The clarification comes in footnote 29 where the Court points out that even though it had concluded in *Arizona v. California* that the power of the states was so limited, it had noted in the case “the Project Act ‘plainly allows the states to do things not inconsistent with the Project Act or with federal control of the river.’ 373 U.S. at 588, 83 S.Ct. at 1491.” *California v. United States*, supra, at 675. Thus, it is *inconsistent* state law that has no place “where the Secretary’s contracts, as here, carry out a Congressional plan for the complete distribution of water to users. . . .” *Arizona v. California*, 373 U.S. at 588.

Would it be inconsistent with the Project Act or with federal control of the river for the State Engineer to require those who initially appropriate Colorado River water under a “section 5 contract” with the Secretary of the Interior to obtain a state water permit? In our opinion, it would be if that permit purported to authorize the diversion of Colorado River water or purported to set terms and conditions for the diversion which added to or were inconsistent with the

terms and conditions set out in the secretary’s contracts. The essential element of a Nevada water permit is that it authorizes the permittee to divert water and put it to a beneficial use. The permit usually specifies the amount which may be continuously diverted and the place and priority of the diversion. In some instances the permit conditions the beneficial uses to which the water may be put. These same elements are covered by the “section 5 contracts.” In those contracts, the Secretary of the Interior agrees to deliver Colorado River water to the contractor in quantities set by the secretary, at points of diversion approved by him and subject to a priority system and to limitations on use established by him. Under the contracts, the diversion is subject also to the provisions of various federal laws and generally to federal control over the river. Changes in the places or points of diversion, which [NRS 533.325](#) require the State Engineer to approve, must be approved by the Secretary of the Interior. Under [NRS 533.395](#) and [533.410](#), the State Engineer is required to cancel a permit under certain circumstances. The secretary’s contracts are for “permanent



service” and in them the United States has provided its own circumstances under which a contractor may be refused permission to divert the water. *See, e.g.*, articles 5, 6, 11, 14 and 17 of the Contract for Delivery of Water between the United States Bureau of Reclamation and the Colorado River Commission, dated March 30, 1942, as amended. Clearly, the State Engineer could not, as we concluded in Opinion No. 107, deny a permit to a contractor, or impose additional or inconsistent terms and conditions on the diversion, without “interfer[ing] with the Secretary’s power to determine with whom and on what terms water contracts would be made.” *California v. United States*, supra, at 675. Even if the terms and conditions of the permit were identical to those of the contract, the permit would still interfere if it purported to authorize the diversion in the first place.

On October 22, 1965, Congress enacted the Southern Nevada Water Project Act, 43 U.S.C. section 616. Section 1 of the act authorized the Secretary of the Interior to construct, operate and maintain certain water diversion and distribution facilities “required to provide water from Lake Mead on the Colorado River for distribution to municipalities and industrial centers within Clark County, Nevada.” 43 U.S.C. § 616ggg. (These “federal facilities” of the Southern Nevada Water Project are now known as the Robert B. Griffith Water Project. The water treatment plant is a “state facility” known as the Alfred Merritt Smith Water Treatment Facility; together the two facilities are known as the Southern Nevada Water System.) Section 3 of the act specifically authorized the secretary “to enter into a contract with the State of Nevada, acting through the Colorado River Commission of Nevada or other duly authorized state agency, for the delivery of water and for repayment of the reimbursable construction costs.” 43 U.S.C. § 616iii. The commission entered into this “section 3 contract” with the secretary on August 25, 1965, which was superseded and replaced by a similar contract between them dated August 4, 1977, (hereinafter referred to as “the repayment contract”).

The repayment contract is not a section 5, Boulder Canyon Project Act contract. Section 6 of the Southern Nevada Project Act, before its amendment in 1966, distinguishes “water supply contracts for the use of water in Nevada *under this Act or section 5 of the Boulder Canyon Project Act. . . .*” 43 U.S.C. § 616lll (emphasis added). As amended by P.L. 89-510 on July 19, 1966, section 6 speaks of “[t]he contract for delivery of water . . . required by section 3 of this Act and the party [*i.e.* the Colorado River Commission] contracting pursuant to section 3 of this Act.” 43 U.S.C. § 616lll. Nevertheless, section 5 of the act declares that “[t]he use of all water diverted for this project from the Colorado River system shall be subject to and controlled by the Colorado River compact, the Boulder Canyon Project Act, and the Mexican Water Treaty.” 43 U.S.C. § 616kkk.

It is our opinion that a state water permit is not required for the commission to appropriate water under the repayment contract made with the Secretary of the Interior under section 3 of the Southern Nevada Water Project Act. The diversion and distribution of Colorado River water through the Southern Nevada Water System is itself a comprehensive congressional scheme under that act, and clearly part of Congress’s overall comprehensive scheme for the apportionment of Colorado River water under the Boulder Canyon Project Act. The Colorado River water delivered through the project pursuant to the commission’s “section 3” repayment contract is part of Nevada’s allocation of Colorado River water which is already generally committed for delivery to Nevada by the secretary under the commission’s “section 5 contract.” Also, the use of project water under that contract was made expressly “subject to and controlled by the Boulder Canyon Project Act.” *See* paragraph 10(a)(1) of the repayment contract.

Like the “section 5 contracts,” the “section 3 repayment contract” provides for the diversion of Colorado River water and specifies the amount, place and priority of the diversion, among numerous other terms and conditions, some of which directly relate to specific federal statutes and to federal control of the river. For the reasons given above, a state permit which purported to authorize this same diversion would be inconsistent with the Project Act, even if its terms and conditions were identical to those of the contract.

The Attorney General stated in his 1972 opinion that the State Engineer could legally require:

[A]ll water users who contract with the secretary to also apply for a state water permit after they have secured their federal contract where the purpose of such an application is *merely* to insure the records of the State Engineer reflect all the necessary information related to water use from the Colorado River which he may need in

order to make intelligent and informed decisions concerning any subsequent allocations of these waters after they come under state jurisdiction. Nev. Op. Att’y Gen. No. 107 at 121 (December 14, 1972) (emphasis added).

By this statement, this office did not mean to imply that an application for a state water permit must be required from a contractor with the Secretary where all the necessary information had already been or was being supplied to the State Engineer. It was explained that the *only* necessity for obtaining a state water permit in addition to the Secretary’s contract was to provide the information the State Engineer needed to carry out the other important duties of his office. Our 1972 opinion did not suggest that that information could not be furnished by some perhaps more effective means other than an application for a state water permit.

It is our understanding that all necessary or requested information concerning the appropriation of Colorado River water by the commission and other entities under federal law has been and continues to be supplied to the State Engineer without the need to go through the process of obtaining a permit which the State Engineer has no discretion to deny. It follows as a corollary to our 1972 opinion on this point that a person who contracts with the Secretary of the Interior for Colorado River water is not legally required to apply for a state water permit *merely* for the purpose of providing information to the State Engineer, where that information already has been or is being timely supplied to him and where any additional information on the matter the State Engineer may need can be and is timely supplied upon request. If a specific procedure for supplying the necessary information outside the permit process needs to be identified, that may be accomplished in joint regulations which the Commission and the State Engineer may adopt pursuant to subsection 2 of [NRS 533.372](#).

## CONCLUSION

The Colorado River Commission is not required to apply for and receive a state permit to appropriate Colorado River water under its congressionally-authorized water delivery contracts with the Secretary of the Interior. A state water permit is not required of the Colorado River Commission, as a party contracting with the Secretary of the Interior, merely for the purpose of gathering necessary information for the State Engineer’s records to facilitate the administration of other water resources where the Colorado River Commission has already furnished and continues to timely furnish that information to the State Engineer, and where necessary additional information can be and is timely furnished to him upon request.

## QUESTION TWO

Are the entities which have contracts with the Colorado River Commission for the delivery of Colorado River water through the Southern Nevada Water System required to obtain a permit from the State Engineer to appropriate that water or to establish their relative rights to that water under those contracts?

## ANALYSIS

Section 3 of the Southern Nevada Water Project Act authorized the Secretary of the Interior to enter into a contract with the Colorado River Commission for the delivery of water and for the repayment of the reimbursable construction costs of the project. 43 U.S.C. § 616iii. As we noted above, the Secretary and the Commission entered into a section 3 repayment contract for the “first stage” of the project on August 25, 1967, and a similar repayment contract for the “second stage” of the project dated August 4, 1977, which superseded and replaced the 1967 contract. At the same time these repayment contracts were respectively executed, the commission entered into nearly identical

water delivery contracts with four of the “project water users,” defined in the repayment contract as “any entity contracting with the state . . . for delivery of Project water through Project works . . .” *See* subarticle 4(g) of the repayment contract. The project water users are the Las Vegas Valley Water District and the

cities of Boulder City, Henderson and North Las Vegas. Many of the provisions of these contracts, particularly the provision for calculating water entitlements, identify and treat these water users as a group. On January 8, 1969, and January 23, 1978, respectively, the commission contracted for the delivery of a fixed annual amount of project water with a fifth project water user, Nellis Air Force Base.

Although the Secretary did not contract directly with the project water users, the language and legislative history of the Southern Nevada Water Project Act, and certain provisions of the repayment contract between the Secretary and the Commission and the water delivery contracts between the Commission and the project water users, clearly evidence a comprehensive scheme to make potable water available to the residents of Clark County through these specific project water users. Section 1 of the project act noted that the principal features of the project were required to “provide water from Lake Mead on the Colorado River for distribution to municipalities and industrial centers with Clark County, Nevada.” 43 U.S.C. § 616ggg. The intended recipients of project water were not named in the act, but they were well known to the Congress. During the hearings on the proposed legislation, they were repeatedly identified as the cities of Las Vegas, North Las Vegas, Henderson, Boulder City and Nellis Air Force Base. (*See* House Report No. 1011 accompanying H.R. 2020, dated September 16, 1965, at pp. 3 and 10; Senate Report No. 332 accompanying S.R. 32, dated June 15, 1965, at pp. 1 and 4.)

Article 6 of the repayment contract between the Secretary and the Commission provides that *as a condition precedent to construction of the project*:

The [commission] shall prepare amendatory project water user contracts for use of Project water. With the exception of the Nellis Air Force Base contract, said contracts shall not be effective until approved in writing by the Contracting Officer and shall have been judicially confirmed.

These requirements reflect a central principle of Congress’s scheme for the Southern Nevada Water System: The water *must* be sold to these project water users in order to generate the revenues necessary to repay the federal treasury for the reimbursable construction costs. The project water user contracts had to be adequate and valid for this purpose. For the same reason, under article 6, these contracts may not be amended or abrogated without the written approval of the federal contracting officer.

Article 10 of the repayment contract provides:

[T]he United States will . . . deliver to the state each year . . . such quantities of raw water . . . as may be reasonably required and beneficially used by the [commission] in fulfilling contracts entered into by it with water users for uses in Clark County, Nevada. . . .

This provision indicates that a purpose of the water delivery is the fulfillment of the commission’s contracts with the project water users, and in fact conditions the amount of water to be delivered to the commission on the amount necessary to meet the commission’s obligation under those contracts.

The United States Supreme Court opinion and decree in *Arizona v. California*, supra, determined that Congress, in implementing the Boulder Canyon Project Act, supra, intended to, and did, create its own “comprehensive scheme” for the apportionment of waters from the Colorado River. Both the repayment contract and the project water user contracts approved by the Secretary of the Interior are specifically made subject to the Boulder Canyon Project Act. It is our opinion, as noted above, that the provisions and legislative history of the Southern Nevada Water Project Act, and the provisions of the repayment contract between the secretary and the commission entered into pursuant to section 3 of the act and the individual water delivery contracts between the commission and the project water users, taken as a whole, clearly evince a comprehensive congressional scheme for the delivery and distribution of Colorado River water under the Southern Nevada Water Project Act that is also clearly part of Congress’s overall scheme for the apportionment of Colorado River water under the Boulder Canyon Project Act. The State Engineer could not deny a project water user a permit to appropriate project water without seriously interfering with, if not defeating, Congress’s comprehensive appropriation and distribution scheme under *both* acts.

Most of Nevada's allocation under the Boulder Canyon Project Act, we understand, is delivered through the Southern Nevada Water System. Moreover, as we pointed out above, even if the State Engineer did not impose additional or inconsistent terms and conditions on the permit, it would still interfere with the secretary's power to determine with whom and on what terms water contracts will be made if it purported to authorize the diversion in the first place. For these reasons we conclude, as did the Attorney General in his 1972 opinion:

[A]ny attempt by the State Engineer to interfere with the appropriation of water from the Colorado River by users who take their water directly from the river would be a violation of the U.S. Supreme Court decree which was subsequently issued in the case of *Arizona v. California*, 376 U.S. 340 (1964), whose Article III specifically enjoined the State of Nevada from in any way interfering with the execution of the Secretary of the Interior's duties under federal law.

Nev. Op. Att'y Gen. No. 107 at 121 (December 14, 1972).

A state water permit also could have no place consistent with both project acts in the adjudication of relative rights to Colorado River water. The rights of the project water users to Colorado River water plainly derive from their contracts with the Colorado River Commission. Article 6 of the project water user contracts specifies the methodology for determining each user's annual entitlement to project water. In our opinion, it is these contracts and not a state water permit that will be relevant in any adjudication of the relative rights of the project water users. Nevada's permit application proceeding, it has been held, is not considered to be an adjudication of relative rights; the permit is an administrative tool only for the use of the State Engineer in administering the state's waters. *See Salmon River Canal Co., Ltd. v. Bell Brand Ranches, Inc.*, 564 F.2d 1244 (9th Cir. 1977), *cert. denied*, 436 U.S. 918 (1978).

Our conclusion to this question is consistent with the Nevada Legislature's own scheme for the administration of project waters within the Southern Nevada Water System. Under section 1.1 of chapter 167, *Statutes of Nevada* 1947, as last amended by chapter 398, *Statutes of Nevada* 1983, at page 972, the commission is responsible for administering the repayment contract and all other applicable contracts "to ensure the delivery of potable water of good quality to the parties entitled to the water, at the times and in the amounts required by those contracts." The Commission plans and executes major capital improvements of the project works, collects money from the users of project water and prepares the budget for the Southern Nevada Water System in concert with the Las Vegas Valley Water District, which is responsible for the system's operation and maintenance "as an agent of the State of Nevada, acting through the Colorado River Commission."

As we pointed out above, the purpose of the Southern Nevada Water Project Act was to provide Colorado River water "to municipalities and industrial centers within Clark County, Nevada." 43 U.S.C. § 616ggg. The project water users are the actual, initial users of the Colorado River water diverted, treated and distributed by the Colorado River Commission through the Southern Nevada Water System under the repayment contract. Subsequent uses of that water brings it within the purview of the state water law [*see* Nev. Op. Att'y Gen. No. 107 at 121 (December 14, 1972)], and, in the context of the Southern Nevada Water System, that appears to occur after the water is first used and then collected and treated within the sewage collection and treatment system. *See* subsection 3 of [NRS 533.440](#).

The final matter we take up in this question is whether the project water users can be required to apply for a state water permit for the purpose of providing the State Engineer with the information he needs to make decisions concerning subsequent uses of Colorado River water. We understand that all necessary or requested information concerning the appropriation of Colorado River water under the project water user contracts has been and continues to be supplied to the State Engineer. It follows from our analysis above that a project water user contracting with the Colorado River Commission pursuant to the

water distribution scheme contemplated by the Southern Nevada Water Project Act is not legally required to apply for a state water permit *merely* for the purpose of providing information to the State Engineer where that information already has been or is being timely supplied to him and where any additional information on the matter the State Engineer may need can be and is timely supplied upon request. Again, a

specific procedure for supplying this information outside the permit process could be identified in joint regulations adopted by the Commission and the State Engineer pursuant to subsection 2 of [NRS 533.372](#).

## CONCLUSION

The Las Vegas Valley Water District, Nellis Air Force Base, and the cities of Boulder City, Henderson and North Las Vegas are not required to apply for and receive from the State Engineer a permit to appropriate Colorado River water from the Southern Nevada Water System under their water delivery contracts with the Colorado River Commission. A state water permit would be irrelevant in any adjudication of their relative rights to Colorado River water under those contracts. The project water users need not apply for a permit merely for the purpose of supplying information to the State Engineer where that information has already been furnished and continues to be promptly furnished to the State Engineer and where necessary additional information can be and is timely furnished to him upon request.

The conclusions reached in Questions One and Two reflect our understanding of congressional policy expressed in federal laws as interpreted and applied by the United States Supreme Court in the cases cited herein; and while we do not necessarily endorse all of the underpinnings of that policy, we feel compelled by section 2 of article 1 of the Nevada Constitution to follow federal law, as so interpreted and applied, in order to render the best opinion we can in answering the questions asked of us.

## QUESTION THREE

What is the statutory responsibility of the Colorado River Commission with respect to approval of permits for the subsequent appropriations or uses of Colorado River water?

## ANALYSIS

Subsection 2 of [NRS 533.372](#) provides:

The state engineer shall not approve *any* application or issue *any* permit to appropriate the waters of the Colorado River held in trust by the Colorado River Commission except after approval of the application by the commission. The commission and the state engineer may adopt such joint regulations as may be necessary for the purpose of carrying out the provisions of this subsection (emphasis added).

Subsection 2 of [NRS 538.171](#) requires:

Applications to appropriate such waters [Nevada's share of Colorado River water described in subsection 1] must be made in accordance with chapter 533 of NRS and are subject to approval by the commission as set forth in [NRS 533.370](#) [now an obsolete internal reference] and 533.372.

In his 1972 opinion, the Attorney General pointed out that a literal reading of the language of [NRS 533.372\(2\)](#) to include original appropriations of Colorado River water under federal water delivery contracts would be in "direct conflict with the authority granted by the Congress of the United States to the Secretary of the Interior under § 5 of the Boulder Canyon Project Act . . . as interpreted by the U.S. Supreme Court in *Arizona v. California* . . ." Nev. Op. Att'y Gen. No. 107 at 120 (December 14, 1972). Likewise, under our opinion today NRS

533.372(2) could not encompass original appropriations of Colorado River water made pursuant to section 3 of the Southern Nevada Water Project Act.

For the sake of completeness we should mention that the original appropriation of Colorado River water made by the Big Bend Water District does not, in our opinion, come under the purview of [NRS 533.372\(2\)](#), even though the district applied for and received a state water permit for that appropriation. The right of the

Big Bend Water District to appropriate Colorado River water derives from its water delivery contract with the Colorado River Commission dated November 9, 1983. On the previous day, the Commission's 1942 section 5 contract with the Secretary of the Interior for the delivery of Nevada's share of Colorado River water was amended to authorize the Commission to subcontract for the delivery of 10,000 acre-feet of that water for use specifically within the area served by the Big Bend Water District. The district's water delivery contract with the Commission is the subcontract contemplated and authorized by the Secretary of the Interior. It is clear that the allocation of Colorado River water to the Big Bend Water District through a subcontract with the Commission is an integral part of the Secretary's power to apportion that water under section 5 of the Boulder Canyon Project Act, and here, again, a permit purporting to authorize the diversion would be inconsistent with the subcontract and, hence, the Project Act. For this reason, we believe there was no legal requirement for the Big Bend Water District to obtain a state water permit to appropriate Colorado River water under its contract with the Commission. And, as with the project water users, questions concerning the relative right of the district to that water will have to be resolved with reference to the priority scheme found in that contract [see article 3(f)] and not the state water permit. See generally *Salmon River Canal Co., Ltd. v. Bell Brand Ranches, Inc.*, supra. We note a similar subcontractual arrangement was entered into with the Southern California Edison Company; it has the same legal effect.

We have seen that a state water permit is never legally required for the purpose of making original appropriations of Colorado River water pursuant to federal law. For that reason, [NRS 533.372\(2\)](#) requiring the Commission's approval of applications to the State Engineer to appropriate Colorado River water cannot apply to those *original* appropriations. If the provision is to have any meaning or effect at all, it must apply to *subsequent* appropriations or uses of Colorado River water. Neither the language of [NRS 533.372\(2\)](#) itself, nor what little legislative history is available on the statute, offers any evidence that the provision was intended to apply only to original or initial appropriations of Colorado River water. To limit the scope of the statute to original or initial appropriations would render it meaningless and ineffective, ignore the broad nature of the words "any application," and "any permit," and would restrict the Colorado River Commission's ability to meet the substantial responsibility it shares with the State Engineer respecting the return flow of water to the river, which is crucial should Nevada users ever divert more than the 300,000 acre-feet per year allotted to the state by the Boulder Canyon Project Act. See Nev. Op. Att'y Gen. No. 107 at 121 (December 14, 1972).

Statutes are not to be interpreted so as to render them meaningless. The Nevada Supreme Court has consistently held that statutes must be construed to give effect to all their parts. *State ex rel. List v. AAA Auto Leasing*, [93 Nev. 483](#), 487, 568 P.2d 1230 (1977); *Nevada State Personnel Division v. Haskins*, [90 Nev. 425](#), 529 P.2d 795 (1974); *Seaborn v. District Court*, [55 Nev. 206](#), 29 P.2d 500 (1934). A reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided. *Bd. of County Comm'rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102 (1983).

The phrase "any application or . . . any permit to appropriate the waters of the Colorado River held in trust by the Colorado River Commission" can reasonably be read to encompass general permits issued under [NRS 533.325](#) to [533.435](#), inclusive, and reservoir and secondary permits issued under [NRS 533.440](#) for subsequent uses of Colorado River water. The latter permits are specifically made subject to the provisions of [NRS 533.325](#) through 533.435 which, of course, include [NRS 533.372\(2\)](#). See [NRS 533.440\(1\)](#). The phrase "held in trust" implies a continuing responsibility—one that would extend beyond initial appropriations. We do not believe that the phrase "waters of the Colorado River held in trust by the Colorado River Commission" in [NRS 533.372\(2\)](#) should be interpreted to mean Colorado River water only *when* it is originally appropriated by the Commission and not when it is subsequently appropriated. We believe the phrase describes a particular portion of water from a certain source, i.e., Nevada's share of water from the Colorado River, not a *time* when the water is appropriated. Water taken from the Colorado River can continue to be called Colorado River water for certain purposes no matter how many times it is reused. For example, Colorado River water in sewage effluent discharged into the Las Vegas Wash is identified and calculated as such by the federal government in order to determine return flow credits. In our opinion, the phrase simply identifies Nevada's share of Colorado River water, even when subsequently appropriated.



The language in both [NRS 538.171\(2\)](#) and [533.372\(2\)](#) regarding the approval by the Commission of permits to appropriate Colorado River water was derived from S.B. 167 of the 1959 legislative session. The evident purpose of the legislation is set out in its title:

AN ACT to amend NRS section 533.370 [now [NRS 533.372\(2\)](#)] relating to approval and rejection of applications to appropriate public waters, and NRS section 538.170 [now [NRS 538.171](#)] relating to the duties of the Colorado River Commission of Nevada with

respect to waters of the Colorado River, by providing procedures relating to applications to appropriate waters of the Colorado River.

Chapter 362, *Statutes of Nevada* 1959, at p. 554.

In 1959 state water permits to appropriate Colorado River water, both initially and subsequently, were required. Later, as we have seen, the 1964 decision in *Arizona v. California*, supra, had the effect of removing any legal requirement that initial appropriators or users of Colorado River water under a contract with the Secretary of the Interior obtain a state water permit. That result was made clear by the Attorney General in his opinion of December 14, 1972. In 1965 the Congress enacted the Southern Nevada Water Project Act; later, well-publicized contracts were executed with project water users, and a massive water system for the Las Vegas Valley was constructed, partly with bond issues authorized by the legislature. It is important to note that the legislature revisited and made amendments to the language in [NRS 538.171](#) on three occasions and reenacted the language of [NRS 533.372](#) once since the decision in *Arizona v. California*, supra, and the enactment of the Southern Nevada Water Project Act. On those occasions the legislature chose not to amend or repeal the language giving the Commission approval authority over permits to appropriate Colorado River water. Legislative language must be interpreted on the assumption that at the time of a statute's enactment the legislature was aware of existing statutes, rules of statutory construction and judicial decisions. Nev. Op. Att'y Gen. No. 232 (December 19, 1956). This assumption should also be made with regard to the time amendments to statutes are made. *Latterner v. Latterner*, [51 Nev. 285](#), 274 P. 194 (1929).

Apparently, the purpose of [NRS 533.372\(2\)](#) is to provide the Colorado River Commission with an effective tool with which it can carry out its substantial responsibilities under [NRS 538.171\(1\)](#) to

“receive, protect and safeguard and hold in trust for the State of Nevada” Colorado River water and the state's rights to that water. It appears to us that when the legislature reenacted the language in [NRS 533.372\(2\)](#) in 1981 and amended [NRS 538.171](#) in 1973, 1981 and 1983, it intended to leave that tool in place. If the will of the legislature is apparent, the language of an act should be construed to give it force and not nullify its purpose. *Sheriff v. Luqman*, [101 Nev. 149](#), 697 P.2d 107 (1985); *Woofter v. O'Donnell*, [91 Nev. 756](#), 542 P.2d 1396 (1975). The *only* construction of [NRS 533.372\(2\)](#) which promotes this legislative purpose is that the provision authorizes the Colorado River Commission to approve or disapprove applications for the only permits for the appropriation of Colorado River water which we have determined may now be issued by the State Engineer, i.e., general permits issued under [NRS 533.325](#) through [533.435](#) and reservoir and secondary permits issued under [NRS 533.440](#), to the extent they involve the subsequent appropriation or use of water originally appropriated from the Colorado River.

Our construction of [NRS 533.372\(2\)](#) and [538.171\(2\)](#) is consistent with the substantial responsibility the Colorado River Commission shares with the State Engineer respecting return flow credits. As we have seen, under [NRS 538.171\(1\)](#), the Commission is responsible for protecting Nevada's allotment of Colorado River water. The Boulder Canyon Project Act, supra, provided an allocation to the State of Nevada of 300,000 acre-feet per year of water from the river. The Supreme Court in *Arizona v. California*, supra, made it clear that the 300,000 acre-feet allocation is the amount of water Nevada can *consumptively use* per year. “Consumptive use” is defined in the Court's decree as diversions from the stream less return flow thereto. 376 U.S. 340. Thus, the total amount of Colorado River water the Commission can *divert* from the river is directly dependent upon the return of that water to the river. Without return flow credits, the state may divert only 300,000 acre-feet of Colorado River water per year. With the amount of return

flow that can be reasonably anticipated, Nevada’s diversionary capability, we understand, can be extended to over 450,000 acre-feet per year. Optimizing Nevada’s ability to divert Colorado River water through return flow credits is, in our view, clearly within the Commission’s trust responsibilities under [NRS 538.171](#)(1). The Commission’s authority under [NRS 533.372](#)(2)—to evaluate and approve or disapprove applications for permits for subsequent appropriations of Colorado River water—is a proper concomitant of those trust responsibilities and would appear to substantially further the stated policy of the legislature to “protect and safeguard” Nevada’s allocation of that water.

### CONCLUSION

The Colorado River Commission has the authority under [NRS 533.372](#)(2) and [538.171](#)(2) to approve or disapprove applications to the State Engineer for permits issued under [NRS 533.325](#) through [533.440](#), to the extent those permits involve the subsequent appropriation or use of water originally appropriated from the Colorado River pursuant to federal law and [NRS 538.171](#).

Sincerely,

BRIAN McKAY  
Attorney General

By: William E. Isaeff  
Chief Deputy Attorney General

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**OPINION NO. 88-17 MOTOR VEHICLES; MISDEMEANOR OFFENSES; BAIL FORFEITURE:** NHP may cite traffic offender to nearest justice court regardless of county lines, deputy sheriff must cite to nearest court in county. Bail forfeitures go to county court processing citation.

Carson City, December 22, 1988

The Honorable William P. Beko, District Judge, Chairman, South Central Regional Judicial Council, Fifth Judicial District Court, Tonopah, Nevada 89049

Dear Judge Beko:

You have recently requested an opinion from this office as to the proper venue and jurisdiction regarding citations issued by law enforcement agencies.

### QUESTION ONE

Must an arresting officer cite a traffic offender to the nearest magistrate within the county where the offense occurred, or may the officer cite the offender to the nearest magistrate regardless of county lines?

### ANALYSIS

[NRS 484.803](#) provides, in pertinent part, as follows:

Whenever any person is taken before a magistrate or is given a written traffic citation containing a notice to appear before a magistrate as provided for in [NRS 484.799](#), the magistrate must be a justice of the peace or municipal judge who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the alleged



violation occurred, except that when the offense is alleged to have been committed within an incorporated municipality wherein there is an established

court having jurisdiction of the offense, the person must be taken without unnecessary delay before the court.

In *Sheriff v. Wu*, [101 Nev. 687](#), 690 (1985) the Nevada Supreme Court construed [NRS 484.803\(1\)](#) to mean that when a traffic violation occurs within municipal boundaries a violator may be prosecuted in either a municipal court or justice court having jurisdiction of the offense. Therefore, if a violation occurs within the incorporated limits of a city the violator may be cited either into the appropriate municipal court or justice court. *State v. Wu*, supra, Nev. Op. Att’y Gen. No. 86-16 (August 19, 1986). When a violation occurs in the unincorporated area of a county, the violator must be taken before, or given a written traffic citation containing a notice to appear before, a justice of the peace who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the alleged violation occurred.

[NRS 4.370](#) provides, in pertinent part, as follows:

4. Except as provided in subsections 5 and 6, in criminal cases the jurisdiction of justices of the peace extends to the limits of their respective counties.

5. In the case of any arrest made by a member of the Nevada highway patrol, the jurisdiction of the justices of the peace extends to the limits of their respective counties and to the limits of all counties which have common boundaries with their respective counties.

This provision confers jurisdiction on justice courts in the county where the violation occurred and in counties adjacent to the county where the violation occurred, when the arrest or citation is made by a member of the Nevada Highway Patrol. Therefore, a justice court in Nye County should have jurisdiction

over offenses occurring in Esmeralda County if the arrest is made or the citation issued by the Nevada Highway Patrol.

No such extension of jurisdiction is found for offenses where the arrest is made or citation issued by a deputy sheriff rather than a Nevada highway patrolman. Those citations must be made to the nearest magistrate within the county where the violation occurred.

## CONCLUSION

A Nevada highway patrolman may cite a traffic offender to the nearest justice’s court regardless of county lines, so long as the nearest justice court is in a county which has a common boundary with the county in which the violation occurred.

A deputy sheriff must cite a traffic offender to the nearest justice court within the county where the offense occurred.

## QUESTION TWO

When the offender appears before a magistrate in a county other than where the offense was committed and furnishes or forfeits bail, which county treasurer is entitled to the bail, i.e., the county treasurer in the county where the offense occurred, or the county where the bail was forfeited?

## ANALYSIS

[NRS 178.518](#) provides, in pertinent part, as follows:

Money collected pursuant to [NRS 178.506](#) to [178.516](#), inclusive, which was collected:

1. From a person who was charged with a misdemeanor must be paid over to the county treasurer. . . .

The statute simply specifies that bail forfeitures be paid over to the county treasurer, but does not specify to which county treasurer, when the bail was forfeited in a county other than the one in which the violation occurred. This office has been unable to find any statutory entitlement to bail forfeitures based upon the mere physical location where the offense occurred. As set forth above, a justice court has jurisdiction over offenses involving a Nevada Highway Patrol arrest or violation which occur in adjacent counties. The justice court which processes the violation is the court expending judicial time and resources to process the complaint over which the court has been granted jurisdiction. There appears to be no statutory or compelling public policy reasons to require the court which processed the complaint and in which the bail was forfeited to pay the bail over to the county treasurer in another county merely because that is where the offense was committed.

Therefore, it is the conclusion of this office that the money should be paid over to the county treasurer of the county in which the bail was forfeited.

### CONCLUSION

Where an offender appears before a magistrate in a county other than where the offense was committed and furnishes or forfeits bail, the bail that is forfeited should be paid over to the treasurer of the county in which the legal proceedings occurred rather than the county where the offense was committed.

Sincerely,

BRIAN McKAY  
Attorney General

By: Chan G. Griswold  
Deputy Attorney General

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**OPINION NO. 88-18 GAMING; LOTTERY RUNNER SERVICES:** Nevada's lottery statutes prohibit the operation of a lottery runner service whereby papers purporting or understood to be or represent California lottery tickets are sold to Nevada residents.

Carson City, December 28, 1988

Mr. Michael D. Rumbolz, Chairman, State Gaming Control Board, 4220 South Maryland Parkway, Las Vegas, Nevada 89158

Dear Mr. Rumbolz:

You have requested an opinion from this office regarding the following:

### QUESTION

Is it a violation of Nevada law for a person to operate a lottery runner service, whereby runners provide patrons of bars and casinos in Nevada with photostatic facsimiles of California lottery tickets, pick up and deliver the tickets and the wagers placed thereon for a fee, and deliver any winnings to the patrons?

### ANALYSIS

Article 4, section 24, of the Constitution of the State of Nevada provides: "No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed." Nev. Const., art. 4, § 24. The

enforcement mechanism for this constitutional prohibition is found in [NRS 462](#). NRS 462.030 provides that a person is guilty of a misdemeanor if he “sells, gives or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share, or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery.” [NRS 462.030](#) (1987).

Lottery runner services violate that provision. The services furnish patrons of bars and casinos in Nevada with photostatic facsimiles of California lottery tickets. Participating patrons fill out the facsimiles with the understanding that someone from a runner service will purchase and play actual California lottery tickets for the patrons in conformity with the facsimile ticket prepared by the patron. A facsimile ticket, therefore, represents an actual lottery ticket because it is a “paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery.” [NRS 462.030](#) (1987). Patrons must pay for both the wager placed in the lottery and the fee charged by the runner service. Persons who operate lottery runner services are, thus, committing misdemeanors by providing such services.

[NRS 462.040](#) makes it a misdemeanor for a person to aid or assist, “either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance or share therein.” [NRS 462.040](#) (1987). At least one lottery runner service posts handbills advertising its services at participating bars and casinos in Nevada. Any form of advertisement by a lottery runner service violates [NRS 462.040](#).

[NRS 462.050](#) provides that a person is guilty of a misdemeanor if he “opens, sets up or keeps . . . any office or other place for the sale of or for registering the number of any ticket in any lottery, or who by printing, writing or otherwise advertises or publishes the setting up, opening or using of any such office.” [NRS 462.050](#) (1987). Consequently, a person who operates a lottery runner service violates [NRS 462.050](#) when he advertises and sells facsimile tickets at bars and casinos in Nevada, and when he registers the numbers of the sold tickets at his office, even if such business is conducted at his residence.

Finally, [NRS 462.070](#) provides that “[e]very person who lets or permits to be used any building . . . or any portion thereof, knowing that it is to be used . . . for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.” [NRS 462.070](#) (1987). Therefore, the owners of the bars and casinos out of which a lottery runner service operates are committing misdemeanors if they know that lottery tickets are being sold to their patrons. This type of conduct by a Nevada gaming licensee is an unsuitable method of operation which may be the subject of disciplinary action against the licensee. Nev. Gaming Comm’n Reg. 5.011(8) (1988). Similarly, private persons and owners and operators of nonlicensee businesses also commit misdemeanors when they knowingly permit lottery runner services to operate at their homes or business establishments. The prohibitions contained in chapter 462 apply equally to all persons and business locations, not just to gaming licensees.

## CONCLUSION

Chapter 462 of the NRS codifies the prohibition against the operation of a lottery and the sale of lottery tickets set forth in the Constitution of the State of Nevada. The operation of a lottery runner service violates [NRS 462.030](#), [462.040](#), [462.050](#) and [462.070](#). A person who operates a lottery runner service commits misdemeanors by selling tickets, or papers representing tickets, by advertising for the California lottery and the sale of the tickets, and by using Nevada bars and casinos for the sale of the lottery tickets.

Furthermore, the operators of the bars and casinos are committing misdemeanors if they knowingly permit the service to operate at their locations. [NRS 462.070](#) (1987). This is likewise an unsuitable method of operation for a Nevada gaming licensee. Nev. Gaming Comm’n Reg. 5.011(8) (1988). Although the lottery runner services do not actually *operate* lotteries, they do sell lottery tickets in violation of Nevada’s constitution and statutes. The operators of the runner services cannot do indirectly what they cannot do directly.

Sincerely,

BRIAN McKAY  
Attorney General

By: Georganne W. Bradley  
Deputy Attorney General

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**OPINION NO. 88-19 INDIANS; PROPERTY TAXATION:** Realty and personalty owned by Indians or a recognized Indian tribe, and situated on a designated Indian reservation or Indian trust lands, are exempt from state and local property taxes due to the federal government's preemption of state and local authority in this area.

Carson City, December 30, 1988

Mr. David Pursell, Chief, Division of Assessment Standards, Department of Taxation, 1340 South Curry Street, Carson City, Nevada 89710

Dear Mr. Pursell:

You have requested an opinion from this office on a number of questions concerning the authority of state and local government to assess and collect real and personal property taxes on property owned by individual Indians and Indian tribes both on and off a designated Indian reservation. More specifically, there are three general areas of concern.

First, you have cited two old Attorney General Opinions, Nev. Op. Att'y Gen. 143 (September 18, 1914) and Nev. Op. Att'y Gen. 10 (February 20, 1931),<sup>1</sup> for the proposition that property located within the boundaries of an Indian reservation may not be exempt from property taxation. However, you have also received a letter from the Bureau of Indian Affairs that indicates the federal government retains the right to grant the state authority to impose state taxes on an Indian reservation, which it has not granted to the state in this instance.

Secondly, you have included a memorandum from the Division of Assessment Standards regarding a specific situation in Douglas County. The case involves an attempt by the county assessor to assess and impose personal property taxes on mobile homes situated within an Indian reservation in the county. While the land is all tribally owned, and the mobile homes are Indian owned, the mobile homes in some instances are leased or rented to non-Indians. In regard to the above, you have asked several questions that can best be answered in response to the following questions.

#### QUESTION ONE

Does the State of Nevada generally have the authority to impose property taxes on realty and personalty owned by an Indian tribe or individual and situated on an Indian reservation within the state?

#### ANALYSIS

The short answer to this question is that the State of Nevada does *not* have the authority to assess or collect real or personal property taxes on property owned by an individual Indian or recognized Indian tribe and situated within the boundaries of an Indian reservation.

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<sup>1</sup> Initially, it should be pointed out that Nev. Op. Att'y Gen. 10 cited above is not applicable to Indian reservations or Indian law issues.

It was established long ago by Chief Justice John Marshall of the United States Supreme Court that Indian nations were “distinct political communities, having territorial boundaries, which is not only acknowledged, but guaranteed by the United States.” *Worcester v. Georgia*, 6 Pet. 515, 557 (1832). It follows from this concept that state law could have no role to play within the reservation boundaries. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168, 93 S.Ct. 1257, 36 L. Ed.2d 129 (1973).

More recently, the United States Supreme Court has outlined the general framework by which Indian jurisdiction and taxation cases are to be analyzed.

In *McClanahan*, supra, at 172, the Court notes that “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.” The Indian-sovereignty doctrine remains relevant, however, “because it provides a backdrop against which the applicable treaties and federal statutes must be read.” *Id.*

The analysis begins with the applicable federal statutes to determine whether state action has been preempted. If not, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed.2d 251 (1958), viz, that it not infringe on the rights of reservation Indians to make their own laws and be ruled by them. *Fort Mohave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1256 (9th Cir. 1976).

Most of the reservations in Nevada were established by executive order, not by treaty or Act of Congress. However, despite some early concern over the authority of the executive to create reservations by executive order, it is now well established that so long as an executive order creating a reservation remains in effect, the Indian title to the reservation lands deserves the same protection as the Indian title to reservations created by treaty or state. *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976). The language of most executive orders speaks only to the setting aside or reservation of certain delineated public lands for the use or benefit of an Indian tribe and does not discuss issues such as the extent of state jurisdiction over these lands. See *State v. Mendez*, [57 Nev. 192](#), 203, 16 P.2d 300 (1936), quoting the executive order of March 23, 1874, creating the Pyramid Lake Indian Reservation. However, the mere fact that the order grants the reservation lands to an Indian tribe for their exclusive use and occupancy is broadly interpreted by the courts as establishing the lands as within the exclusive sovereignty of the tribe in question under general federal supervision, and excluding the extension of state law, including tax laws, to these lands.

See *McClanahan*, supra, at 174-75. It is well recognized that “in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands” and the decision in *McClanahan*, supra, “lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L. Ed.2d 114 (1973).

It is generally recognized that the United States Congress has preempted the authority of the State of Nevada to impose real property taxes on realty within the boundaries of an Indian reservation, or personal property taxes on personalty owned by Indians and situated within the boundaries of an Indian reservation. See *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480-81, 96 S.Ct. 1634, 48 L. Ed.2d 96 (1976).

As to Indian lands which were organized or acquired under the Indian Reorganization Act of 1934, Congress specifically exempted such lands from state and local taxation. 25 U.S.C. § 465. These lands are identifiable because they have been acquired in the name of the United States in trust for the Indian tribe or individual for which the land was acquired. The exemption has been held to be limited to property taxes. *Mescalero Apache Tribe*, supra, at 155.

## CONCLUSION

Realty and personalty owned by Indians or recognized Indian tribes and situated on a recognized Indian reservation or Indian trust lands are exempt from state and local property taxes due to federal preemption of the state’s authority in this area.

## QUESTION TWO

Is a mobile home leased or owned by a non-Indian and situated on an Indian reservation subject to imposition of property taxes?

### ANALYSIS

It follows from the analysis of question one above that if the situation in Douglas County involves an attempt by the Douglas County Assessor to assess and collect real or personal property taxes against mobile homes owned by Indians and situated on a recognized Indian reservation, or on land held by the United States in trust for an Indian tribe or individual, then the assessment is beyond the authority of the county assessor. See *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L. Ed.2d 710 (1976). This result would be the same even if the Indian owned mobile home is leased or rented to a non-Indian. There is no authority in chapter 361 of NRS to assess personal property taxes on a non-Indian lessee of the mobile home. However, personal property which is *owned by a non-Indian* and situated on the Indian reservation, such as a mobile home, would be subject to personal property taxation. *Thomas v. Gay*, 169 U.S. 264 (1898).

### CONCLUSION

If the mobile home is owned by an Indian or an Indian tribe and situated on Indian lands it is not subject to taxation.

Finally, in conjunction with these issues, you have informed us that periodically the issue arises as to whether property purchased by a recognized Indian tribe outside of established reservation boundaries is exempt from property taxation. In this regard, you have asked several questions which can be synthesized into the following question.

### QUESTION THREE

If a federally recognized Indian tribe buys property outside established reservation boundaries, does the property become exempt from property taxation?

### ANALYSIS

The answer to this question depends in large part on the facts of each individual situation. Generally speaking, if an individual Indian, an Indian tribe, or Indian corporation purchases or leases realty off the reservation, or owns and keeps personalty off the reservation, it is subject to state and local property taxation in the absence of a specific federal exemption. *Board of Equalization v. Alaska Native Brotherhood*, 666 P.2d 1015 (Alaska 1983). *Cohen, Handbook of Federal Indian Law*, 254 (1986 reprint of 1940 ed.). However, if the land and personal property was purchased under the provisions of 25 U.S.C. § 465, then the property may be exempt from property taxation. *Alaska Native Brotherhood*, supra; *Mescalero Apache Tribe*, supra, at p. 155.

### CONCLUSION

Realty and personalty owned by Indians or an Indian tribe outside a reservation's boundary that has not been acquired pursuant to 25 U.S.C. section 465 and the regulations thereunder, or are not subject to some other specific federal exemption, are subject to property taxation.

Very truly yours,

BRIAN McKAY  
Attorney General

By: John S. Bartlett  
Deputy Attorney General

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**OPINION NO. 88-20 GAMING; WORK PERMITS:** State and local governments have concurrent jurisdiction over issuance of gaming work permits. Local governments may enlarge the categories of persons affected by work permit requirements. The Gaming Control Board may investigate and object to issuance of a work permit by local government even if issued pursuant to ordinance that is more expansive than state law.

Carson City, December 30, 1988

Robert W. Story, Esquire, Chief Deputy District Attorney, District Attorney of Douglas County, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Story:

Your request for the legal opinion of this office concerning the propriety under state law of the present conditions and bases under which work cards are issued to gaming employees by Douglas County, Nevada, has been referred to me for reply.

#### FACTS

Douglas County requires that all employees specified in section 5.04.090(A) of the Douglas County Code and employed by a “gambling house,” before commencing to act or serve as such, must submit and have approved a written application for an “employment certificate,” or what is commonly known as a work permit. Douglas County Code section 5.04.090 (1981). Douglas County defines “employees of gambling houses,” as used in code section 5.04.090, to mean “all employees, whatsoever, regardless of type of employment, who are employed upon the premises or grounds of an establishment where gambling is carried on.” *Id.* § 5.04.050(E) (1985); *id.* § 5.04.090(A) (1981).

Additionally, Douglas County does not make any distinction between restricted or nonrestricted gaming establishments. Rather, Douglas County requires that a license be procured for “all establishments where gambling games are conducted or operated or where gambling devices are operated.” *Compare id.* § 5.04.060 (1985) with Nev. Gaming Comm’n Reg. 4.030(1)-(a)-(b) (1988). The Douglas County Code defines the terms “gambling game” and “gaming device” with great similarity to the definitions under state law. *Compare* Douglas County Code §§ 5.04.050(G)-(H) (1985) with [NRS 463.0152](#), [463.0155](#) (1987). In any event, slot machines are clearly within the definitions of “gambling game” and “gaming device,” as those terms are defined by Douglas County and the state.

However, for the purposes of work permits, the Nevada Gaming Control Act and Douglas County ordinances define a “gaming employee” differently. State law expressly excludes persons employed solely as bartenders and cocktail waitresses from the definition of “gaming employees,” while the Douglas County Code expressly includes them. *Compare* [NRS 463.0157](#) (1987) with Douglas County Code § 5.04.090(A) (1981).

#### QUESTION ONE

May Douglas County lawfully require all cocktail waitresses and bartenders, employed by all licensed gaming establishments within Douglas County, to possess and maintain a work permit (“employee certificate”), even if such employees are not included within the definition of “gaming employee” provided in [NRS 463.0157](#)?

## ANALYSIS

[NRS 463.335](#)(2) provides in pertinent part that:

No person may be employed as a *gaming employee* unless he is the holder of:

(a) A valid work permit issued in accordance with the applicable ordinances or regulations of the *county* or city in which his duties are performed *and* the provisions of this chapter; *or*

(b) A work permit issued by the board, *if* a work permit is *not* required by either the *county* or the city.

A work permit issued to a gaming employee must have clearly imprinted thereon a statement that it is valid for gaming purposes only.

[NRS 463.335](#)(2) (1987) (emphasis added).

Clearly then, a work permit for gaming purposes may be issued to a person by the county or city in which he works pursuant to the provisions of the local ordinances *and* the provisions of chapter 463 of the NRS, or it may be issued directly by the Gaming Control Board itself if the employee works in a city or county which does not itself require work permits. Pursuant to this authority, Douglas County has enacted ordinances requiring all employees specified in Douglas County Code section 5.04.090(A) to possess “employee certificates” in order to lawfully be employed at *any* establishment in Douglas County where gambling games are conducted or operated, or where gambling devices are operated. *See* Douglas County Code §§ 5.04.050(E), 5.04.060 (1985); *id.* § 5.04.090(A) (1981). However, as we have already seen, the Nevada Gaming Control Act and Douglas County Code define “gaming employee” differently, with the county including bartenders and cocktail waitresses while the statute does not require them to obtain work permits. *Compare* [NRS 463.0157](#) (1987) *with* Douglas County Code § 5.04.090(A) (1981).

Because the term “gaming employee” as defined in [NRS 463.0157](#) does not specifically include bartenders and cocktail waitresses, it can be argued that such individuals are not required by [NRS 463.335](#) to obtain

a work permit in order to be so employed by a nonrestricted gaming establishment. Additionally, the term “work permit” is defined by [NRS 463.0197](#) to mean any card, certificate or permit issued to a person authorizing his employment as a “gaming employee.” [NRS 463.0197](#) (1987). Since it can be argued that the term “gaming employee,” as used in [NRS 463.335](#) to [463.339](#), inclusive, does not include bartenders or cocktail waitresses, it can be argued that, therefore, the “work permit” to which the Gaming Control Board may object under [NRS 463.335](#) does not include a work permit issued to a bartender or cocktail waitress, ostensibly *nongaming* employees, under the definition set forth in [NRS 463.0157](#).

If the field of “work permits” were intended by the Nevada legislature to be occupied totally by the state laws thereon, to the exclusion of all local regulation, then these arguments could be persuasive in demonstrating that these provisions of the Douglas County ordinances were impermissibly in conflict with those of the Nevada Gaming Control Act. Nevertheless, [NRS 463.335](#)(2) clearly provides for and contemplates *concurrent* jurisdiction by both the Gaming Control Board *and* the local authorities, such as Douglas County, over the area of work permits. Because of this concurrent regulatory structure fashioned by the Nevada legislature in the field of work permits, the issue at hand may be resolved by simply examining the scope and extent of the grant of concurrent jurisdiction.

Generally, whenever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject through legislation ceases. In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, a court may look to the whole purpose and scope of the legislative scheme. In no event may a county enforce regulations which are in conflict with the clear mandate of the legislature. *Lamb v. Mirin*, [90 Nev. 329](#), 322-33, 526

P.2d 80 (1974). It is also a well-settled rule that a city or county can enact ordinances regulating gambling within the city’s or county’s territorial limits as long as they are not inconsistent with the state laws or gambling regulations. *Kelly v. Clark County*, [61 Nev. 293](#), 299, 127 P.2d 221 (1942). The mere fact that the



state, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. 56 Am. Jur. 2d *Municipal Corporations* § 374 at 408 (1971).

Both the state and a municipality may have concurrent jurisdiction over the same subject matter, in which event the municipality may make regulations on the subject notwithstanding the existence of state regulations thereon, provided the two sets of regulations are not in conflict. 62 C.J.S. *Municipal Corporations* § 143 at 286 (1949). Clearly, the very language of [NRS 463.335\(2\)\(a\)](#) provides for and contemplates concurrent jurisdiction between the state and the county, since the work permit must be issued in accordance with the applicable ordinances of the county *and* the provisions of chapter 463 of the NRS.

Having found concurrent jurisdiction here between the State Gaming Control Board and Douglas County concerning work permits, the issue becomes whether Douglas County Code section 5.04.090(H) conflicts with [NRS 463.0157](#) to the degree which requires it to be declared null and void. Clearly, Douglas County classifies bartenders and waitresses as “gaming employees” who must possess work permits, while the state does not classify them as “gaming employees” and does not require them to possess a work permit.

However, it is equally clear that bartenders and cocktail waitresses employed at a nonrestricted gaming establishment who are required to perform one or more gaming related responsibilities, fall within the definition of “gaming employees” provided in [NRS 463.0157](#). These responsibilities may include the

following duties: (1) providing change for slot machine patrons; (2) assuming responsibility for reporting slot machine malfunctions; or (3) assuming responsibility for reporting cheating activity of slot players to superiors. When performing these types of responsibilities such individuals would then be performing the duties of gaming employees included within the statutory definition, such as change personnel. As such, they are then required by state law to obtain work permits. [NRS 463.335\(2\)](#) (1987). Whether someone is a “gaming employee” or not depends upon his actual *duties performed* and *not* upon his *title alone*. This is consistent with prior informal legal opinions provided by our office to the State Gaming Control Board.

Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of a mere lack of uniformity in detail. The fact that an ordinance enlarges upon the provisions of a statute, as here, by requiring more than the statute requires, creates *no* conflict therewith unless the statute limits the requirement for all cases of its own prescription. *Baltimore v. Sitnick*, 255 A.2d 376 (Md. Ct. App. 1969); 56 Am. Jur. 2d *Municipal Corporations* § 374 at 408-09 (1971). Merely because the two are not identical does not make them conflicting and incompatible. No conflict exists unless both contain provisions which are irreconcilable with each other. The test in determining whether an ordinance is in conflict with a state statute is whether the ordinance permits or licenses that which the state forbids and prohibits, and vice versa. 62 C.J.S. *Municipal Corporations* § 143(b)(3) at 291-93 (1949). Further, it has been held that a municipality may adopt an ordinance in furtherance of its own public welfare which is not inconsistent with state enactment or policy but is merely a refinement of a state policy. *Holy Sepulchre Cemetery v. Town of Greece*, 79 N.Y.S.2d 683 (Sup. Ct. 1947).

Judicial rulings are helpful in examining the nature of the state statutes and Douglas County ordinances in issue here. Courts have held that the state’s definition of the term “sale at retail” or “retail sale” as including the sale of or charge made for title insurance and escrow business did *not* preclude a city service or other type of business for the purpose of the city’s business and occupation tax. *Commonwealth Title Insurance Co. v. City of Tacoma*, 502 P.2d 1024, 1026 (Wash. 1972). Also, it has been held that a state statute which defines “fireworks” as that which explodes and detonates, but which excludes certain named devices such as sparklers, does *not* preclude a city from regulating or prohibiting the sale, use or possession of the smaller, less powerful fireworks such as sparklers. *Hoddenham v. City of Laramie*, 648 P.2d 551, 553-54 (Wyo. 1982).

Accordingly, based upon the foregoing authorities, we are of the opinion that the state has not preempted local regulation of the issuance and possession of work permits but rather has concurrent jurisdiction with local entities such as Douglas County, if such local entities themselves require work permits of gaming employees. While [NRS 463.0157](#) does not define a “gaming employee” to generally include bartenders and cocktail waitresses and Douglas County Code section 5.04.090(A) does, this difference alone does not create an impermissible conflict which renders the county code provision null and

void. We are of the opinion that no irreconcilable conflict exists between the two provisions, even though they are obviously not identical. The difference arises from a permissible enlargement of the scope of the state statute in the interests of local police powers and broader local regulation.

For these same reasons, the provisions of the Douglas County Code enlarging the categories of gaming establishments whose gaming employees must obtain “employee certificates” (work permits), over that provided by the Nevada Gaming Control Act, is also permissible and lawful. As we have seen, the Douglas

County “employee certificate” requirements apply to *all* gaming establishments within Douglas County. *See* Douglas County Code §§ 5.04.050(E), 5.04.060 (1985). However, not *all* gaming employees of *every* gaming establishment within Nevada are required to obtain work permits under the Gaming Control Act.

[NRS 463.0157](#) provides in pertinent part that a “gaming employee” means any person connected directly with “the operation of a gaming establishment licensed to conduct any game, *16 or more slot machines*, a race book, sports pool or pari-mutuel wagering . . . .” [NRS 463.0157](#) (1987) (emphasis added). The Gaming Control Act and Nevada Gaming Commission Regulation 4.030(1) provide for two general classifications of state gaming licenses, that is restricted and nonrestricted licenses. A restricted license is defined to be one that permits the operation of 15 or fewer slot machines only, in an establishment wherein the operation of the machines is incidental to the primary business of the licensee. *See* [NRS 463.0189](#) (1987); Nev. Gaming Comm’n Reg. 4.020(1)(a) (1987). A nonrestricted license is in turn defined as any license other than a restricted license. *See* [NRS 463.0177](#) (1987); Nev. Gaming Comm’n Reg. 4.030(1)(b) (1988). However, the definition of “gaming employee” expressly includes persons connected directly with the operation of 16 or more slot machines; not 15 or fewer slot machines. Thus, on its face, the statutory definition of “gaming employee” specifically does *not* include persons who may be otherwise named in [NRS 463.0157](#), but who work in establishments which have 15 or fewer slot machines only, namely a restricted gaming licensee. As before, this interpretation is also consistent with prior informal legal opinions provided by our office to the State Gaming Control Board.

Thus, Douglas County’s requirement of an “employee certificate” or work permit for *all* gaming employees, whether employed by restricted or nonrestricted gaming licensees within Douglas County, is lawful. This

county work permit ordinance is permissible notwithstanding the fact that it enlarges upon the scope of “gaming employees” who are required under state law to obtain work permits, expanding the coverage to include not only nonrestricted licensees but restricted licensees as well.

## CONCLUSION

Douglas County may lawfully require all employees employed by restricted and nonrestricted licensed gaming establishments, in Douglas County, to obtain work permits or “employee certificates,” pursuant to local ordinance notwithstanding differing provisions of the Nevada Gaming Control Act which do not extend as far in regulating such employees.

## QUESTION TWO

Assuming that Douglas County may validly broaden the definition of “gaming employee” set forth in [NRS 463.0157](#), may the State Gaming Control Board investigate and object to the issuance of a work permit for such a gaming employee?

## ANALYSIS

Considering the concurrent jurisdiction of the State Gaming Control Board and counties on the subject of work permits, the State Gaming Control Board has clear jurisdiction to investigate and object to the issuance of a work permit issued to any gaming employee, whether a “gaming employee” pursuant to [NRS 463.0157](#) or otherwise. In addition to our earlier analysis which is equally applicable here, our opinion in this regard is bolstered by the fact that to find otherwise could lead to an absurd result inconsistent with the state policy concerning the strict regulation of gaming. [NRS 463.0129](#) (1987).

Assume arguendo that the State Gaming Control Board did not have jurisdiction to object to the issuance of a work permit issued by a county to a bartender or a

cocktail waitress because, under chapter 463 of NRS, neither a bartender nor a cocktail waitress are “gaming employees” to whom a “work permit” is issued and to which the State Gaming Control Board may object. However, also assume that a certain individual, while permitted to be a bartender or a cocktail waitress would nevertheless be considered unsuitable to hold a work permit by the Gaming Control Board if he was a floorman or other person specifically included in the definition of “gaming employee” set forth in [NRS 463.0157](#). Yet, if this person transferred positions from a bartender or a cocktail waitress to a floorman at the same nonrestricted licensed gaming establishment after receiving a work permit from Douglas County to which the State Gaming Control Board could not object, he would not be required to obtain a new work permit, to which the State Gaming Control Board could then object, or even to advise the State Gaming Control Board concerning his new job. See [NRS 463.335\(3\)](#) (1987); Douglas County Code § 5.04.090 (E)(1) (1981).

Thus, an absurd result would be realized in that the State Gaming Control Board would be precluded from objecting to an unsuitable gaming employee’s employment because his entry position with the establishment was a bartender or cocktail waitress. Statutory construction should always avoid absurd results, and statutes must be interpreted to effect their purposes. *State v. Webster*, [102 Nev. 450](#), 455, 726 P.2d 831 (1986); *Welfare Div. v. Washoe Co. Welfare Dept.*, [88 Nev. 635](#), 637-38, 503 P.2d 457, 459 (1972). See also *Alper v. State ex rel. Dep’t of Highways*, [96 Nev. 925](#), 621 P.2d 492 (1980) (statutes should be construed to effect their purposes and unlikely, absurd or strained consequences should be avoided). We reject such an absurd construction and result because such an interpretation is utterly inconsistent with the public policy favoring the strict regulation of gaming employment. See [NRS 463.0129\(1\)\(c\)](#) (1987).

At the same time, we recognize that the same danger discussed above may not be present if the gaming establishment possesses only a restricted license, since no transfer to a position specifically included within the [NRS 463.0157](#) definition of “gaming employee” could occur without necessitating a change in place of employment and thus a new work permit application. Under these circumstances, it is unlikely that the State Gaming Control Board would consider itself compelled to exercise its discretionary jurisdiction to investigate and object to a work permit issued to a gaming employee employed by an establishment possessing a restricted gaming license. Considering the fact that a restricted gaming licensee may apply for and receive a nonrestricted license, the Board properly may, however, retain jurisdiction to investigate and object to work permits at restricted locations for the reasons discussed above.

## CONCLUSION

The State Gaming Control Board has the discretionary jurisdiction to investigate and object to the issuance of any work permit or “employee certificate” by any county or city, to any gaming employee employed by either a restricted or nonrestricted licensed gaming establishment.

Sincerely,

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