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January 3, 2012

OPINION NO. 2012-01

LAW ENFORCEMENT; JURISDICTION; TRIBAL RESERVATIONS: When the State has jurisdiction over a crime committed by an Indian off of a reservation, who then flees onto a reservation, a state peace officer may give fresh pursuit wherever the suspect goes within the State so long as the crime is a felony or was committed in the officer's presence.

Kenneth E. Mayer, Director
Nevada Department of Wildlife
1100 Valley Road
Reno, Nevada 89512

Dear Mr. Mayer:

This opinion addresses whether a peace officer, specifically a Nevada Department of Wildlife game warden,[1] may pursue an Indian suspect onto tribal land while in fresh pursuit.

QUESTION ONE

May a Nevada Department of Wildlife game warden give fresh pursuit onto an

[1] Game wardens are category 1 peace officers. NRS 289.280; NRS 289.460; NRS 289.470; and NRS 601.375.

Indian colony or reservation when the fleeing suspect is Indian[2] and the subject is either suspected of committing a felony or did commit a crime in the warden's presence?

ANALYSIS

Every person who commits a crime in this State is subject to punishment by the laws of this State. NRS 171.010. This includes Indians who commit off-reservation crimes. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001) ("It is ... well established in our precedent that States have criminal jurisdiction over reservation [tribal members] for crimes committed off the reservation").

Warrantless arrest of an individual who commits a crime is authorized when the crime is either a felony or gross misdemeanor, NRS 171.136(1); or was committed in the arresting officer's presence. NRS 171.136(2)(b). *See also Lofton v. Warden, Nev. State Prison*, 83 Nev. 356, 358, 431 P.2d 981, 982 (1967). *But see State v. Bayard*, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003) holding that "full custodial arrest" for minor traffic violations is improper under Nevada law unless objectively identifiable reasons exist to support it.

If a criminal suspect flees, a peace officer may pursue, even into a private residence. *United States v. Santana,* 427 U.S. 38, 42-43 (1976) (when an arrest is set in motion in a public place, the police may pursue a retreating suspect into a private residence, even if the offense is a mere misdemeanor). In the common law, the fresh pursuit doctrine includes an extrajurisdictional aspect when the crime committed is a felony. *See e.g. Gattus v. State,* 105 A.2d 661, 666 (1954). In some jurisdictions, there is "another common law doctrine of fresh pursuit whereby a peace officer may arrest, without a warrant, for misdemeanors committed in his presence within a reasonable time thereafter." *Id.*

Nevada has statutorily authorized and defined fresh pursuit both within the state, NRS 171.166—176 (Uniform Act on Intrastate Fresh Pursuit), and out of state. NRS 171.156—164 (Uniform Act on Interstate Fresh Pursuit). Further, Nevada permits any officer or agent of the Bureau of Indian Affairs or tribal policemen to pursue any person, while in fresh pursuit, from tribal land onto non-tribal land in Nevada, and make arrests. NRS 171.1255. *See also* Op. Nev. Att'y Gen. 2003-07 (Oct. 23, 2003) (concluding that arrest authority includes citation authority).

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[2] Although variously defined, Congress has defined the term "Indian" to mean "all persons of Indian descent who are members of any recognized Indian tribe . . . under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

In some jurisdictions, the common law extrajurisdictional fresh pursuit doctrine is limited to felonies and will not support the arrest of a "misdemeanant suspect outside an officer's geographical jurisdiction." *State v. Tingle*, 477 N.W. 2d 544, 547 (Neb. 1991). But no such limitation attends Nevada's definition for intrastate fresh pursuit. Nevada's definition enlarges the doctrine in its intrastate application by authorizing fresh pursuit for misdemeanors that are committed in the presence of an arresting officer.

> "Fresh pursuit" [in-state] shall include fresh pursuit as defined by the common law and also the pursuit of a person who has committed a felony or is reasonably suspected of having committed a felony in this state, *or who has committed or attempted to commit any criminal offense in this state in the presence of the arresting officer* referred to in NRS 171.172 [authorizing arrest] or for whom such officer holds a warrant of arrest for a criminal offense . . . .

NRS 171.168 (emphasis added). *Accord, Incorporated County of Los Alamos*, 776 P.2d 1252, 253 (N.M. 1989) ("[w]e believe the legislature intended in [New Mexico's Fresh Pursuit Act] to expand the fresh pursuit and territorial arrest powers of county sheriffs and municipal police officers. . . .").

Nevada's statute does not expressly reference colonies or reservations within the State. However, "an Indian reservation is considered part of the territory of the State." *Hicks*, 533 U.S. at 361-62. Therefore, it necessarily follows that Nevada's intrastate fresh pursuit statutes—authorizing pursuit for both felonies and lesser crimes—apply when a suspect flees onto a reservation.

In addition, decisions from other jurisdictions are pertinent to the question you have asked. In *United States v. Patch*, 114 F.3d 131, 134 (9th Cir. 1997), arising out of Arizona, the Ninth Circuit held that under the doctrine of "hot pursuit," a police officer who observes a traffic violation committed off of tribal land may pursue the offender onto tribal land to make an arrest. Consistently with Nevada's law, *Patch* requires that state officers must observe a misdemeanor offense when it occurs within state boundaries.

Relying on *Patch*, the Montana Supreme Court likewise held that a state officer is authorized to pursue a driver onto tribal land when the officer observed a traffic offense within state boundaries and attempted to stop the driver. *City of Cut Bank v. Bird*, 38 P.3d 804, 807 (Mont. 2001).[3]

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[3] But *see State of South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004) (declining to depart from the earlier holding in *State v. Spotted Horse*, 462 N.W.2d 263 (S.D. 1990), that fresh pursuit onto a reservation is not authorized).

CONCLUSION

When the State has jurisdiction over a crime committed by an Indian off of a reservation, who then flees onto a reservation, a state peace officer may give fresh pursuit wherever the suspect goes within the State so long as the crime is a felony or was committed in the officer's presence.

We note that entry onto a reservation might, in a given case, "infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure." *New Mexico v. Harrison*, 238 P.3d 869, 872 (N.M. 2010). To avoid this possibility, and in the interest of comity with tribes, we strongly recommend the use of cooperative agreements authorized by NRS 277.080-.170 to address such issues before they arise.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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May 7, 2012

OPINION NO. 2012-02

PAROLE BOARD; PAROLE AND PROBATION; CRIMINAL HISTORY: The Division of Parole and Probation has express authority to investigate an inmate's criminal history to assist the Parole Board in making parole decisions. The secondary dissemination of criminal history record information to the Parole Board is permitted by federal regulations and policy. A parole and probation officer likely enjoys absolute quasi-judicial immunity from civil rights and state tort lawsuits for alleged factual errors in the report provided to the Parole Board to assist them in the parole determination process.

Chris Perry, Director
Nevada Department of Public Safety
555 Wright Way
Carson City, NV 89711-0525

Dear Director Perry:

You requested a written opinion addressing whether the Division of Parole and Probation has authority to conduct investigations into an inmate's criminal history for use by the Board of Parole Commissioners (Parole Board) to make parole decisions.

QUESTION ONE

Does the Division of Parole and Probation have authority to investigate an inmate's criminal history for use by the Parole Board to make parole decisions?

ANALYSIS

"An administrative agency's powers are generally limited to the powers set forth by statute, although 'certain powers may be implied even though they were not expressly granted by statute, when these powers are necessary to the agency's performance of its enumerated duties.'" *Stockmeier v. Bd. of Parole Comm'rs*, 255 P.3d 209, 212, 127 Nev. ___, ___, (Adv. Op. 19, May 19, 2011) (quoting *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006)). "[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty" of the agency. *Id.* (citing *Kilgore*, 122 Nev. at 335, 131 P.3d at 14). Accordingly the Division of Parole and Probation may investigate inmate criminal history if doing so is an enumerated statutory duty of the Division or if investigating an inmate's criminal history is essential to carrying out an enumerated statutory duty of the Division.

Investigations of inmate criminal histories is literally essential to the Parole Board's statutory duty of "determining whether to release a prisoner on parole" upon consideration of "[t]he seriousness of the offense and the history of criminal conduct of the prisoner." NRS 213.1099(2)(c). The Legislature has therefore expressly provided that Parole and Probation Officers shall "[i]nvestigate all cases referred to them for investigation by the Board [of Parole Commissioners]...." NRS 213.1096(1).

CONCLUSION TO QUESTION ONE

The Division of Parole and Probation has express authority to investigate an inmate's criminal history to assist the Parole Board in making parole decisions.

QUESTION TWO

Does providing reports of investigations to the Parole Board violate federal regulations restricting secondary release of police reports or criminal history?

ANALYSIS

Federal regulations limit agency access to National Crime Information Center (NCIC) criminal history record information. 28 C.F.R. § 20.35 and 20.38. NCIC criminal history information may only be disseminated to "criminal justice agencies" for criminal

justice purposes. 28 C.F.R. § 20.33. Federal regulations define a criminal justice agency as a governmental agency, including subunits of that agency, that engages in the "administration of criminal justice pursuant to a statute" and that allocates a substantial part of its annual budget to "the administration of criminal justice." 28 C.F.R. § 20.3(g)(2); *see also*, 28 C.F.R. Pt. 20, App.

The Department of Public Safety is charged with the administration and enforcement of statutes contained in NRS Chapter 176A relating to probation and suspensions of criminal sentences and statutes contained in NRS Chapter 213 relating to pardons and paroles. NRS 480.110. The Division of Parole and Probation is a division of the Department of Public Safety. NRS 480.130, NRS 213.1071. The Division of Parole and Probation administers and enforces the provisions of NRS Chapter 176A and Chapter 213 relating to parole and probation, and performs such duties and exercises such powers as may be conferred upon it by those chapters and any other specific statute. NRS 480.140(5). The Division's powers and duties relate primarily to the supervision of persons on probation and prisoners released on parole. NRS 213.1095–.1096. The Board of Parole Commissioners primarily performs functions associated with the determination of whether a prisoner, eligible for release on parole, should be released on parole. NRS 213.1099–.145.

A review of these enabling statutes establishes that the Parole Board and the Division of Parole and Probation (Division) are primarily engaged in the administration of criminal justice pursuant to statute. Given those primary duties, the Parole Board and the Division allocate a substantial part of their annual budgets to the administration of criminal justice. The Parole Board and Division are thus "criminal justice agencies" as defined by federal regulation. The reports being requested by the Parole Board, which contain criminal history record information, are used to aid the Parole Board in the parole determination process. This is a criminal justice purpose. *See* 28 C.F.R. Pt. 20, App. As a result, the federal regulations permit dissemination of criminal history record information from NCIC to the Parole Board.

Policies that have been approved by the FBI provide further guidance on secondary dissemination of information to the Parole Board. Pursuant to 28 C.F.R. § 20.35, the FBI's Criminal Justice Information Services (CJIS) Advisory Policy Board was created for the purpose of providing policy recommendations to the FBI Director with respect to the philosophy, concept, and operational principles of various criminal justice information systems managed by the Division CJIS. The CJIS Advisory Policy Board has recommended, and the FBI has approved, the Criminal Justice Information Services Security Policy (CJIS Security Policy).

Section 5.1.3 of the CJIS Security Policy provides that if criminal history record information is released to another authorized agency, and that agency was not part of

the releasing agency's primary information exchange agreement(s), the releasing agency shall log such dissemination. Section 5.4.7 of the CJIS Security Policy requires the log be maintained for one year, and that the log must contain the name of the operator, the authorized receiving agency, the requestor, and the secondary recipient. Generally, the identification of the requestor and the secondary recipient shall take the form of a unique identifier that shall remain unique throughout the minimum one year retention period. *Id.* Section 5.6.1.1 of the CJIS Security Policy permits an agency to act as a servicing agency and perform transactions on behalf of authorized agency's requesting service. Servicing agencies may do so using the requesting agency's unique identifier, ORI, or they may use their own ORI to perform the inquiry transaction on behalf of the requesting agency if the means and procedures are in place to provide an audit trail for the current specified retention period. The Division is required to follow the procedures set out in the CJIS Security Policy for secondary dissemination of criminal history record information from NCIC to the Parole Board.

Since agency access to federal criminal history databases managed by the FBI can be cancelled if the agency fails to comply with applicable federal regulations and policies, the Division should consult with the state and federal officials who manage criminal history records information databases to ensure the Division complies with all applicable federal and state statutes, regulations and policies related to secondary dissemination of information to the Parole Board. *See*, 28 C.F.R. § 20.38.

CONCLUSION TO QUESTION TWO

The secondary dissemination of criminal history record information from NCIC to the Parole Board is permitted by federal regulations and policy. The Division should consult with state and federal officials to ensure they comply with applicable federal and state statutes, regulations and policies related to the dissemination of criminal history record information to the Parole Board.

QUESTION THREE

What is the Division of Parole and Probation's liability for mistaken information in its investigative reports provided to the Parole Board?

ANALYSIS

Although it is unknown what type of legal claim a prisoner might bring for alleged erroneous information in the report provided to the Parole Board, one type of claim might come in the form of a civil rights claim pursuant to 42 U.S.C. § 1983. Probation officers will likely enjoy absolute quasi-judicial immunity from Section 1983 damages claims related to alleged erroneous information contained in the reports. Under

analogous circumstances, the Ninth Circuit held that probation officers preparing presentence reports for state court judges are entitled to absolute judicial immunity from personal damage actions brought under Section 1983. *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1985); *see also Hili v. Sciarrotta*, 140 F.3d 210 (2nd Cir. 1998).

In *Demoran*, the plaintiff complained that a state probation officer, with malice and bad faith, prepared a probation report containing deliberately false statements and that, as a result, he received an improperly long sentence. *Demoran,* 781 F.2d at 156.

The *Demoran* court based its immunity finding on the following factors: (1) probation officers preparing presentence reports serve a function integral to the independent judicial process; (2) probation officers preparing presentence reports act as an arm of the sentencing judge and are under a duty to engage in impartial fact-finding; (3) the prospect of damages liability under Section 1983 would seriously erode the probation officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties; and (4) there are "a plethora of procedural safeguards surrounding the filing of the presentence report," including the fact that the report is reviewed by the sentencing judge and is made available to defense counsel prior to the sentencing hearing. *Id.* at 157–158.

In the context of parole hearings, the Ninth Circuit has held that parole board officials are entitled to absolute quasi-judicial immunity from Section 1983 suits brought by prisoners for actions taken when processing parole applications". *Sellars v. Procunier*, 641 F.2d 1295, 1302 (9th Cir. 1981). Like a probation officer preparing a presentence report for a court, a probation officer preparing the report for the Parole Board is acting pursuant to a statutory duty and at the Parole Board's direction. The probation officer is acting as an arm of the Parole Board to assist it in its adjudicatory role. In this context, the probation officer would be expected to act as an impartial fact finder for the Parole Board. Although the authorizing statutes do not designate any safeguards surrounding the submission of the report to the Parole Board, the Division and the Parole Board can adopt procedures to enable the Parole Board to identify erroneous information in the reports. With reasonable safeguards in place, a probation officer will likely enjoy absolute quasi-judicial immunity from Section 1983 damages claims for erroneous information contained in the reports provided to the Parole Board.

A prisoner might also bring a state tort claim for alleged erroneous information in the report provided to the Parole Board. The Nevada Supreme Court has found, in limited circumstances, non-judicial officers are entitled to absolute quasi-judicial immunity from state tort claims as well. For example, in *Duff v. Lewis*, 114 Nev. 564, 571, 958 P.2d 82, 87 (1998), the Court granted absolute quasi-judicial immunity to a court-appointed psychologist involved in evaluating individuals in the context of a custody dispute when allegations of physical and sexual abuse had been made. In

Foster v. Washoe County, 114 Nev. 936, 943, 964 P.2d 788, 793 (1998), the Court extended quasi-judicial immunity to court appointed special advocates involved in a child abuse investigation. The Court concluded the special advocates were an integral part of the judicial process and that public policy considerations militated in favor of immunity for their actions during the child abuse investigation. *Id.* In *Matter of Fine*, 116 Nev. 1001, 1015, 13 P.3d 400, 409 (2000), the Court reaffirmed the proposition that court appointed experts are entitled to absolute quasi-judicial immunity when they provide information that a court may utilize in rendering a decision because they act, in that context, as an arm of the court. Finally, in *State of Nevada v. Second Jud. Dist. Ct.*, 118 Nev. 609, 55 P.3d 420 (2003), the Court addressed whether absolute quasi-judicial immunity should be applied to protect various State child protective services employees from a negligence lawsuit arising out of the death of a child in the care of a foster parent. Using the same analysis used in the Section 1983 context, the Court concluded as follows:

> State employees engaged in child protective services are entitled to quasi-judicial immunity when they provide information to the court (e.g. reports, case plans, testing evaluations and recommendations) pertaining to a child who is or may become a ward of the State. We do not intend the aforementioned examples to be an exclusive list. Rather, they demonstrate some of the duties protective service workers engage in that are integral to the court's decision-making processes. When a state agency or its employees provide decision making expertise to the court, they act as an arm to the court and are entitled to absolute quasi-judicial immunity.

118 Nev. at 619, 55 P.3d at 426.

Under the same analysis set out above for Section 1983 claims, Parole and Probation Division officers will likely enjoy absolute quasi-judicial immunity from State tort claims arising out of alleged erroneous information contained in the reports provided to the Parole Board to assist them in the parole determination process.

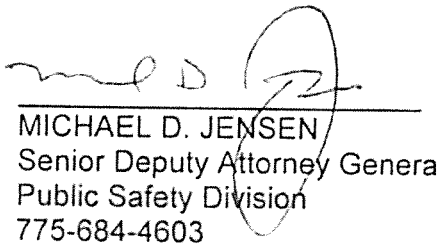
CONCLUSION TO QUESTION THREE

For claims brought pursuant to 42 U.S.C. § 1983 and state tort claims, a parole and probation officer may enjoy absolute quasi-judicial immunity from suit for alleged factual errors in the report provided to the Parole Board to assist them in the parole determination process. Since the authorizing statute does not contain safeguards for

accuracy, the Division and the Parole Board should adopt reasonable safeguards to identify erroneous information in the reports provided to the Parole Board.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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August 31, 2012

OPINION NO. 2012-03

HEALTH; INSURANCE; FEES: Imposition of fees through the regulatory process on participating issuers of insurance based on their enrollment of consumers in the Exchange is implicitly within the Exchange's statutory authority to ensure compliance with federal requirements that the Exchange be self-sustaining. The Exchange has statutory authority to charge for advertising on its web portal under its authority to enter into contracts and under its authority to apply for ad accept gifts, donations and other sources of funds.

Jon M. Hager, Executive Director
Silver State Health Insurance Exchange
808 West Nye Lane, Suite 204
Carson City, Nevada 89703

Dear Mr. Hager:

You have requested an opinion from the Office of the Attorney General concerning the authority of the Silver State Health Insurance Exchange (the Exchange) to impose fees on participating health insurance issuers for participating in the exchange and for advertisement on the web portal of the exchange.[1]

[1] The opinion request sets forth three questions. The second question is integrally related to the first and is addressed as part of the first.

QUESTION ONE

Does the Exchange have statutory authority to establish, through the regulation process, fees charged to participating health insurance issuers to allow the issuers to place their health plans on the Exchange for sale to consumers if the fees are based on the enrollment of consumers within the Exchange?

ANALYSIS

The Exchange, as an agency of the State of Nevada, has only such powers as are authorized by the legislature. *Clark County School Dist. v. Clark County Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999). A legislative grant of authority to an agency may be either express or implicit. *State, Dept. of Commerce, Div. of Ins. v. Interocean Risk Systems, Inc.*, 109 Nev. 710, 713, 857 P.2d 3, 5 (1993). "Any enlargement by implication of express powers . . . must be fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. County of Clark*, 120 Nev. 948, 956, 102 P.3d 578, 584 (2004).

The Exchange was created to comply with the Patient Protection and Affordable Care Act of 2010 (Pub.L.No. 111-148, H.R. 3590) (PPACA), to provide a marketplace through which health insurance could be purchased. Testimony of Michael Willden, Director of Nevada Department of Health and Human Services, *Hearing on SB 440 Before the Senate Committee on Finance,* 2011 Leg., 76th Sess. 12-13 (May 18, 2011).

The PPACA requires that "in establishing an Exchange under this section, the State shall ensure that such Exchange is self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations." 42 U.S.C. 18031(d)(5).

The legislation enabling the creation of the Exchange (SB 440 (2011) (codified as NRS Chapter 695I) does not expressly direct or authorize the Exchange to charge users of the Exchange a fee for their use. The question therefore is whether the charging of such fees is "fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co.,* 120 Nev. at 956, 102 P.3d at 584. "The intent of the legislature is the controlling factor in statutory interpretation." *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757(1998).

Indicative of its intent, the Legislature has given the Exchange the following duties and powers:

> 1. The Exchange shall:
> (a) Create and administer a state-based health insurance exchange;
> (b) Facilitate the purchase and sale of qualified health plans;
>
> (c) Provide for the establishment of a program to assist qualified small employers in Nevada in facilitating the enrollment of their employees in qualified health plans offered in the small group market;
> (d) Make only qualified health plans available to qualified individuals and qualified small employers on or after January 1, 2014; and
> (e) *Unless the Federal Act*[2] *is repealed or is held to be unconstitutional or otherwise invalid or unlawful, perform all duties that are required of the Exchange to implement the requirements of the Federal Act.*
> 2. The Exchange may:
> (a) Enter into contracts with any person, including, without limitation, a local government, a political subdivision of a local government and a governmental agency, to assist in carrying out the duties and powers of the Exchange or the Board; and
> (b) Apply for and accept any gift, donation, bequest, grant, or *other source of money* to carry out the duties and powers of the Exchange or the Board.

NRS 695I.210 (emphasis added).

The Exchange, through its Board, is further given authority to "[a]dopt regulations to carry out the duties and powers of the Exchange." NRS 695I.370(2)(a). The Exchange is also empowered to "request from the Department of Administration an advance from the State General Fund for the payment of authorized expenses" if "the current expenses of the Exchange exceed the amount of money available because of a delay in the receipt of money from federal grants *or a delay in the receipt of revenue*

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[2] "'Federal Act' means the federal Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the federal Health Care and Education Reconciliation Act of 2010, Public Law 111-152, and any amendments to, or regulations or guidance issued pursuant to, those acts." NRS 695I.050.

from other sources." NRS 695I.510 (emphasis added).

Moreover, legislative testimony in support of SB 440 suggested that a premium-based fee would be among the options to be considered by the Exchange and its Board:

> SENATOR KIECKHEFER:
> How will this be self-supporting by 2015? Where will the money come from? . . .
> BRETT J. BARRATT ([then] Commissioner of Insurance, Division of Insurance, Department of Business and Industry):
> The methodology for self-funding is undecided at this point. The Board will play an active role in deciding the best method for Nevada. Utah charges a fee that is included in the premium collected by the Exchange. A portion of the fee is distributed to the broker responsible for the individual member or small employer. Part of the fee goes to the administration of the Utah Exchange. Nevada could start the program with something similar to the Utah model.

Hearing on SB 440 Before the Senate Committee on Finance, 2011 Leg., 76th Sess. 12-13 (May 18, 2011) (emphasis added).

Director Willden, in testifying in support of SB 440, provided written testimony as follows:

> Nevada received a $1 million dollar [sic] grant award to begin the process of determining how to create an Exchange to meet the unique needs of Nevadans. A key milestone of the grant requires States to draft and pass enabling legislation that provides the legal authority to establish and operate an Exchange that complies with Federal requirements.

Id., Exhibit F.

The Legislature's objective in creating the Exchange was to fulfill federal requirements, including that it be self-sustaining. Therefore, the Exchange's authority to fulfill the duty that it be self-sustaining by charging fees on issuers of insurance is "fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co.*, 120 Nev. at 956, 102 P.3d at 584.

Your request further asks whether imposition of user fees would constitute an interpretation of the law that preempts or supersedes the authority of the Insurance Commission to regulate the business of insurance within this State, in violation of NRS 695I.520. NRS 695I.520 provides that "[n]othing in this act, and no action taken by the Exchange pursuant to this act, shall be construed to preempt or supersede the authority of the Commissioner to regulate the business of insurance within this State."

The "business of insurance" has been defined as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement. . . ." *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). The purpose of the Exchange is to enable persons to purchase health insurance by providing a market for that activity. NRS 695I.200. Imposing an access fee for those wanting to participate in the Exchange merely sets a price on a marketing service. As issuers of insurance are not prohibited from marketing outside of the Exchange, it does not affect the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, or enforcement. It merely creates an expense for those issuers who wish to avail themselves of a new mechanism for marketing insurance. Imposition of a fee on issuers of insurance who use the Exchange is therefore consistent with the Exchange's statutory authority under to NRS 695I.520.

CONCLUSION TO QUESTION ONE

Imposition of fees through the regulatory process on participating issuers of insurance based on their enrollment of consumers in the Exchange is implicitly within the Exchange's statutory authority to ensure compliance with federal requirements that the Exchange be self-sustaining. This authority is not contrary to NRS 695I.520.

QUESTION TWO

Does the Silver State Health Insurance Exchange have statutory authority to establish fees charged to organizations for placement of advertisements on the web portal of the Exchange? Does establishment of such advertisement fees require creation of regulations?

ANALYSIS

As noted above, the Exchange was created in the context of federal legislation that requires it be self-sustaining by January 1, 2015 and include funding mechanisms, including user fees charged to participating issuers, "and to otherwise generate funding." 42 U.S.C. 18031(d)(5)(A).

The Exchange has the express power to "[e]nter into contracts with *any person*, including, without limitation, a local government, a political subdivision of a local government and a governmental agency, to assist in carrying out the duties and powers of the Exchange or the Board." NRS 695I.210(2)(a) (emphasis added). Under this provision, the Exchange may enter into a contract with persons to run advertisements for them on the portal, in exchange for financial assistance that would enable the portal to run after January 1, 2015, when federal funding ceases.

The Exchange also has the express power to "[a]pply for and accept any gift, donation, bequest, grant or *other source of money* to carry out the duties and powers of the Exchange or the Board." NRS 695I.210(2)(b)(emphasis added). In exchange for financial support from donors or other sources, the Exchange can provide recognition on its web portal. Therefore, NRS 695I.210(2)(b) confers upon the Exchange the authority to charge fees or receive other remuneration for advertising.

Your request also queries whether establishment of advertisement fees requires the creation of regulations. NRS 695I.370(2)(a) confers authority to adopt regulations for the Exchange upon its Board. "Regulation" is defined as "[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. . . ." NRS 233B.038(1)(a).[3] Excluded from the definition of "regulation" are contracts or agreements. NRS 233B(2)(j).

As noted above, the Exchange has the authority to enter into advertising contracts, thereby establishing fees on a negotiated basis. However, should the Board choose to set fees by rule, it is required by NRS 695I.370(2)(a) to do so by Board-adopted regulation. *See State Bd. of Equalization v. Sierra Pac. Power Co.*, 97 Nev. 461, 465, 634 P.2d 461, 463 (1981).

CONCLUSION TO QUESTION TWO

The Exchange has statutory authority to charge for advertising on its web portal under its authority to enter into contracts and under its authority to apply for and accept

[3] While the Exchange is exempt from NRS Chapter 233B rulemaking requirements, the definition of "regulation" contained therein is nevertheless useful in the absence of any other legislative guidance. *Goodman v. Goodman*, 68 Nev. 484, 488, 236 P.2d 305, 307 (1951).

gifts, donations and other sources of funds. The Board may choose to leave the fee setting to negotiation, or it may choose to set fees by regulation.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
Division of Business and Taxation

DLB:SLG

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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September 4, 2012

OPINION NO. 2012-04

DEPARTMENT OF MOTOR VEHICLES; FEES; REGISTRATION: A transfer of registration occurs when there is a transfer of ownership of a vehicle or the vehicle becomes unusable, and the holder of the original registration transfers the registration from the previously owned vehicle to another vehicle to be registered to the same holder. The Department must charge the six dollar transfer fee when the customer elects to use his or her credit from a surrendered registration on either a new or existing vehicle registration. There is no statutory minimum dollar amount that can be considered a credit.

Bruce Breslow, Director
State of Nevada
Department of Motor Vehicles
555 Wright Way
Carson City, Nevada 89711

Dear Director Breslow:

On February 23, 2012, you requested a formal opinion from the Office of the Attorney General regarding how and when to apply the six dollar ($6.00) "transfer of registration fee" provided for in NRS 482.480. The Department of Motor Vehicles'

(Department) current interpretation of this issue equates a "transfer" with reassigning a license plate from one vehicle to another by the same registered owner. As you explained in your letter, when a customer transfers his or her registration and license plate to another vehicle, and does not apply for use of credits, a transfer fee of six dollars ($6.00) is charged to the customer. However, if the customer chooses to receive a new registration and license plate, exclusive of the use of credits, the customer is only charged one dollar ($1.00) in addition to other fees. In these circumstances, you have asked the following questions: 1) What constitutes a "transfer of registration" under NRS 482.480; 2) should the Department charge the six dollar ($6.00) transfer fee when a customer wants to use his or her credit from a surrendered registration on either a new or existing vehicle registration; and, 3) is there a minimum dollar amount that may constitute a credit?

QUESTION ONE

What constitutes a "transfer of registration" under NRS 482.480?

ANALYSIS

"To determine legislative intent, [the Nevada Supreme Court] first looks at the plain language of a statute." *Allstate Insurance Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (*citing Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000)). The Court will "only look beyond the plain language if it is ambiguous or silent on the issue in question." *Id.* Here, NRS 482.480 sets out the fee schedule for various registration transactions. The fee pertinent to this opinion is found in section (5), which reads as follows:

> There must be paid to the Department for the registration or the transfer or reinstatement of the registration of motor vehicles, trailers and semitrailers, fees according to the following schedule:
>
> . . . .
>
> 5. For each transfer of registration, a fee of $6 in addition to any other fees.

NRS 482.480(5). NRS 482.480(5) does not define the term "transfer of registration." The term furthermore could be given different meanings, and is therefore ambiguous. When a statute is ambiguous, it may be construed by referring to well-known canons of statutory construction. *State of Nevada Employees Ass'n v. Lau,* 110 Nev. 715, 718, 877 P.2d 531, 534 (1994). The court "read[s] statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Fackett*, 125 Nev. at 138, 206 P.3d at 576 (citing *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008)). Therefore, other sections of NRS Chapter 482 may be considered to determine the meaning of a "transfer of registration."

Elsewhere within NRS Chapter 482, NRS 482.399(1) provides that a vehicle's registration expires upon the transfer of ownership of, or interest in, any vehicle by any holder of a valid registration, or if the vehicle is destroyed. The predicate to a transfer of registration is the transfer of ownership of a vehicle, or a vehicle becoming unusable. NRS 482.399(2) further describes this:

> The holder of the original registration may transfer the registration to another vehicle to be registered by the holder and use the same regular license plate or plates or special license plate or plates issued pursuant to NRS 482.3667 to 482.3822, inclusive, or 482.384, on the vehicle from which the registration is being transferred, if the license plate or plates are appropriate for the second vehicle, upon filing an application for transfer of registration and upon paying the transfer registration fee and the excess, if any, of the registration fee and governmental services tax on the vehicle to which the registration is transferred over the total registration fee and governmental services tax paid on all vehicles from which he or she is transferring ownership or interest.

NRS 482.339(2). In sum, based on NRS 482.399(2), a transfer of registration occurs when the holder of the original registration transfers the registration from a previously owned or unusable vehicle to another vehicle to be registered by the holder. This, in turn, occurs when the holder makes either one or both of two elections: 1) to transfer plates from one vehicle to another; 2) to use credit due under NRS 482.399(3) and (4), as described in answer to the following question.

CONCLUSION TO QUESTION ONE

NRS 482.399 and 482.480 should be read together in a manner to avoid an unreasonable or absurd result. A "transfer of registration" occurs when there is a transfer of ownership of a vehicle or the vehicle becomes unusable, and the holder of the original registration transfers the registration from the previously owned vehicle to another vehicle to be registered to the same holder.

QUESTION TWO

Should the Department charge the six dollar ($6.00) transfer fee when a customer wants to use his or her credit from a surrendered registration on either a new or existing vehicle registration?

ANALYSIS

As discussed in answer to Question One, NRS 482.480 requires a fee of six dollars ($6.00) to be charged for a transfer of registration. The holder must pay the six dollar ($6.00) transfer of registration fee and also the excess, if any, of the registration fee and governmental service tax paid on all vehicles from which the holder is transferring ownership or interest.

The amount of registration fees and governmental service tax remaining on the vehicle(s) from which the holder transfers ownership is referred to as credit. NRS 482.399(3) and (4) set out how the credit is to be computed. The governmental services tax credit is the "portion of the tax paid on the first vehicle attributable to the remainder of the current registration period or calendar year on a pro rata monthly basis against the tax due on the second vehicle or any other vehicle of which the person is the registered owner." NRS 482.399(3). The registration fee credit is the "portion of the registration fee paid on each vehicle attributable to the remainder of the current calendar year or registration period on a pro rata basis against the registration fee due on the vehicle to which registration is transferred." NRS 482.399(4). If either credit exceeds the amount due on the new registration, the holder is not entitled to a refund of the excess amount. NRS 482.399(5). The application of credit from the registration of a previously owned vehicle to another vehicle registration constitutes a transfer of registration. Therefore, the six dollar ($6.00) transfer of registration fee must be charged if a customer elects to use the credit on either a new or existing vehicle registration.

CONCLUSION TO QUESTION TWO

The Department must charge the six dollar ($6.00) transfer fee when the customer elects to use his or her credit from a surrendered registration on either a new or existing vehicle registration.

QUESTION THREE

Is there a minimum dollar amount that may constitute a credit?

ANALYSIS

Regarding credits to apply to registration fees when a transfer of registration occurs, NRS 482.399(4) provides:

> In computing the registration fee, the Department or its agent . . . shall credit the portion of the registration fee paid on each vehicle attributable to the remainder of the current

> calendar year or registration period on a pro rata basis against the registration fee due on the vehicle to which registration is transferred.

NRS 482.399(4). Further, NRS 482.399(5) provides guidance when the Department will not issue a refund:

> If the amount owed on the registration fee or governmental services tax on the vehicle to which registration is transferred is less than the credit on the total registration fee or governmental services tax paid on all vehicles from which a person transfers ownership or interest, no refund may be allowed by the Department.

NRS 482.399(5). Pursuant to this statute, there is no minimum dollar amount that can be considered as a credit, even when that dollar amount is less than six dollars ($6.00).

CONCLUSION TO QUESTION THREE

There is no statutory minimum dollar amount that can be considered a credit.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /FWR/
JULIE B. TOWLER
Deputy Attorney General
(775) 684-4605

JBT/JMR

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October 4, 2012

OPINION NO. 2012-05

AUDIT; CONTROLLER; CLAIMS: The Controller has the authority to audit claims against the State in order to determine the legality and justness of such claims. The Controller is legally required to be both a member of the Board of Directors of NDOT and the auditor of claims against the State Highway Fund.

The Honorable Kim R. Wallin, State Controller
Office of the State Controller
101 North Carson Street, Suite 5
Carson City, Nevada 89701-4786

Dear Ms. Wallin:

You have requested an opinion from the Office of the Attorney General regarding two legal issues.

QUESTION ONE

What audit authority does the State Controller have under Nevada law?

ANALYSIS

The Nevada Constitution provides that there shall be certain State executive officers who will be elected, "A Secretary of State, a Treasurer, a C*ontroller*, and an Attorney General shall be elected at the same time and places, and in the same manner as the Governor. . . ." NEV. CONST. art. 5, § 19(1) (emphasis added).

The constitutional authority of the Controller is set out as follows, "The . . . State Controller . . . shall perform such other duties as may be prescribed by law." NEV. CONST. art. 5, § 22.

The Nevada Legislature has "prescribed by law" additional duties of the State Controller, some of which are codified in NRS Chapter 227. Specifically, the Controller's audit authority is set forth in NRS 227.160, reproduced in its entirety below:

NRS 227.160 Auditing and allowance of claims; examination of witnesses and documentary evidence.

> 1. The State Controller shall:
> (a) *Audit all claims against the State*, for the payment of which an appropriation or authorization has been made but of which the amount has not been definitely fixed by law, which have been examined and passed upon by the State Board of Examiners, or which have been presented to the Board and not examined and passed upon by it within 30 days from their presentation.
> (b) Allow of those claims mentioned in paragraph (a) as not having been passed upon by the State Board of Examiners within 30 days after presentation the whole, or such portion thereof as the State Controller deems *just and legal*, and of claims examined and passed upon by the State Board of Examiners, such an amount as the State Controller decrees *just and legal* not exceeding the amount allowed by the Board.
> 2. No claim for services rendered or advances made to the State or any officer thereof may be audited or allowed unless the services or advancement have been specially authorized by law and an appropriation or authorization made for its payment.
> 3. For the purpose of satisfying himself or herself of the *justness and legality of any claim, the State Controller may examine witnesses under oath and receive and consider documentary evidence* in addition to that furnished him or her by the State Board of Examiners. The State Controller shall draw warrants on the State Treasurer for such amounts as the State Controller allows of claims of the character described in this section, and also for all claims of which the amount has been definitely fixed by law and for the payment of which an appropriation or authorization has been made.

NRS 227.160 (emphasis added).

Pursuant to the requirements of NRS 227.160, before the Controller allows a claim and draws a warrant therefor, the Controller must find that the claim is just and legal. The Legislature has granted the Controller the authority to examine witnesses under oath as a method of determining the justness and legality of any claim and the authority to receive and consider documentary evidence in addition to that furnished by the Board of Examiners.

Implied in the authority to audit claims, including the authority to examine witnesses under oath and to receive and consider additional documentary evidence, are any incidental powers reasonably necessary to carry out that authority.[1] "It is absolutely necessary that every claim against the State . . . must be itemized or 'show a detailed account' of each item thereof, in order that the . . . State Controller . . . may properly and intelligently audit the same, and if found correct, lawfully allow and pay the same." Op. Nev. Att'y Gen. No. 1941–330 (1941).

In a very old case, the Nevada Supreme Court considered whether the State Controller possesses audit authority by the creation of the office within the State Constitution. In *State ex rel. Lewis v. Doron*, 5 Nev. 399 (1870), the Nevada Supreme Court interpreted Article 5, Section 22 of the Nevada Constitution. The Court found that during Nevada's period as a Territory, the office of State Controller had the title of Territorial Auditor as evidenced in Article 17, Section 14 of the Constitution. "[I]t was provided in the schedule that '[t]he Territorial Auditor shall continue to discharge the duties of his said office until the time appointed for the qualification of the State Controller.'. . . " *Id.* at 409. The Court determined that the Controller is the, "supervising officer of revenue . . . among whose duties is the final auditing and settling of all claims against the State; . . ." *Id.* at 408. The Court held that "Auditor" and "Controller" are synonymous terms, and that, "the official designation of Controller, in the Constitution of the State of Nevada, of its own force, was a positive delegation of the powers usually incident to the office of Controller, . . ." *Id.* at 413.

Courts in other states have similarly found that "Auditor" and "Controller" are synonymous terms with generally understood powers and duties that can be implied from the creation of the office within a state's constitution. *See Love v. Baehr*, 47 Cal. 364 (1874); *Tirapelle v. Davis*, 20 Cal.App.4th 1317, 26 Cal.Rptr.2d 666 (1993); *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940); *Yelle v. Bishop*, 55 Wash.2d 286, 347 P.2d 1081 (1959); and *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 448 P.2d 799 (1969).

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[1] *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 629–30, 446 P.2d 981, 985 (1968) (everything to carry out power implied; incidental reasonably necessary power attends). *State ex rel. Hinckley v. Sixth Jud. Dist. Ct.*, 53 Nev. 343, 352, 1 P.2d 105, 107 (1931) (everything lawful and necessary to execution of power given by statute implied by law).

CONCLUSION

The Controller has the authority to audit claims against the State in order to determine the legality and justness of such claims. Implied in that audit authority are any incidental powers reasonably necessary to carry out that authority.

QUESTION TWO

You asked whether a conflict of interest prevents the Controller from auditing the claims of the Nevada Department of Transportation (NDOT) when the Controller is a member of the Board of Directors of NDOT pursuant to NRS 408.106.

ANALYSIS

The Legislature created the Board of Directors of NDOT in 1989 and designated the Controller as a member of that Board.[2] Provisions regarding the State Highway Fund were enacted in 1957 and specified that bills and charges against the State Highway Fund must be audited by the State Controller.[3] The plain language of these statutory provisions, read together, provide that the Controller must audit claims against the State Highway Fund while simultaneously serving as a member of the Board of Directors of NDOT.

In addition to the plain language of the statutes, it is presumed that the Legislature has knowledge of existing statutes relating to the same subject.[4] Based on this presumption, we can conclude that the Legislature included the State Controller as a member of the Board of Directors, with full knowledge that the Controller audits the claims of NDOT.

We can further conclude that the Legislature properly designated the State Controller as a member of the Board pursuant to its broad lawmaking authority.[5] "When in the exigencies of government it is necessary to create and define new duties, the legislative department has the discretion to determine whether additional offices will be

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[2] NRS 408.106.

[3] NRS 408.235(6).

[4] *Ronnow v. City of Las Vegas*, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937) (presumed that the Legislature, in enacting a statute, acted with full knowledge of existing statutes relating to same subject).

[5] "Briefly stated, legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

created, or whether these duties are to be attached to and become ex officio duties of existing officers."[6] *See also Ahto v. Weaver*, 39 N.J. 418, 423, 189 A.2d 27, 30 (1963). ("What the legislation does—and it is unquestionably within the power of the Legislature . . .—is to allow such dual office holding . . . .").

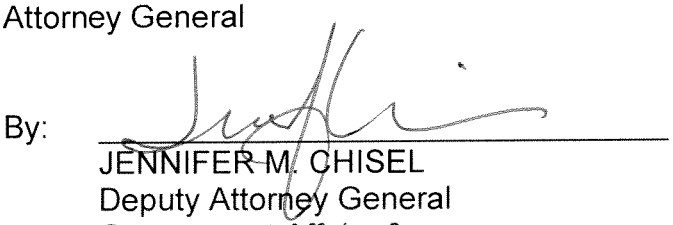
There are several legislatively created bodies that include constitutional officers, including the Board of Finance[7] and the Executive Branch Audit Committee.[8] Additionally, the Nevada Legislature statutorily prescribed the duties of and procedures for the Board of Examiners[9] and the Board of State Prison Commissioners,[10] bodies established by the Nevada Constitution.[11]

CONCLUSION

The Controller is legally required to be both a member of the Board of Directors of NDOT and the auditor of claims against the State Highway Fund; therefore, we can conclude that no conflict of interest can be imputed to the Controller when carrying out her legal duties as prescribed by the State Legislature.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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[6] 63C AM. JUR. 2D *Public Officers and Employees* § 43 (2012).

[7] NRS 355.010.

[8] NRS 353A.038.

[9] NRS 353.010.

[10] NRS 209.101.

[11] NEV. CONST. art. 5, § 21.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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GREGORY M. SMITH
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October 30, 2012

OPINION NO. 2012-06

LOANS; INTEREST; CIVIL LAW: The prohibition against civil suits or alternative dispute resolution under NRS 604A.480(2)(f) is applicable to all loans made pursuant to NRS 604A.480(2). It applies to both an outstanding loan as well as a new loan the proceeds of which are used to extend the "repayment, renewal, refinancing or consolidation of an outstanding loan." NRS 604A.480(1). All loans made pursuant to this section must comply with all of the requirements under subsection (2), including waiving the ability to pursue civil action or alternative dispute resolution procedures if the customer defaults.

George E. Burns, Commissioner
State of Nevada
Department of Business and Industry
Financial Institutions Division
2785 E. Desert Inn Rd., #180
Las Vegas, Nevada 89121

Dear Mr. Burns:

You have requested an opinion from the Office of the Attorney General regarding the interpretation and application of NRS 604A.480.

QUESTION

Is the prohibition against civil suits or alternative dispute resolution set forth in NRS 604A.480(2)(f) applicable to a new deferred deposit loan or high-interest loan made pursuant to NRS 604A.480(2) to pay the balance of an outstanding loan, or does it only limit actions to collect on the outstanding loan?

ANALYSIS

Nevada Revised Statutes Chapter 604A regulates short term lending in the State of Nevada. The chapter recognizes three forms of lending: deferred deposit loans, high-interest loans, and title loans.[1] A deferred deposit loan is a transaction in which the customer provides the licensee[2] with a check or authorization for electronic transfer of funds on a future date in exchange for immediate receipt of a lesser sum of money from the licensee. NRS 604A.050. A high-interest loan is a loan which has single or multiple installments and charges more than 40 percent in annual interest rate. NRS 604A.0703. The original loan term of a deferred deposit loan or high-interest loan usually does not exceed 35 days. NRS 604A.408(1). Further, the licensee cannot extend either type of loan contract beyond 90 days from the date of execution of the loan contract. NRS 604A.408(3).[3] A high-interest loan may be made for a period of 90 days as long as it requires fully amortized installments, is not subject to extension, and does not contain a balloon payment. NRS 604A.408(2).

Nevada Revised Statutes 604A.480 is separated into two subsections and reads in full as follows:

> 1. *Except as otherwise provided in subsection 2*, if a customer agrees in writing to establish or extend the period for the repayment, renewal, refinancing or consolidation of an outstanding loan by using the proceeds of a *new* deferred deposit loan or high-interest loan *to pay the balance of the outstanding loan, the licensee shall not establish or extend the period beyond 60 days after the expiration of the initial loan period.* The licensee shall not add any unpaid interest

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[1] For the purposes of this analysis, title loans are not relevant.

[2] "'Licensee' means any person who has been issued one or more licenses to operate a check-cashing service, deferred deposit loan service, high-interest loan service or title loan service pursuant to the provisions of this chapter." NRS 604A.075.

[3] "Notwithstanding the provisions of NRS 604A.480, a licensee shall not agree to establish or extend the period for the repayment, renewal, refinancing or consolidation of an outstanding deferred deposit loan or high-interest loan for a period that exceeds 90 days after the date of origination of the loan."

> or other charges accrued during the original term of the outstanding loan or any extension of the outstanding loan to the principal amount of the new deferred deposit loan or high-interest loan.
>
> 2. *This section does not apply to a new deferred deposit loan or high-interest loan if the licensee*:
>
> (a) Makes the *new* deferred deposit loan or high-interest loan to a customer pursuant to a loan agreement which, under its original terms:
>
> (1) Charges an annual percentage rate of less than 200 percent;
>
> (2) Requires the customer to make a payment on the loan at least once every 30 days;
>
> (3) Requires the loan to be paid in full in not less than 150 days; and
>
> (4) Provides that interest does not accrue on the loan at the annual percentage rate set forth in the loan agreement after the date of maturity of the loan;
>
> (b) Performs a credit check of the customer with a major consumer reporting agency before making the loan;
>
> (c) Reports information relating to the loan experience of the customer to a major consumer reporting agency;
>
> (d) Gives the customer the right to rescind the new deferred deposit loan or high-interest loan within 5 days after the loan is made without charging the customer any fee for rescinding the loan;
>
> (e) Participates in good faith with a counseling agency that is:
>
> (1) Accredited by the Council on Accreditation of Services for Families and Children, Inc., or its successor organization; and
>
> (2) A member of the National Foundation for Credit Counseling, or its successor organization; and
>
> (f) Does not commence any civil action or process of alternative dispute resolution on a defaulted loan or any extension or repayment plan thereof.

NRS 604A.480 (emphasis added).

The first subsection establishes the rule that a licensee can only extend a deferred deposit loan or high-interest loan through the proceeds of a new deferred

deposit loan or high-interest loan[4] for an additional 60 days beyond the term of the original loan. NRS 604A.480(1). The limitation on the term of deferred deposit and high-interest loans thus protects customers from falling into a cycle of debt.

The second section establishes that the restrictions set forth in NRS 604A.480(1) do not apply if the licensee satisfies all of the applicable requirements. Among them, subsection 2(f) prohibits certain collection actions by a licensee. Specifically, it bars a licensee from commencing a civil action or process of alternative dispute resolution "on a defaulted loan or any extension or repayment plan thereof." NRS 604A.480(2)(f). The question that you ask is whether this language bars collection only of the outstanding loan; or, as well, the new loan used to pay the balance of the outstanding loan.

To begin the analysis, deference is given to an interpretation of the agency charged with administering a statute, in this case the Financial Institutions Division (Division). *See Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747-48, 918 P.2d 697, 463 (1996) ("An agency charged with the duty of administrating an act is impliedly clothed with power to construe it as a necessary precedent to administrative action. Further, great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute") (internal citations and quotation marks omitted).

On December 10, 2009, the Division issued a Declaratory Order and Advisory Opinion Regarding Mandatory Disclosures for Loans Made Pursuant to NRS 604A.480 (Advisory Opinion). In it, the Division concluded that NRS 604A.480(2)(f) bars collection action on *any* loan, new or outstanding. Advisory Opinion at 7.

The Division's interpretation is reasonable. First, if a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the statute's language. . . ." *Western Sur. Co. v. ADCO Credit, Inc.*, 127 Nev. __, __, 251 P.3d 714, 716 (Adv. Op. 8, March 17, 2011). In this case, the statute provides that a licensee who utilizes the exception in section 2 may not commence a civil action or process of alternative dispute resolution "on a defaulted loan or any extension or repayment plan thereof." NRS 604A.480(2)(f). The statute does not confine the prohibition to the outstanding loan; it applies to "a defaulted loan or any extension or repayment plan thereof." The bar reasonably applies to either an outstanding loan or a new loan used to pay the balance on an outstanding loan. Therefore on its face the statute is clear and there is no occasion for statutory construction. "[W]here there is no ambiguity in a statute, there is no opportunity for judicial construction and the law must be followed regardless of result." *Krahn v. State, Dep't of Motor Vehicles and Pub. Safety*, 108 Nev.

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[4] The term "new deferred deposit or high-interest loan" as used herein and in the statute means the source of proceeds for "the repayment, renewal, refinancing or consolidation of an outstanding loan . . . ." NRS 604A.480(1).

1015, 1016, 842 P.2d 728, 729 (1992) (internal citations and quotation marks omitted). *See also Washoe County v. Baker,* 75 Nev. 335, 338, 340 P.2d 1003, 1004 (1953) ("[w]e shall not, then, permit a resort to legislative history for the purpose of rendering ambiguous that which otherwise appears to be both clear and reasonable").

Even if ambiguity did exist and construction were necessary, canons of statutory construction would require the same result. A statute is construed "in line with what reason and public policy would indicate the legislature intended." *Bacher v. State Eng'r*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006) (internal quotation marks omitted).

Originally enacted in 2005, one of the main goals of NRS Chapter 604A was to stop what was called the "debt treadmill." This problem occurs when a customer who is unable to repay the original loan either continues to make interest-only payments just to keep the loan current; or takes out another, larger loan to pay the principal and interest incurred from the first loan. The result is a cycle of debt in which the customer becomes trapped. *See* Hearing on A.B. 384 Before the Assembly Committee on Commerce and Labor, 2005 Leg., 73rd Sess. 46 (April 6, 2005).

Removing the ability to pursue civil action and alternative dispute resolution methods is reasonably related to the legitimate purpose of ensuring that licensees make loans in amounts and under terms the customer can repay. *Silver State Elec. Supply Co. v. State ex rel. Dep't of Taxation,* 123 Nev. 80, 84, 157 P.3d 710, 712 (2007) ("When a party contends that a statute violates its equal protection rights but does not allege the involvement of a suspect class or fundamental right, the statute is constitutional if the classification scheme created by that statute is rationally related to furthering a legitimate state interest"). [5]

CONCLUSION

The prohibition against civil suits or alternative dispute resolution under NRS 604A.480(2)(f) is applicable to all loans made pursuant to NRS 604A.480(2). It applies to both an outstanding loan as well as a new loan the proceeds of which are used to extend the "repayment, renewal, refinancing or consolidation of an outstanding loan." NRS 604A.480(1). All loans made pursuant to this section must comply with all

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[5] *Cf. Guralnick v. Sup. Ct. of New Jersey*, 747 F. Supp. 1109 (D.N.J.,1990) (compulsory attorney fee arbitration system does not unconstitutionally impair attorneys' contractual rights; impairment of attorney-client contract was not substantial. Further, such impairment was justified by legitimate state purpose of maintaining public confidence in judicial system. State action which substantially impairs contracts entered into by private parties is nevertheless constitutional if justified by significant and legitimate public purpose, based on reasonable conditions and of character appropriate to public purpose justifying its adoption) (relying on *Energy Reserves Grp, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411–12 (1983) establishing three-part test requiring (1) a substantial impairment of the contractual relationship, (2) that is justified by a significant and legitimate public purpose, and (3) is based on "'reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'").

of the requirements under subsection (2), including waiving the ability to pursue civil action or alternative dispute resolution procedures if the customer defaults.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
GINA C. SESSION
Chief Deputy Attorney General
for DANIEL D. EBIHARA
Deputy Attorney General
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DDE:MAS

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December 7, 2012

OPINION NO. 2012-07

TAXATION; INDIAN COUNTRY: The State may collect sales tax from sales of construction project materials occurring outside of Indian country to a non-Indian construction contractor who then delivers and uses the material on tribal property. A tribe may collect sales tax from sales of construction project materials within Indian country to a non-Indian contractor where the transaction concludes on tribal land, precluding the ability of the state to levy a sales tax on the same transaction.

Christopher Nielsen, Executive Director
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. Nielsen:

You have asked this office for an opinion on the subject of taxation in Indian country.[1] Your request is for advice about state authority to levy several different kinds

[1] The term Indian country is widely accepted to mean,

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

of tax in different circumstances. With your consent, your opinion request will be bifurcated. This opinion will address the question that you have indicated should be prioritized; remaining questions will be addressed in a subsequent opinion.[2]

QUESTION ONE

If a non-Indian construction contractor[3] performing a construction contract for improvement to real property[4] on tribal land, purchases and receives construction material outside the reservation, and then transports the material to the work site on the reservation, are applicable sales or use taxes due to the tribal government or to the State of Nevada?

ANALYSIS

Because this question hypothesizes the application of either a sales tax or a use tax, there are two distinct analyses that must be made: (i) whether sales tax is due on the purchase; and (ii) if sales tax is avoided (*i.e.,* a resale certificate is presented), whether use tax is due on the use of the materials. These issues will be addressed in turn.

Sales and Use Tax Generally

Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in Nevada. NRS 372.105. Nevada also imposes a corresponding excise tax, known as a use tax, on the storage, use, or other consumption of tangible personal property in Nevada. NRS 372.185, NRS 372.190. Use tax is complementary to the sales tax in that it guarantees that any nonexempt retail sales of property that have escaped sales tax liability are nonetheless taxed when the property is utilized in the state. *State, Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 280, 871 P.2d 331, 334 (1994); *see also* NRS 372.345. While sales tax is

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18 U.S.C. § 1151, *quoted in Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 526–27 (1998).

[2] The other questions concern state authority to impose taxes based on lodging; cigarettes or other tobacco products; and tires. You have also asked whether the exemptions created for tribes in state law at NRS 372.805 and 374.805 apply when land is acquired in fee title by an Indian tribe.

[3] "'Construction contractor' means any person who acts solely in his or her professional capacity or through others to construct, alter, repair, add to, remodel or otherwise improve any real property." NAC 372.190(1).

[4] "'Construction contract for improvement to real property' means a contract for erecting, constructing or affixing a structure or other improvement on or to real property, or the remodeling, altering or adding to or repairing of an improvement to real property." NAC 372.190(2).

assessed at the time of sale, use tax is assessed at the time storage, use, or other consumption of the property occurs within Nevada. *Sparks Nugget, Inc. v. State ex rel. Dep't of Taxation*, 124 Nev. 159, 164, 179 P.3d 570, 574 (2008). Although complementary, the two are separate and distinct taxes administered by the State of Nevada.

A tribe has authority to tax transactions occurring within Indian country. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). This includes the right of the tribe to impose a sales tax. "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

Where the transaction occurs outside of Indian country with a non-tribal member, the law is clear that the state may levy its sales tax on the transaction, regardless of where the property is ultimately consumed, as state taxation is unaffected by tribal sovereignty. "An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001). This was firmly established in *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 99 (2005). There the State of Kansas imposed a tax on receipt of motor fuel by non-Indian fuel distributors even though the distributors subsequently delivered that fuel to a gas station owned by, and located on, the Reservation of the Prairie Band Potawatomi Nation. Prior to *Wagnon*, authorities held differing views about whether an interest-balancing test – drawn from *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) – is required to determine state authority to tax in the face of claims of preemption based on a tribe's sovereign interest. The *Wagnon* Court, though, resolved the dispute by simply rejecting use of *Bracker's* interest-balancing test outside of Indian country.[5]

> [W]e formulated the balancing test to address the "difficult questio[n]" that arises when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. (Citations omitted.)

Wagnon, 546 U.S. at 110.

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[5] In its analysis, the Court first determined that the legal incidence of the state tax fell on the non-Indian distributor and not on the tribe. The conclusions drawn in this opinion also rest on the assumption that the legal incidence of Nevada's sales and use taxes fall on the non-Indian contractor, not the tribe.

Therefore, under the rule of *Wagnon*, the State may impose a sales tax on the sale of construction project material occurring outside of Indian country, even if the material is ultimately used in Indian country.[6]

Use Tax for Use of Materials in Indian Country

Payment of sales tax creates an exemption from use tax. NRS 372.345, NRS 372.350. Therefore, where a retail sale is made outside of Indian country to a non-tribal member without the application of sales tax, for example under a resale certificate, and the ultimate use of the property is made on tribal land, the analysis shifts to use tax.

Nevada law is clear that, in a construction contract for improvement to real property, the construction contractor is the consumer of the property, subject to use tax on materials consumed in the construction contract that were not subject to sales tax. NAC 372.190(2), NAC 372.200. Here, the contractor, as a non-tribal member, will be subject to Nevada use tax on the consumption of the property used in completion of the construction contract as: (i) the legal incidence of the tax does not fall on the tribe or a tribal member, and (ii) there is no provision for use tax in most Indian tax ordinances; and even where the Tribe asserts a use tax, a similar levy by the State is not precluded by NRS 372.805.

Legal Incidence of Use Tax Falls on Non-Tribal Construction Contractor

The incidence of the use tax falls directly on the non-Indian construction contractor, not the tribe or a member of the tribe. "[A] State's excise tax is [per se] unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). Where the incidence of a state tax falls on non-tribal members, a state's action in imposing the tax is permissible because it does not interfere with any supervening federal law and does not violate the proscription against direct on-reservation taxation of

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[6] Your question infers that the answer must be that either the State can tax a transaction or a tribe may do so. But state and tribal taxation are not mutually exclusive. Even if the State may tax an off-reservation transaction, the tribe may also impose its own tax.

> When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority.

Wagnon, 546 U.S. at 114–15, quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 184, n. 9 (1980) (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). We offer no conclusions regarding any tribe's specific authority.

Indians without clear congressional intent. *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 508 N.E.2d 914 (N.Y. 1987), *cert. granted, judgment vacated on other grounds*, 487 U.S. 1212 (1988). It is irrelevant who bears the economic burden of the tax. Only the legal incidence of the tax is relevant. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (9th Cir. 2008). Where a construction contractor is statutorily or by regulation liable for tax as the consumer of the property used in a construction contract, the construction contractor is the party upon whom the legal incidence of the tax falls. *Id.* at 1190; NAC 372.200, NAC 372.210. Here, the legal incidence of the use tax falls upon the construction contractor.

Additionally, while a full evaluation of the balancing factors set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) is beyond the scope of this opinion, the taxation of a non-Indian construction contractor making use of tangible personal property that escaped sales taxation outside of Indian country is likely permissible under a *Bracker* analysis.

With respect to on-reservation activities by non-tribal members, there are two barriers to the levy of the use tax by the State: (i) preemption by federal law; and (ii) an infringement on the sovereignty of the Tribe. *Bracker*, 448 U.S. at 142-43. As noted above, there is nothing preempting the application of the use tax, as the incidence of the test falls on a non-Indian construction contractor, and there is no direct federal preemption of the use tax. And with regard to the infringement of the sovereignty of the tribe, without having a full description of circumstances to apply the balancing factors, a specific determination cannot be made. However, given that the taxation involves non-tribal members, *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Cmty. v. State of Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995); it is levied in a non-discriminatory manner; and it is intended to tax items that for one reason or another escaped State sales taxation, the application of the use tax to the construction contractor is likely valid. Assessment of a use tax on a construction contractor would not impact the right of the tribe to conduct its affairs.

<u>Tribal Taxing Ordinance Does not Include Levy of Use Tax</u>

Within Nevada, where a tribe has authority to levy a sales tax, the State has legislatively preempted collection of a State sales tax on the same transaction, to the extent the tribe has levied its own tax, regardless of whether the State *may* do so under a *Bracker* analysis. More specifically, the Nevada Legislature has concluded that the State may not collect sales or use taxes on the "*sale* of tangible personal property on an Indian reservation or Indian colony . . . if: (1) The tax is equal to or greater than the tax imposed by this chapter; and (2) A copy of an approved tribal tax ordinance imposing the tax has been filed with the Department of Taxation." NRS 372.805 (emphasis added). There is no analogous statutory provision preventing collection of use tax by

the State, as the express statutory language is limited to the "sale" of property in Indian country.

As an example, the Washoe Tribe Law and Order Code levies a sales tax for transactions on reservation land stating, "[f]or the privilege of *selling* tangible personal property at retail, a tax is hereby imposed upon all retailers located within the jurisdiction of the Washoe Tribe" at the sales tax rate applicable where the tribe is located. Washoe Tribe of Nevada and California, Law & Order Code, Title 12, §12-20-010 (emphasis added).

CONCLUSION TO QUESTION ONE

The State may collect sales tax from sales of construction project materials occurring outside of Indian country to a non-Indian construction contractor who then delivers and uses the material on tribal property. Additionally, the State may collect use tax on the use of construction project materials by a non-Indian construction contractor where such materials were sold by non-Indian retailers outside of Indian country and escaped sales taxation.

QUESTION TWO

If a non-Indian construction contractor, engaging in a construction job on tribal land, receives construction material delivered to the work site on the reservation, are all applicable sales or use taxes due to the tribal government or to the State of Nevada?

ANALYSIS

Once again, the issue addressed in this question requires analyses of two separate factual scenarios: (i) where the sale concludes outside of tribal land and the goods are then delivered to tribal lands; and (ii) where delivery upon tribal land concludes the sale, and is thus the situs for the incidence of taxation. In the first scenario, the State of Nevada retains taxing jurisdiction, while in the second, the tribe has authority to tax.

For a "sale" to occur, there must be a "transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property for a consideration." NRS 372.060(1); *Shell Oil Co. v. Dir. of Revenue*, 732 S.W.2d 178 (Mo. 1987). The transfer of title or possession is the moment upon which the transaction occurs for sales and use tax purposes. *Hales Sand & Gravel, Inc. v. State Tax Comm'n*, 842 P.2d 887, 892 (Utah 1992). Delivery of goods is not itself sufficient to conclude transfer or right, title, or possession, as delivery to a particular place or consignee, such as a common carrier, consummates the transaction and is considered the point of sale, regardless of whether delivery has been made to the ultimate purchaser. *Id.*

Thus, the situs of the transaction is the place at which right, title, or possession transfers. If right, title, or possession transfers off the reservation, the sales tax analysis described above dictates that the transaction is taxable by the State of Nevada. If however, the transaction concludes on the reservation, the State is preempted from taxing the transaction, to the extent the tribe has complied with the requirements of NRS 372.805.

In Nevada, the Legislature has eliminated uncertainty in conflicting taxation, stating, "[t]he governing body of an Indian reservation or Indian colony may impose a tax on the privilege of selling tangible personal property at retail on the reservation or colony." NRS 372.800(1). Based on the analysis set forth above, where a sale is deemed to transact on the reservation, the tribe has the authority to levy a sales tax. If a tribe collects a sales tax on a transaction occurring on the reservation, the State cannot, so long as the tribe's tax is at least as great as the State's would be, and the ordinance providing for such taxation is on file with the Department of Taxation pursuant to NRS 372.800 and 372.805 (and parallel provisions NRS 374.800 and 374.805).

Specific facts are necessary to evaluate where a particular sale transacts. However, if the sale transacts on non-tribal land, and the delivery to the tribal land is subsequent to the incidence of the tax, the State retains the right to levy a sales tax. If, however, delivery to tribal land is a condition of the sale, and delivery is made other than by a consignee (*i.e.,* a common carrier), the sale concludes on tribal land, and the tribe retains the authority to levy its own sales tax, precluding the State's ability to levy a sales tax, assuming the requirements of NRS 372.805 are satisfied.

It should be noted that where the parties attempt to alter the substance of the transaction by concluding the sales on tribal land, such action may not be respected. For example, when a sale would have occurred outside the reservation but for the tax exempt status of the tribe, the State retains the right to tax such transactions. This is because the balance of interests tips in favor of the State when "the state levies a neutral sales tax on non-Indians' purchases that—but for contractual creativity—would have occurred on non-Indian land." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008).

CONCLUSION TO QUESTION TWO

A tribe may collect sales tax from sales of construction project materials within Indian country to a non-Indian contractor where the transaction concludes on tribal land, precluding the ability of the state to levy a sales tax on the same transaction pursuant to the requirements of NRS 372.805. If the transaction concludes on non-tribal land, and

the materials are merely delivered to tribal land after consummation of the sale; the state retains authority to levy a sales tax.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By
GINA C. SESSION,
Chief Deputy Attorney General
for JEDEDIAH R. BODGER
Deputy Attorney General
Division of Business and Taxation

JRB/SAB

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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December 10, 2012

OPINION NO. 2012-08

ECONOMIC DEVELOPMENT; PUBLIC BODIES; SECRETARY OF STATE: The power to appoint a designee to serve on the Board of Economic Development as a voting member also includes the power to do that which will make the delegation effective and complete.

Steven D. Hill, Executive Director
Nevada Governor's Office of
Economic Development
808 West Nye Lane
Carson City, Nevada 89703

Dear Mr. Hill:

You have requested our opinion regarding designee membership on the Board of Economic Development (BOED). NRS 231.033(1)(a)(3) allows the Secretary of State to designate a person to serve in his stead as a member of the BOED. NRS 231.033 provides for the composition of the BOED as follows:

> NRS 231.033 Board of Economic Development: Creation; membership; terms; officers; quorum; meetings; expenses.
> 1. There is hereby created the Board of Economic Development, consisting of:
> (a) The following voting members:
> (1) The Governor or his or her designee;
> (2) The Lieutenant Governor or his or her designee;
> (3) The Secretary of State or his or her designee; and

(4) Six members who must be selected from the private sector and appointed as follows:
(I) Three members appointed by the Governor;
(II) One member appointed by the Speaker of the Assembly;
(III) One member appointed by the Majority Leader of the Senate; and
(IV) One member appointed by the Minority Leader of the Assembly or the Minority Leader of the Senate. The Minority Leader of the Senate shall appoint the member for the initial term, the Minority Leader of the Assembly shall appoint the member for the next succeeding term, and thereafter, the authority to appoint the member for each subsequent term alternates between the Minority Leader of the Assembly and the Minority Leader of the Senate.
(b) The following nonvoting members:
(1) The Chancellor of the Nevada System of Higher Education or his or her designee; and
(2) One member appointed by the Department of Employment, Training and Rehabilitation from the membership of the Governor's Workforce Investment Board.

QUESTION

Whether it is permissible for the Secretary of State to appoint his deputy as his designee to the BOED on an "as necessary" basis.

BACKGROUND

These facts underlie this request for our opinion.

Ross Miller, Secretary of State, was unable to attend the July 13, 2012 meeting of the BOED. He sent Ryan High, Deputy Secretary of State, to the meeting as his designee. NRS 233.031(1)(a)(3) defines the Nevada Secretary of State "or his designee" as a voting member of the BOED. The Secretary of State may, in his discretion, name a designee to the BOED.

Mr. High introduced himself during roll call as Mr. Miller's designee. He was seated, but he was told that he could not vote. Minutes of the meeting indicate Mr. Miller was recorded as "absent excused."

NRS 225.060 provides that the Secretary's Chief Deputy (and other specified deputies) may perform all the duties required of the Secretary of State.

ANALYSIS

The power to appoint a designee[1] conferred by NRS 231.033(1) is given to three constitutional officers. NRS 231.033(1) defines these three designees as voting members of the BOED. Your opinion request asks whether such designees are either permanent appointments or alternatively can be ad hoc, as-needed appointments.

The Legislature has treated the terms of appointment of the other members of the BOED differently from the three constitutional officer members for whom no tenure is specified.[2] This is an important distinction which we believe means that constitutional officer designees serve at the will of the appointer.

The Secretary of State is a public officer as defined in NRS 281.005.[3] NEV. CONST. ART. 15, §§ 10 and 11[4] provide authority for appointment and removal of public

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[1] Appointment is one of several meanings for designee. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002)

[2] NRS 231.033(4) states:

> Except as otherwise provided in this subsection, the members of the Board appointed pursuant to subparagraph (4) of paragraph (a) of subsection 1 and subparagraph (2) of paragraph (b) of subsection 1 are appointed for terms of 4 years. The initial members of the Board shall by lot select three of the initial members of the Board appointed pursuant to subparagraph (4) of paragraph (a) of subsection 1 to serve an initial term of 2 years.

[3] NRS 281.005(1) defines "public officer" as:

> 1) [A] person elected or appointed to a position which:
> (a) Is established by the Constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and
> (b) Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

[4] Section 10 establishes that officers are chosen or appointed according to law: Election or appointment of officers. All officers, whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law. NEV. CONST. art. 15, § 11. Section 11 defines the tenure of public officers: The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four (4) years, except as herein otherwise provided in this Constitution. In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter

officers in certain contexts. The following examination of NEV. CONST. ART. 15, § 11, necessary to answer your question, is guided by principles of construction utilized by the Nevada Supreme Court.[5]

The phrase in NRS 231.033(1)(a)(3), "or his designee," means the appointment of a public officer. Had the Secretary of State permanently designated Mr. High to the BOED, there would be no question that Mr. High would have been a voting member without any restriction. However, disagreement arose because the Secretary of State intended to appoint his deputy on an as needed basis.

The statute is silent regarding restriction on the power of appointment of a designee to the BOED. However, we believe the delegated power to appoint an officer/designee is subject to NEV. CONST. art. 15, § 11, which provision allows removal or replacement of the officer at the pleasure of the appointer, but only with certain legal restrictions. This constitutional provision is consistent with the widely accepted general rule applicable to public officer appointment to and removal from administrative agencies, boards, and commissions.[6]

The general rule regarding the appointment and removal of public officer is that the power of appointment carries with it the power of removal at the pleasure of the appointer where definite terms are not specified by the Legislature and in the absence of other statutory restrictions. NEV. CONST. art. 15, § 11; *Eads v. City of Boulder City,* 94 Nev. 735, 738, 587 P.2d 39, 41 (1978) citing NEV. CONST. art. 15 § 11; and *Leeper v. Jamison,* 32 Nev. 327, 108 P.1 (1910); Op. Nev. Att'y Gen. No. 89-19 (December 31, 1989)(appointed representatives on the Nevada State Board of Geographic Names serve at the pleasure of the appointer); *see also Gowey v. Siggelkow,* 382 P.2d 764 (Idaho 1963) for an extensive recitation of authorities supporting the general rule.

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with reference to the tenure of office or the dismissal from office of any such officer or employee shall control. NEV. CONST. art. 15, § 11.

[5] The Nevada Supreme Court's primary objective when construing the Nevada Constitution is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective. *Guinn v. Legislature*, 119 Nev. 460, 471, 76 P.3d 22 (2003). When construing constitutional provisions, the Court uses the same rules of construction used to interpret statutes. *Rogers v. Heller,* 117 Nev. 169, n. 17, 18 P.3d. 1034, 1038 n.17 (2001). The Court will give words in the Constitution their plain meaning unless doing so would violate the spirit of the provision. *State ex rel. State Board of Equalization v. Bakst,* 122 Nev. 1403, 1413, 148 P.3d 717, 724 (2006).

[6] We do not believe that the statute's use of "designee" has any meaning other than appointment. The Legislature uses other words such as proxy, alternate and substitute, but their statutory use is not synonymous with designee. Use of proxy is typically found in contexts in the NRS including chapters governing insurance, corporations, securities, and trusts.

The *Eads* Court explicitly stated the rule: "Absent a specified term of office, the incumbent may be removed at will by the appointing authority." *Eads,* 94 Nev. at 738. The *Eads* Court was also mindful that the general rule applies only where there are no legal restrictions against "at will" removal, for instance, statutory restriction forbidding removal unless for cause. Our review of NRS 231 does not reveal any such legal restriction preventing removal of the designee at the pleasure of the Secretary of State.

At its August meeting, the BOED did not allow Secretary of State Miller's designee to vote. Furthermore, it appears the BOED did not seat Mr. High as a designee but considered Secretary Miller to be the member since he was marked "absent excused" in the minutes of the meeting. Credentials may have been an issue since Mr. High merely appeared and orally announced he was Secretary Miller's designee. The request for opinion explains that Secretary Miller intends to participate in future meetings and did not intend to permanently appoint Mr. High to the seat.

We believe that NRS 231.033's delegation of the power to appoint a designee implies the power necessary to complete his or her delegated authority. "Power conferred by statute necessarily carries with it the power to make it [the delegated power] effective and complete." *Moore v. Bd. of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 210, 495 P.2d 605, 607 (1972). To be complete, an appointment can and should include specification of the duration of the appointment.

We suggest that the BOED adopt a policy to describe necessary credential requirements for the constitutional officer's designee before he or she may be seated, and a process that provides appropriate notice at a specified time before the BOED's next meeting that a designee will appear in the stead of the appointer.

In a situation similar to the issue presented herein, the West Virginia Supreme Court of Appeals suggested establishing a procedural rule clarifying the meaning of "designated representative." A lower court had invalidated the vote of a person attending a public meeting of a Regional Jail and Correctional Authority, an appointed body, finding her vote to have been a proxy. Proxy votes were prohibited by procedural rule, although statute clearly gave the secretary of the Department of Administration authority to appoint "his or her designated representative" to attend public body meetings. The West Virginia Supreme Court of Appeals found she had been sent as the designated representative with full voting power, not as a proxy, although she had not been "properly documented." The court summed up the situation and appealed to the Legislature for relief:

> [We] are reluctant to invalidate the [designated representative's] vote [rejecting a lower court's determination that the voter was a "proxy"] in issue solely

> due to lack of guidance on what is required to qualify as a designated representative. We do, however, suggest that a procedural rule clarifying what is required to comply with the meaning of a "designated representative" under West Virginia Code [] specifically be adopted to address the requirements, such as the preparation of a document which indicates whether the authorization extended is continuing or limited to a particular meeting.

State of West Virginia v. County Commission of Cabell County, 222 W.Va. 1, 12, 657 S.E.2d 176,187 (2007). The court's suggestion of a clarifying procedural role is equally appropriate in the present circumstances.

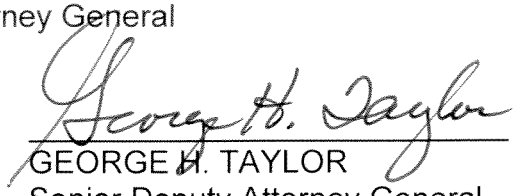
CONCLUSION

The plain meaning of NRS 231.033 guides our view that the Secretary of State's designee to the BOED is a voting member of the Board, but the statute is silent regarding the designee's term. This indicates that the term of his appointment is indefinite and that the designee serves at the pleasure of the Secretary of State. Consequently the Secretary has authority to appoint a designee on an as-needed basis.

The power to appoint a designee to serve on the BOED as a voting member also includes the power to do that which will make the delegation effective and complete. To be complete, an appointment should include specification of the duration of the appointment. It is recommended a policy be adopted by the BOED specifying, at a minimum, the required terms and conditions regarding the appointment of permanent or temporary designees and whether the Board must be notified by a time certain prior to meetings that a designee will be appointed.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
GEORGE H. TAYLOR
Senior Deputy Attorney General
(775) 684-1230

GHT/CG
cc: Ross Miller, Nevada Secretary of State

STATE OF NEVADA

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December 14, 2012

OPINION NO. 2012-09

EMPLOYEES; OVERTIME; WAGES: When the variable workweek exception identified in NRS 281.100(3)(b)(2) is met, the criminal penalties of NRS 281.100(5) do not apply so long as the employee's hours of work do not exceed 80 hours in a bi-weekly pay period. An employee who chooses a variable work schedule and whose workweek does not exceed 40 hours is not statutorily entitled to overtime compensation.

Brandi Jensen, Esq.
City Attorney
City of Fernley, Nevada
595 Silver Lace Blvd.
Fernley, NV 89408

Dear Ms. Jensen:

You have asked this office to address several questions arising under NRS 281.100 relating to the hours of work and overtime provisions applicable to city employees. A clarification to your questions was received on October 23, 2012.

QUESTION ONE

If an employee chooses and is approved for a variable schedule workweek, and works more than ten hours in a work day, will that constitute a violation of NRS 281.100 so as to subject the City of Fernley to criminal sanctions?

ANALYSIS

NRS 281.100(5) states:

> Any officer or agent of the State of Nevada, or of any county, city, town, township, or other political subdivision thereof, whose duty it is to employ, direct or control the services of an employee covered by this section, who violates any of the provisions of this section as to the hours of employment of labor as provided in this section, is guilty of a misdemeanor.

NRS 281.100(5).

Within the same statutory section, NRS 281.100(3)(b)(2) authorizes a variable schedule workweek if chosen by the employee and approved by the employer. This same subsection limits the hours of employment under a variable schedule workweek to "not more than 80 hours in a bi-weekly pay period." The other restrictions on an employee's hours of employment contained in NRS 281.100 do not apply to an employee who chooses and is approved to work a variable workweek. NRS 281.100(3)(b)(2). Under this exception, the hours worked on any particular workday are rendered irrelevant, as the applicable restriction is instead based upon the total hours worked in a bi-weekly pay period. Under this scenario, a workday in excess of ten hours will not subject City officials to criminal sanctions.

CONCLUSION TO QUESTION ONE

When the variable workweek exception identified in NRS 281.100(3)(b)(2) is met, the criminal penalties of NRS 281.100(5) do not apply so long as the employee's hours of work do not exceed 80 hours in a bi-weekly pay period.

QUESTION TWO

If an employee chooses and is approved for a variable workweek, and works more than ten hours in a workday, but not more than 40 hours in a workweek, will the employee be exempt from overtime requirements?

ANALYSIS

Cities such as the City of Fernley are subject to the Federal Fair Labor Standards Act (FLSA). 29 U.S.C. § 201. *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985). The FSLA's overtime provisions are calibrated to the number of hours worked during the employee's workweek and do not require payment for overtime unless the employee's hours exceed 40 hours in a workweek. 29 U.S.C. § 207(a)(2). Under the FLSA, entitlement to overtime pay is generally not measured by the hours worked in a workday. 29 C.F.R. § 778.602(a).[1] Therefore there is no statutory obligation under federal law to pay overtime in these circumstances.

NRS 281.100(4) addresses a public employee's entitlement to overtime pay, and requires that any employee whose hours of employment are controlled by subsection 1 of that statute is entitled to overtime pay or compensatory vacation time. As set forth in the analysis to Question One above, the requirements of NRS 281.100 do not attach when any of the exceptions stated in subsection 3 of NRS 281.100 are met. This includes an employee who has chosen and been approved to work a variable workweek. NRS 281.100(3)(b)(2). Accordingly an employee who works a variable workweek is not subject to NRS 281.100(1), and the overtime entitlement provisions of NRS 281.100(4) are inapplicable in this scenario.

Additionally, if the employee is a member of a bargaining unit covered by a collective bargaining agreement, the employee's entitlement to overtime is not controlled by NRS 281.100. *See* NRS 281.100(3)(b)(5). Nevada law provides that employee compensation must first be treated through the collective bargaining process. NRS 288.150(2)(a). The Local Government Employee-Management Relations Board has determined that this includes treating overtime compensation as a mandatory subject of bargaining. *Truckee Meadows Firefighters, Local 2487 v. Truckee Meadows Fire Protection Dist.*, Item No. 448A, EMRB Case No. A1-045650 (July 23, 1999). Accordingly, neither federal nor state law directs overtime payment for an employee who chooses and is approved to work the variable workweek as stated in your question, but additional overtime requirements may arise under the terms of a given collective bargaining agreement.

CONCLUSION TO QUESTION TWO

An employee who chooses a variable work schedule and whose workweek does not exceed 40 hours is not statutorily entitled to overtime compensation.

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[1] There are limited specialized instances under the FLSA that do account for the hours worked in a workday, however these exceptions do not apply to the scenario described in the question.

QUESTION THREE

In the event of a dispute regarding interpretation of NRS 281.100, what administrative agency, if any, would have jurisdiction over the matter?

ANALYSIS

This analysis assumes a dispute referring solely to a question of statutory interpretation. Administrative agencies are creatures of statute, and their authority to act is limited to those powers delegated or necessarily implied by statute. *City of Henderson v. Kilgore,* 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). One such implied power is the authority to initially construe a statute which the agency administers. *See State, Dep't of Bus. and Ind., Office of Labor Comm'r v. Granite Const. Co.,* 118 Nev. 83, 90, 40 P.3d 423, 428 (2002). However, NRS Chapter 281 does not designate any agency to administer or interpret NRS 281.100.

In the absence of a statutory grant of power to an administrative agency to administer or interpret NRS 281.100, the judicial branch will interpret the statute. *See Casazza v. A-Allstate Abstract Co.,* 102 Nev. 340, 344, 721 P.2d 386, 388 (1986) ("When a statute may be interpreted in varying ways, it is the duty of this court to select the construction that will best give effect to the intent of the legislature"). The Nevada Constitution vests original jurisdiction in such matters at the district court level. NEV. CONST. art. 6, § 6(1).

CONCLUSION TO QUESTION THREE

A district court would have original jurisdiction to interpret NRS 281.100.

Sincerely,

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