Bill Explanation

SENATE BILL NO. 362

Assembly Committee on Taxation
Hearing: May 6, 1999

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Section 1: Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

Section 2: Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

Section 3: Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

Section 3.5: Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

Section 4: Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

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Assembly Committee on Taxation
Date: 5-6-99
Submitted by: TED ZUEND
LCB FISCAL DIV.
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Requires the commission, when an appeal is heard, to notify the district attorney of each county which may affected by the decision.

Section 5: This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

Section 6: Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

Section 7: Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

Section 8: Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

Section 9: Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

Section 10: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

Section 11: Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

Section 12: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 13: Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

Sections 14 to 15: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 16: Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

Section 17: Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

Section 18: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

Section 19: Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

Sections 20 to 22: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 23: Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

Section 24: Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

Section 25: Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

Section 26: Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

Section 27: Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

Sections 28 to 29: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 30: Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

Section 31: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Section 32: Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

Section 33: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 34: Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Sections 35 to 36: Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

Section 37: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 38: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362* (Exhibit I).

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362* (Exhibit J). He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

Senator Neal asked for an explanation of the words "net deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

> If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court-of-jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 232B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS *chapter* 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Halley Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

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SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

ADMINISTRATIVE RECORD INDEX
SOUTHERN CALIFORNIA EDISON v.
DEPARTMENT OF TAXATION, ET AL.
NEVADA DEPARTMENT OF TAXATION CASE NO. 465-197-254

Bate/Page Nos:

ADDITIONAL INFORMATION INDEX
SOUTHERN CALIFORNIA EDISON v.
DEPARTMENT OF TAXATION, ET AL.
NEVADA DEPARTMENT OF TAXATION CASE NO. 465-197-254

Bate/Page Nos:

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February 27, 2009

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IN THE MATTER OF: ***Southern California Edison***

The Nevada Supreme Court on April 24, 2008 issued a decision in *Chanos v. Nevada Tax Commission, et.al,* 181 P.3d 675, Nev., April 24, 2008 (no. 48292), voiding a decision by the Nevada Tax Commission ("Commission") approving a refund of Nevada use tax. The refund at issue was for use tax paid by Southern California Edison ("Edison") for coal slurry product purchased in Arizona and used at Edison's power plant in southern Nevada. Because its previous decision was void, the Commission scheduled this matter for a new hearing. The parties, which included Edison, the Department of Taxation ("Department"), Clark County and the city of Henderson, stipulated to a briefing and hearing schedule.

A hearing was held before the Commission on September 9, 2008. The Department was represented by counsel, Gina C. Session, Chief Deputy Attorney General. Clark County was represented by Deputy District Attorney Paul Johnson. The City of Henderson was represented by Assistant City Attorney Terri A. Williams. Edison was represented by Norman Azevedo, Esq. and Christopher Campbell, Esq. Post-hearing briefs were filed, and on December 1, 2008, closing arguments were presented to the Commission. The matter having been submitted to the Commission, the Commission by a vote of 6-2 now enters the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

1. The coal slurry product purchased by Edison in this case was a processed and/or manufactured product consisting of approximately fifty percent water and fifty percent finely pulverized coal.

2. The coal slurry product was prepared in Arizona, from coal and water derived in Arizona, and delivered to Edison via a coal slurry pipeline more than two hundred and fifty miles long.

3. All of the coal slurry product was used by Edison at its power plant in Nevada.

4. Edison filed claims for refund on use taxes paid between March 1, 1998 and December 31, 2000.

5. The only stated basis for Edison's claims in its original requests for refund was for *credit against* taxes paid to other jurisdictions.

6. After Edison's initial refund requests were denied, Edison untimely sought to amend its claims to assert new grounds for refund not previously asserted.

7. There is not now, nor was there during the time period covered by Edison's refund requests, any source of commercial coal production in Nevada.

8. There is not now, nor was there during the time period covered by Edison's refund requests, any vendor of coal or coal products produced from Nevada sources, nor did the State of Nevada collect any net proceeds tax from any producer of coal or coal products during the relevant time period.

9. None of the taxes or fees for which Edison sought a credit for were sales taxes or net proceeds taxes for which a credit could be given.

10. Neither Edison, nor its coal slurry provider, were subject to any discriminatory tax in Nevada; inasmuch as, there were neither providers nor potential providers of coal or coal slurry originating from Nevada sources.

CONCLUSIONS OF LAW

1. The coal slurry product at issue in this case is not a raw mineral that would be subject to the exemption in NRS 372.270[1] and/or Article 10, Section 5 of the Nevada Constitution.

2. The payment of use tax by Edison does not violate the Commerce Clause of the United States Constitution, nor any Nevada statutory or constitutional provision.

3. Edison's claims related to the Commerce Clause of the United States Constitution, NRS 372.265, NRS 372.270 and Article 10, Section 5 of the Nevada Constitution or any other basis not raised in Edison's original claims for refund were waived and are barred by NRS 372.635, NRS 372.645 and NRS 372.650.

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[1] The sales and use tax statutes relevant to this case found in chapters 372 and 374 of the NRS are identical; hence, only the statutes in Chapter 372 are cited herein.

4. None of the taxes and/or fees paid by Edison or Peabody Coal Company in Arizona were entitled to a credit against Nevada's use tax. Use tax was properly collected in Nevada on the coal slurry product purchased by Edison in Arizona and used in Nevada.

DECISION

Based on the above Findings of Fact and Conclusions of Law, Edison's request for refund of use tax on coal slurry product purchased in Arizona and used in Nevada is DENIED.

FOR THE COMMISSION:

DINO DICIANNO
Executive Director
Nevada Department of Taxation

cc: Jennifer Crandell, Senior Deputy Attorney General
Gina Session, Chief Deputy Attorney General
Tax Managers
Anthony Smith, Southern California Edison
Dolores Sandler, Southern California Edison
Christopher Campbell, O'Melveny & Myers LLP

COPY

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DISTRICT COURT
CLARK COUNTY NEVADA

HARRAH'S OPERATING COMPANY, INC., Plaintiff, vs. STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION, Defendant.	Case No. A09603967-C Dept. No. I MOTION TO DISMISS Date of Hearing: 03/02/10 Time of Hearing: 09:00 am

COMES NOW, Defendant State of Nevada, ex rel. Department of Taxation (hereinafter "Department"), by and through its attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, and hereby moves this Court for an Order dismissing the Complaint. This Motion is filed pursuant to NRCP Rule 12(b)(5) and is also based on all pleadings and papers on file, the attached

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Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

Respectfully submitted:

Dated January 22nd, 2010

CATHERINE CORTEZ MASTO
Attorney General

By: _____

DAVID J. POPE
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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion to Dismiss will be heard before the above-entitled Court on the 2nd day of March, 2010 at 09:00 a.m. in Department I or as soon thereafter as counsel may be heard.

Dated January 22nd, 2010

CATHERINE CORTEZ MASTO
Attorney General

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I. MEMORANDUM OF POINTS AND AUTHORITIES

FACTS AND PROCEDURAL HISTORY

Plaintiff, Harrah's Operating Company, Inc. (hereinafter "Harrah's") purchased four aircraft and remitted use tax to Defendant, the Department of Taxation (hereinafter "Department") related to the purchase of each aircraft. Complaint, para. 3 through 5 attached hereto as Exhibit 1. The Department administers and collects Nevada's sales and use tax. Claims for refund were filed with the Department on behalf of Harrah's. Id. at para. 6 through 7. The Department denied the requests for refunds and Harrah's filed Petitions for Redetermination. Id. The matters regarding the requests for refunds were then submitted on stipulated facts to an Administrative Law Judge (hereinafter "ALJ"). *Id.* at para. 9. The ALJ issued his Findings of Fact, Conclusions of Law and Decision (hereinafter "ALJ's Decision") denying the refund claims on or about June 16, 2008. *Id.* Harrah's appealed the ALJ's Decision to the Commission. Following a hearing over which it presided, the Commission issued its final written decision on October 14, 2009 denying the refunds requested by Harrah's. See Commission Decision, with the ALJ's Decision, attached hereto as Exhibit 2.

On November 20, 2009, Harrah's filed its Complaint seeking to recover the use taxes it paid to the Department related to the four aircraft it purchased. See Complaint, p. 2-4. Harrah's alleges that by application of NRS 372.258 and NRS 374.263 use tax is not due, that the Department is wrongfully holding the tax that it remitted and that it is entitled to a refund. Harrah's seeks as its remedy:

1. A judicial determination that its purchase and use of the four aircraft meet the requirements of NRS 372.258 and NRS 374.263 and that therefore use tax does not apply;
2. A judicial determination that it is entitled to a refund in the amount of $8,626,042.60, plus interest calculated in accordance with NRS 372.695 and NRS 374.700;
3. The costs of suit[1]; and,

[1] Not available in a Petition for Judicial Review.

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4. Such other relief as this Court deems appropriate under the circumstances.

Complaint, p. 4-5.

The issues raised by Harrah's in its Complaint were adjudicated through administrative proceedings before the Administrative Law Judge and the Commission and are the subject of a final decision of the Commission. See Commission Decision attached hereto as Exhibit 2. Though the Commission Decision is a final decision for purposes of judicial review pursuant to NRS 360.245, Harrah's did not file a Petition for Judicial Review pursuant to NRS Chapter 233B but filed a Complaint citing NRS 372.680.

By filing a Complaint as opposed to a Petition for Judicial Review, Harrah's has initiated a civil law suit against the Department. In the Complaint, however, Harrah's admits in its factual allegations that it had the opportunity to offer its version of the facts and argue the issues, that the matter was submitted on stipulated facts to an Administrative Law Judge for a decision, that the Administrative Law Judge issued Findings of Fact, Conclusions of Law and Decision denying the refund claims and that a hearing was later held before the Commission the result of which was that the Commission affirmed and adopted the Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge as its final decision. See Complaint, para. 9 and 10.

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II. ARGUMENT

A. STANDARD OF REVIEW

Harrah's Complaint should be dismissed pursuant to NRCP Rule 12(b), which states in relevant part, "every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted . . .."

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements

Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas*, __ Nev. __, 181 P.3d 670, 672 (Adv. Op. 21, April 17, 2008). The pleadings must be liberally construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

B. A PETITION FOR JUDICIAL REVIEW IS THE PROPER MEANS OF BRINGING THIS MATTER BEFORE THIS COURT

Harrah's has chosen to file this action as a Complaint. To the best of the Department's knowledge and belief Harrah's did not file a Petition for Judicial Review of the Commission's decision.[2] The Complaint was served on the Department and the Office of the Attorney General.

Pursuant to the Nevada Rules of Civil Procedure a Complaint requires that an answer be filed and ultimately that a trial on the merits is held. The foregoing procedure is inappropriate to the appeal of a state agency decision. NRS 233B.130 et. seq. With the adoption of the Administrative Procedures Act, NRS 233B, in 1965, the Legislature has stated its intention that the provisions in such chapter "are the exclusive means of *judicial review of, or judicial action concerning*, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B130(6) (emphasis added).

The provision under which Harrah's chose to file suit, NRS 372.680, was revised in 1999. Following the revision, NRS 372.680 provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or

[2]Pursuant to NRS 233B.130(5) a person filing a Petition for Judicial Review has 45 days to serve the Petition on the agency and every party. No such Petition has been served to date and the 45 days from the last date to file a Petition has passed.

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maintains his principle place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

(emphasis added). NRS 372.680 speaks specifically to filing a claim for refund in district court after a final decision by **the Commission**. Id. Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by **the Department** without going through an administrative hearing procedure. The change to a decision by the Commission ensured that there would be an administrative hearing. NRS 372.680 does not provide authority for a trial de novo. There is ambiguity as to whether NRS 372.680 seeks to provide some other remedy than appellate review to a taxpayer aggrieved by a decision of the Commission.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy available to the taxpayer seeking a refund that is aggrieved by a final decision by the Commission it is appropriate to look to the legislative history for clarification. See *Chanos v.* Nevada *Tax Comm'n*, ____ Nev. __ , 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm

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Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.)* 362 and the changes to NRS 372.680 it states:

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest the denial. The language of *S.B.* 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event the taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Exhibit 3. Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azvedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

> [T]his particular provision was addressed in NRS chapter 232B (sic) and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

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See Exhibit 4. The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[3] as well as Carson City." *See* Exhibit 5, Sect. 33.

Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the procedure a taxpayer is required to follow pursuant to NRS 372.680. Harrah's refund claims were originally heard by an Administrative Law Judge. When Harrah's was aggrieved by the decision of the Administrative Law Judge, Harrah's appealed the Findings of Fact, Conclusions of Law and Decision to the Commission for an administrative appellate review. When Harrah's was still aggrieved following the Commission's decision, Harrah's had the option to file a petition with a district court in a judicial review proceeding.

A July 1990 publication for the State Bar of Nevada, entitled "The Basics of Nevada Administrative Law" sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

55-JUL INALIA 19, July 1990, The Basics of Nevada Administrative Law, p. 6. The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been reversed by the Nevada Supreme Court:

[3] Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrored the venue language in NRS 233B.130.

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> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.
>
> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

Id. (citations omitted). The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. Id. at fn. 113. NRS 607.215(3) states, "[u]pon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the case at hand that specifically authorizes a trial de novo. The language in NRS 372.680, the statute at issue, states that a claimant "may bring an action." NRS 372.680 contains no mention of a right to trial de novo and falls short of granting the court jurisdiction to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from the *Hicks* case, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

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Id. at 123, 856. See also, *Las Vegas Valley Water District v. Curtis Park Manor Water Users Association*, 98 Nev. 275, 646 P.2d 549 (1982). Though the *Hicks* case dealt with a gaming licensee, and is no longer good on another part of law, the reasoning applies equally to the case at hand. Allowing this action to proceed as a trial de novo would render meaningless the expertise of the Commission as well as the record that was before it.

Based on the relevant statutes and the doctrine of judicial economy it is clear that this matter should proceed as a Petition for Judicial Review.[4] Inexplicably, rather than preserve their right to review by filing a Petition for Judicial Review, Harrah's has instead filed a civil Complaint and seeks a new civil court proceeding. Harrah's exercised its right to the administrative process, received an unfavorable decision from the ALJ, received and unfavorable decision from the Commission, accumulated a sizeable administrative record, and failed to timely serve a Petition for Judicial Review on the Commission, the Department, or the Office of the Attorney General. The decision of the Commission is now final and preclusive.

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C. CHANGES IN NRS 233B AND IN NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW.

Prior to 1989, the NRS Chapter 233B specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At the time NRS 233B.130(1) read in pertinent part:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization

[4] See Order to Proceed as Petition for Judicial Review, filed in the First Judicial District Court, Case No. 09 OC 00016 1B attached hereto as Exhibit 6 (stating that the proceedings in a tax refund case that had been presented to a hearing officer and the Commission are controlled by NRS 233B.130(6). Further stating that the plaintiff was "not entitled to a second evidentiary hearing in district court, but is entitled to judicial review . . .." This order has been stayed pending further review).

> of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs*, 1989 Nev. Stat. 3. The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are "the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [the] chapter applies." The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final decision was by way of judicial review. In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures
> . . ..

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989. Mr. Campbell explained the importance of allowing administrative agencies to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. BcGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.

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> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

Id. at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the Commission, not a decision of the Department. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B.

The following legislative changes in this area demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

1989

The legislature removes language permitting original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6): "The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." (emphasis added).

1997

The legislature adds the language in NRS 360.245(5) that states, "A decision of the Nevada Tax Commission is a final decision for the purpose of judicial review." (emphasis added).

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1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim . . .." NRS 372.680 (emphasis added). "Thus, [the legislation] contemplates a change from past practice where refund claims upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General (emphasis added).

D. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS COURT OF JURISDICTION TO HEAR THIS MATTER

NRS 233B.130 states in pertinent part:

1. Any party who is:
2. Identified as a party of record by an agency in an administrative proceeding; and
3. Aggrieved by a final decision in a contested case, is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy
4. Petitions for judicial review must:
5. Name as respondents the agency and all parties of record to the administrative proceeding;
6. Be instituted by filing a petition in the district court in and for Carson City, in and for the county where the agency proceeding occurred; and
7. Be filed within 30 days after service of the final decision of the agency.
8. Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

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The final decision by the Commission was dated October 14, 2009. Thirty days from the date of service, as provided in NRS 233B.130(2)(c), would have been on or about November 14, 2009. Harrah's filed its Complaint on November 20, 2009 and even if the Complaint were deemed to be a Petition for Judicial Review it was still undeniably filed after the 30 day period for filing a Petition for Judicial Review. The sole means of this court taking action in this administrative case or reviewing the final decision by the Commission was by way of a Petition for Judicial Review. NRS 233B.130(6). No Petition for Judicial Review was filed. The failure to file a Petition for Judicial Review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't.*, 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

> When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review. . .Noncompliance with the requirements is grounds for dismissal of the appeal...Thus, the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional...In the past, this court has upheld the dismissal of appeals for failure to timely commence them.

Id. at 25, 68 (citations omitted).

Judicial review was the only means for Harrah's to access a court for action on the claims for refund heard by the Commission. Instead, Harrah's filed a civil Complaint. Harrah's Complaint should be dismissed.

E. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA

Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton* identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.* at 692-693 and 569-570. The inquires are "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether *the party against*

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whom the judgment is asserted was a party, or in privity with a party to the prior adjudication." *Id.*

If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear that administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous action are outlined in the Commission's Decision. This court, in reviewing the action of the Commission, is limited to the record that was before the Commission. NRS 233B.135(1)(b). Since the court is so limited, the issues decided by the Commission are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Pursuant to NRS 360.245(5), decisions of the Commission are considered final decisions for purposes of judicial review. Moreover, because no Petition for Judicial Review has been filed and the date for filing one has passed, the decision by the Commission is final. As is apparent from the Complaint, the Commission's decision was a decision on the merits of Harrah's claims for refund. See Complaint, para. 9-10.

The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party, to the prior adjudication. The Commission's Decision in the administrative proceeding below was against Harrah's. The judgment is being asserted against Harrah's in the case at hand.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been unsuccessful appeals before an administrative hearing officer and the Nevada Tax Commission. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a Petition for Judicial Review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of

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the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal . . . exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the taxpayer paid the taxes prior to going through the administrative procedure. See Complaint, para. 3 through 7.

The Nevada Supreme Court, while reaffirming the doctrine of administrative res judicata, concluded that there were unique circumstances involved in *Campbell* that justified a different result than granting summary judgment.[5] The Court remanded the case for judicial review after making clear that "pursuant to *Britton*, the Campbells do not have a right to a second evidentiary hearing." *Campbell* at 219, 836 (emphasis added).

Because Harrah's failed to file a Petition for Judicial Review and because there does not exist any of the circumstances that were unique to the *Campbell* case, Harrah's Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

F. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION

The Court in *Five Star Capital Corp. v. Ruby*. __ Nev. __, 194 P.3d 709, 711 (2008) does not specifically discuss administrative res judicata, but does discuss in depth the term res judicata and breaks down the difference between claim preclusion and issue preclusion. The *Five Star* Court wrote:

> In addressing claim preclusion the *Tarkanian* court stated that the doctrine 'is triggered when a judgment is entered. A valid and final judgment on a claim precludes a second action on that claim or any part of it.' Further, the court recognized that the claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach' than the issue preclusion doctrine.

[5] Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above in 1999 the statute was amended to require denial by the Tax Commission prior to filing an action for judicial review in district court.

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Id. at 711. The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

Id. at 713.

Applying those factors to the current case it is clear that the parties, Harrah's and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the Commission is final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 372.680 states a taxpayer may file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim..." So under both NRS Chapter 233B and under NRS 372.680 Harrah's may not bring any claims that have not been actually decided below by the Commission. All the factors are met and this matter should be dismissed based on the doctrine of claim preclusion.

G. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

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1. The issue decided in the prior litigation must be identical to the issue presented in the current action;
2. The initial ruling must have been on the merits and have become final; ...
3. The party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
4. The issue was actually and necessarily litigated.

Five Star at 713.

The Commission in its final decision affirmed the ALJ's decision in its entirety. See Commission's Decision attached hereto as Exhibit 2. In its Complaint Harrah's states that the "Commission affirmed the decision of the Administrative Law Judge." Complaint, para. 10. Harrah's requests "a judicial determination that Harrah's purchase and subsequent use of the four aircraft at issue meet the requirements of NRS 372.258 and NRS 374.263 so as to be considered tangible personal property purchased for use in interstate commerce and not purchased for storage, use or other consumption in Nevada." Complaint, p. 5, ln. 21-24. The issues raised in Harrah's Complaint were raised and adjudicated in the administrative proceedings presided over by the ALJ and later the Commission. See Commission's Decision attached hereto as Exhibit 2. Because Harrah's issues raised in its Complaint were raised by the claims for refund filed by Harrah's and adjudicated by the ALJ and the Commission, they were actually and necessarily litigated in the administrative proceedings below. The Commission's decision is final and Harrah's should not be permitted to re-litigate matters that have been adjudicated and finally decided.

CONCLUSION

Harrah's, by filing an original civil action, is asking this court to preside over the re-litigation of issues that have been the subject of litigation for several years before the Department and the Commission. It would be a prodigious waste of judicial resources to start anew in a case that already has an administrative record and final decision.

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Harrah's had an adequate legal remedy available through NRS Chapter 233B whereby this court could have reviewed the final decision of the Commission for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. This court could have determined whether the Commission's final decision was clearly erroneous in view of the evidence presented to it or whether the Commission acted in an arbitrary or capricious manner. If Harrah's was unhappy with this court's decision, it would have had the ability to appeal to the Nevada Supreme Court. By failing to file a Petition for Judicial Review within the statutory time limit under NRS 233B.130(2)(c), Harrah's has abandoned its rights to review and allowed the Commission's decision to become final.

Based on the doctrine of administrative res judicata, claim preclusion and issue preclusion, the Department respectfully requests that the court grant its Motion to Dismiss pursuant to NRCP 12(b)(5) and dismiss Harrah's Complaint with prejudice.

Respectfully submitted this 22nd day of January, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: _____

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on January 22, 2010, I deposited in the U.S. mail, postage prepaid, via First Class Mail and facsimile, a true and correct copy of the foregoing **MOTION TO DISMISS**, addressed as follows:

John S. Bartlett, Esq.
1201 Stewart St., Ste. 130
Carson City, NV 89706
(Fax No.: (775) 841-2172

Dated this 22nd day of January, 2010

An Employee of the State of Nevada
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SIERRA PACIFIC POWER COMPANY, INC. and NEVADA POWER COMPANY, INC., jointly doing business as NV ENERGY,

Plaintiffs,

vs.

STATE OF NEVADA, ex rel., DEPARTMENT OF TAXATION,

Defendant.

Case No.: CV09-03554

Dept. No.: I

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

MOTION TO DISMISS OR IN THE ALTERNATIVE PROCEED PURSUANT TO NRS CHAPTER 233B

Defendant State of Nevada ex rel. Department of Taxation (Department), by and through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief Deputy Attorney General, hereby submits its Motion to Dismiss or in the Alternative Proceed Pursuant to NRS Chapter 233B in this matter. This motion is filed pursuant to NRCP Rule 12(b)(5), and also based upon the following memorandum of points and authorities, and the other papers and pleadings on file with the court in this matter.

FACTS

Sierra Pacific Power Company, Inc. and Nevada Power Company, Inc., jointly doing business as NV Energy (NV Energy) filed a Complaint on December 8, 2009, to recover use

taxes paid to the Department on the use and consumption of out-of-state coal at a coal-fired power plant in Nevada. See Complaint, paragraphs 15-19. By filing a Complaint as opposed to a Petition for Judicial Review, NV Energy has initiated a civil law suit with the Department as Defendant. In the Complaint, NV Energy admits in its factual allegations that an administrative hearing was held by an Administrative Law Judge (ALJ) on March 14, 2008, and a Findings of Fact, Conclusions or Law and Decision was issued denying the *refund*. See Complaint, paragraph 17. The ALJ's decision was appealed to the Nevada Tax Commission (NTC) and a second administrative hearing was held on September 15, 2009. Clark County, City of Henderson, Humboldt County, City of Winnemucca and the Humboldt County Hospital District were parties to the administrative proceeding before the NTC. The NTC upheld the decision of the ALJ. See Complaint, paragraph 18. There exists an administrative record of documents, agendas, transcripts of hearings and administrative decisions in this case.

NV Energy has filed this action pursuant to NRS 372.680. NV Energy has not filed a Petition for Judicial Review of the NTC's decision. The Complaint was served on the Department and on the Office of the Attorney General. The Complaint was not served on any of the local governments that participated in the administrative proceeding. The Complaint includes Claims for Relief which are not available on a Petition for Judicial Review. The Complaint requests the cost of suit and other remedies not available in a Petition for Judicial Review.

SUMMARY OF ARGUMENTS

This case raises issues regarding the proper interaction of NRS Chapter 233B and NRS 372.680.[1] It is the position of the Department that a decision by the Nevada Tax Commission (NTC) is final unless a party aggrieved by the decision files a Petition for Judicial Review. Because no Petition has been filed in this case, the NTC's decision is final and preclusive. Administrative res judicata applies and the case should be dismissed. There is no language in NRS 372.680 that authorizes a trial de novo. If the court chooses not to dismiss

[1] The sales and use tax statutes relevant to this case found in chapters 372 and 374 of the NRS are identical; hence only the statutes in Chapter 372 are cited herein.

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the case, in the alternative the Department believes this matter should proceed pursuant to NRS Chapter 233B and not as a civil trial de novo.

ARGUMENT

A. STANDARD OF REVIEW

NV Energy's Complaint should be dismissed pursuant to NRCP Rule 12(b), which states in relevant part, "every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted. . ."

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001). Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas*, ___ Nev. ___, 181 P.3d 670, 672 (Adv Op 21, April 17, 2008). The pleadings must be liberally construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

B. A PETITION FOR JUDICIAL REVIEW IS THE PROPER MEANS OF BRINGING THIS MATTER BEFORE THE COURT.

With the adoption of the Administrative Procedure Act, NRS Chapter 233B, in 1965, the Legislature has stated its intention that the provisions in that chapter "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B.130(6).

Both the Department and the NTC fall within the definition of "agency" provided in NRS 233B.031. The Department and the NTC are not exempt from the application of NRS Chapter 233B. NRS 233B.039. NRS 233B.039 sets out not only the agencies that are completely exempt from the application of NRS Chapter 233B, but also more specifically agencies whose

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special statutory provisions prevail over the more general provisions of NRS Chapter 233B. See NRS 233B.039(3). The carve-out does not include any statutory provisions applicable to the Department or the NTC. The legislature could have easily included NRS 372.680 and the NTC's decisions regarding tax refunds in the list specifically exempt from the application of judicial review pursuant to NRS Chapter 233B, but the legislature did not do so. Because the NTC is not exempt NRS Chapter 233B applies to the NTC and its decisions.

The provision that NV Energy chose to file suit under, NRS 372.680, was revised in 1999. NRS 372.680 provides as follows:

> 1. Within 90 days **after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim** in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments. [Emphasis added]

NRS 372.680 speaks specifically to filing a claim for refund in district court after a final decision by the NTC. Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by the Department without going through an administrative hearing procedure. The change to a decision by the NTC ensured that there would be an administrative hearing. NRS 372.680 does not provide authority for a trial de novo. There is ambiguity as to whether NRS 372.680 seeks to provide some other remedy than appellate review to a taxpayer aggrieved by a decision of the NTC.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy

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available to a taxpayer seeking a refund that is aggrieved by a final decision by the Commission it is appropriate to look to the legislative history for clarification. See *Chanos v. Nevada Tax Comm'n*, ___ Nev. ___, 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.)* 362 and the changes to NRS 372.680 it states:

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of *S.B.* 362 now changes this procedural route. In the event that *S.B.* 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Exhibit 1.

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Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

> [T]his particular provision was addressed in NRS chapter 232B (sic) and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

See Exhibit 2.

The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[2] as well as Carson City." *See* Exhibit 3.

Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the procedure a taxpayer is required to follow pursuant to NRS 372.680. NV Energy was originally heard by an ALJ. When NV Energy was aggrieved by the decision of the administrative hearing officer, NV Energy appealed the hearing officer's decision to the NTC for an administrative appellate review. When NV Energy was still aggrieved after a NTC decision, NV Energy had the option to file a petition with a district court in a judicial review proceeding.

C. CHANGES IN NRS 233B AND IN NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TOJUDICIAL REVIEW.

Prior to 1989 the NRS Chapter 233B specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At that time NRS 233B.130(1) read in pertinent part:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal

[2] Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 *mirrored* the venue language in NRS 233B.130.

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> is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs, 1989 Nev. Stat. 3.*

The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are the exclusive means of judicial review or judicial action concerning a final decision in a contested case involving an agency to which the chapter applies. The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final agency decision was by way of judicial review.

In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures...

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989.

Mr. Campbell explained the importance of allowing administrative agencies to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. McGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.

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> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

Id. at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the NTC, not a decision of the Department. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B.

The following is a timeline of legislative changes in this area that demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

1989

The legislature removes language permitting original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6): "The provisions of this chapter are the exclusive means of judicial review of, or **judicial action** concerning, **a final decision** in a contested case involving an agency to which this chapter applies." [emphasis added]

1997

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is **a final decision** for the purposes of judicial review." [emphasis added]

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a

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refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring **an action** against the Department on the grounds set forth in the claim..." [emphasis added] "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. [emphasis added]

D. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS COURT OF JURISDICTION TO HEAR THIS MATTER.

NRS 233B.130 states in pertinent part:

> 1. Any party who is:
> (a) Identified as a party of record by an agency in an administrative proceeding; and
> (b) Aggrieved by a final decision in a contested case,
> is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.
>
> 2. Petitions for judicial review must:
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and
> (c) Be filed within 30 days after service of the final decision of the agency.
> Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

The final decision by the NTC was dated October 23, 2009. Thirty days from the date

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of service as provided in NRS 233B.130(2)(c) would have been on or about November 23, 2009. The sole means of this court taking action in this administrative case or reviewing the final decision by the NTC was by way of a Petition for Judicial Review. NRS 233B.130(6). No Petition for Judicial Review was filed. The failure to file a Petition for Judicial Review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

> When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review...Noncompliance with the requirements is grounds for dismissal of the appeal...Thus, the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional...In the past, this court has upheld the dismissal of appeals for failure to timely commence them.

Id. at 25, 68 (citations omitted).

Judicial review was the only means for NV Energy to access a court for action on the claims for refund heard by the NTC. Instead, NV Energy filed a civil action that was not served on all of the parties to the administrative proceedings. None of the local governmental entities that were parties to the administrative proceedings below have been served with the Complaint. The time for filing for judicial review is passed and the court lacks jurisdiction. NV Energy's Complaint should be dismissed.

E. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA.

Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton* identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.* at 692-693 and 569-570. The inquiries are "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether the party against whom the judgment is asserted was a party, or in privity with a party to the prior adjudication." *Id.*

If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear

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that administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous action are outlined in the Complaint and regard the request for refund of use tax paid on out-of-state coal. This court in reviewing the action of the NTC is limited to the record that was before the Commission. NRS 233B.135(1)(b). The court is similarly limited by NRS 372.680. Since the court is so limited, the issues decided by the NTC are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Because no Petition for Judicial Review has been filed and the date for filing one has passed, the decision by the NTC is final. The NTC's decision was a decision on the merits of NV Energy's claims for refund. Complaint, paragraphs 16-18.

The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party to the prior adjudication. The NTC's judgment in the administrative proceeding below was against NV Energy. The judgment is being asserted against NV Energy in the current case.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been unsuccessful appeals before an administrative hearing officer and the Nevada Tax Commission. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a Petition for Judicial Review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal...exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the taxpayer paid the taxes prior to going through the administrative procedure. *See* Complaint,

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paragraphs 15-16.

The Nevada Supreme Court, while reaffirming the doctrine of administrative res judicata, concluded that there were unique circumstances involved in *Campbell* that justified a different result than granting summary judgment.[3] The Court remanded the case for judicial review after making clear that "pursuant to *Britton*, the Campbells **do not have a right to a second evidentiary hearing.**" *Campbell* at 219, 836 (emphasis added).

Because NV Energy failed to file a Petition for Judicial Review and because there does not exist any of the circumstances that were unique to the *Campbell* case, NV Energy's Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

F. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

The Court in *Five Star Capital Corp. v. Ruby*, ___ Nev. ___,194 P.3d 709, 711 (2008) does not specifically discuss administrative res judicata, but does discuss in depth the term res judicata and breaks down the differences between claim preclusion and issue preclusion. The *Five Star* Court wrote:

> In addressing claim preclusion the *Tarkanian* court stated that the doctrine 'is triggered when a judgment is entered. A valid and final judgment on a claim precludes a second action on that claim or any part of it.' Further, the court recognized that the claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach' than the issue preclusion doctrine.

Id. at 711.

The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

Id. at 713.

---

[3] Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above in 1999 the statute was amended to require denial by the Tax Commission prior to filing an action for judicial review in district court.

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Applying those factors to the current case it is clear that the parties, NV Energy and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the NTC is final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 372.680 states a taxpayer may file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim..." So under both NRS Chapter 233B and under NRS 372.680 NV Energy may not bring any claims that have not been actually decided below by the Commission. The final factor of the test for claim for claim preclusion is met in this case. This matter should be dismissed based on the doctrine of claim preclusion.

G. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION.

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
> (2) the initial ruling must have been on the merits and have become final;...
> (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
> (4) the issue was actually and necessarily litigated.

Five Star at 713.

Because all of the issues above were raised by the claims for refund filed by NV Energy, they were actually and necessarily litigated in the administrative proceedings below. The NTC's decision is final and the NTC's decisions on the issues actually raised and litigated are preclusive. NV Energy should not be permitted to re-litigate matters that have already been finally decided.

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H. IN THE ALTERNATIVE THE MATTER SHOULD PROCEED PURSUANT TO NRS 233B.

1. AFTER A FINAL DECISION BY AN ADMINISTRATIVE AGENCY THE COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW.

If the court does not agree that this case should be dismissed pursuant to the doctrine of administrative res judicata and this case is allowed to proceed, the proceedings should be governed by NRS Chapter 233B. The Nevada Supreme Court in *Campbell v. State of Nevada*, 108 Nev. 215, 827 P.2d 833 (1992), rather than apply administrative res judicata to a complaint that was timely filed for purposes of judicial review, ordered that the case be subject to judicial review. *Id.* at 219, 836. The Court specifically found that "pursuant to *Britton*, the Campbells do not have a right to a second evidentiary hearing. NV Energy likewise, has no right to a second evidentiary hearing.

The Court's decision in *Campbell* is based on sound and long-standing public policy considerations. A July 1990 publication for the State Bar of Nevada, entitled "The Basics of Nevada Administrative Law" sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

INTER ALIA, July 1990, The Basics of Nevada Administrative Law, p. 8.

The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been frequently reversed by the Nevada Supreme Court:

> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.

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> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

Id. (citations omitted).

The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. NRS 607.215(3) states "Upon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the current case that specifically *authorizes* a trial de novo. The language in the statute at issue, NRS 372.680, states a claimant "may bring an action". There is no mention in NRS 372.680 to a right to trial de novo rather than judicial review. The statute falls far short of granting jurisdiction to the court to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from *Hicks*, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

Id. at 123, 856. *See also, Las Vegas Valley Water District v. Curtis Park Manor Water Users Association*, 98 Nev. 275, 646 P.2d 549 (1982).

While *Hicks* dealt with a gaming licensee, the reasoning applies equally to the case before this court. Permitting this action to go forward as a trial de novo would render meaningless the expertise of the Tax Commission as well as the extensive record that was before it.

Hicks and other cases recognize the value of having the administrative body with expertise in an area responsible for weighing and considering the facts in fields where it has a

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particular competence. *Id.*, *see also*, *Clark County Board of Commissioners v. Taggart*, 96 Nev. 732, 734-35, 615 P.2d 965, 967 (1980); *Spilotro v. State of Nevada*, 99 Nev. 187, 190, 661 P.2d 467, 469 (1983); *Sports Form, Inc. v. LeRoy's Horse and Sports Place*, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992)(discussing the doctrine of primary jurisdiction); *Richardson Construction v. Clark County School District*; 123 Nev. 61, 156 P.3d 21, 24 (2007)(discussing the doctrine of primary jurisdiction).

Based on the relevant statutes and the doctrine of judicial economy it is clear that this matter should proceed as a Petition for Judicial Review. This approach was applied in a nearly identical case brought by Southern California Edison in the First Judicial District. *See* Exhibit 4, Order to Proceed as Petition for Judicial Review, November 19, 2009. The Nevada Supreme Court also endorsed this approach in the *Campbell* case.

CONCLUSION

NV Energy, by filing an original civil action, is asking this court to preside over the re-litigation of issues that have been the subject of extensive administrative proceedings before the Department and Commission. NV Energy had an adequate legal remedy available through NRS Chapter 233B whereby this court could have reviewed the Decision of the Commission for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. This court could have determined whether the Commission's Decision was clearly erroneous in view of the evidence presented to it or whether the Commission acted in an arbitrary or capricious manner. If NV Energy were unhappy with this court's decision, it would have had the ability to appeal to the Nevada Supreme Court. By failing to file a Petition for Judicial Review within the statutory time limit under NRS 233B.130(2)(c), NV Energy has abandoned its rights to review and allowed the Commission's Decision to become final. Based on the doctrines of administrative res judicata, claim preclusion and issue preclusion, the Department respectfully requests that the court grant its Motion to Dismiss pursuant to NRCP 12(b)(5) and dismiss NV Energy's Complaint with prejudice.

In the alternative the proper nature of the proceeding before this court is an action for

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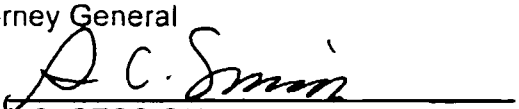
judicial review subject to NRS Chapter 233B. There is no statute authorizing a trial de novo. NRS 372.680 requires a final decision by the NTC. Pursuant to NRS 360.245(5) a final decision by the NTC is subject to judicial review. NRS 233B.130(6) provides that the procedures in NRS Chapter 233B are the exclusive means of judicial action in relation to a final decision of an administrative agency such as the NTC. In order to harmonize these statutory provisions and comply with the Nevada Supreme Court's decision in *Campbell*, if this matter is to go forward, it should go forward as a Petition for Judicial Review.

DATED this 19th day of January, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: 
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 19th day of January, 2010 I served a copy of the foregoing , by mailing a true copy to the following:

John Bartlett
1201 Stewart St., Suite 130
Carson City, NV 89706

An employee of the Attorney General

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Dismiss filed in District Court Case **CV09-03554** does not contain the social security number of any person.

CATHERINE CORTEZ MASTO
Attorney General

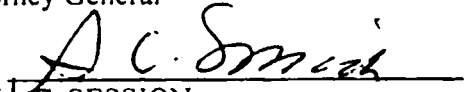
By: 
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EXHIBIT 1

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Writer's Direct Dial (775) 684-1222

Fax (775) 687-6718

MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Deputy Attorney General

SUBJECT: *Venue Sections of S.B. 362*

Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).

2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).

3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).

4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).

5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).[1] By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

> Sec. 13. NRS 361.435 is hereby amended to read as follows:
>
> 361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[, Nevada,]~~ ***or Clark County, in any court of competent jurisdiction***

[1] It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

In Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may *file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may* bring an action against the state treasurer in ~~{the district court in and for}~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the excise tax so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.*

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~{the district court in and for}~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the amount so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.*

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~{the mailing of the notice of the department's action}~~ *a final decision* upon a claim filed pursuant to this chapter ~~{,}~~ *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark county* for the

recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter [,] *is rendered by the Nevada tax commission*, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

NJA:jm

EXHIBIT 2

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362* (Exhibit I).

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362* (Exhibit J). He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

Senator Neal asked for an explanation of the words "net deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

> If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court-of-jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 233B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Halley Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

• • • • •

SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

EXHIBIT 3

Bill Explanation

SENATE BILL NO. 362

Assembly Committee on Taxation
Hearing: May 6, 1999

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Section 1: Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

Section 2: Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

Section 3: Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

Section 3.5: Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

Section 4: Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

Exhibit G P 1 of 3
Assembly Committee on Taxation
Date: 5-6-99
Submitted by: TED ZUEND
LCB FISCAL DIV.
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Requires the commission, when an appeal is heard, to notify the district attorney of each county which may affected by the decision.

Section 5: This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

Section 6: Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

Section 7: Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

Section 8: Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

Section 9: Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

Section 10: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

Section 11: Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

Section 12: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 13: Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

Sections 14 to 15: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 16: Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

Section 17: Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

Section 18: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

Section 19: Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

Sections 20 to 22: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 23: Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

Section 24: Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

Section 25: Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

Section 26: Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

Section 27: Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

Sections 28 to 29: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 30: Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

Section 31: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Section 32: Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

Section 33: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 34: Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Sections 35 to 36: Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

Section 37: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 38: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

EXHIBIT 4

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

Southern California Edison,

Plaintiff,

vs.

STATE OF NEVADA ex rel. Department of Taxation,

Defendants.

Case No. 09 OC 00016 1B

Department No. 1

ORDER TO PROCEED AS PETITION FOR JUDICIAL REVIEW

This matter was originally before the Court as a motion to dismiss filed by Defendants. As part of the Court's order denying the motion dismiss, the Court directed the parties to meet and confer as to the nature of the proceedings before this Court. After meeting, the parties were unable to agree as to the nature of the proceedings and stipulated to a briefing schedule to brief the issues to the Court. Plaintiff filed a motion that this action be conducted as a trial de novo pursuant to NRS 372.680. The Defendants filed its brief arguing that the action is subject to NRS Chapter 233B and should proceed as a petition for judicial review. Each party filed an answering brief. On October 8, 2009 a hearing was held to determine the proper nature of the proceedings before this Court.

The Court has read and considered the points and authorities and other materials

submitted by Plaintiff and Defendants and considered the arguments of counsel at the hearing. Based on the foregoing, and good cause appearing the Court hereby rules as follows:

1. The proceedings in this case are controlled by NRS 233B.130(6) which states that: "The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies."
2. NRS Chapter 233B applies to all administrative agencies within the state unless exempt. The Department of Taxation ("Department") and the Nevada Tax Commission ("Commission") are not exempt from the provisions of NRS Chapter 233B. NRS 233B.039. All decisions by the Commission are therefore subject to NRS 233B.130(6).
3. The judicial review standards imposed by NRS Chapter 233B apply unless there is a specified exception. NRS 372.680 which states in pertinent part: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department..." does not contain specific language authorizing the Court to conduct a trial de novo.
4. NRS 372.680 is, to some extent, only a venue statute, informing a claimant that has received a denial from the Commission of its claim for refund of sales or use tax where it may file its action to seek a recovery of taxes it has overpaid.
5. Local governments that were parties to the proceedings below filed a petition for judicial review of an earlier decision by the Commission in this matter. The Nevada Supreme Court voided the earlier decision. Uniform standards and uniform application of the law demands that both the local government agencies and the taxpayers be treated the same and supports treating the current action as a petition for judicial review.
6. The Legislature made the following changes to NRS Chapter 233B and NRS

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372.680 indicating that decisions by the Nevada Tax Commission on refund claims are subject to NRS 233B:

1989

The legislature removes language authorizing original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6) "The provisions of this chapter are the exclusive means of judicial review of, or **judicial action** concerning, **a final decision** in a contested case involving an agency to which this chapter applies." (emphasis added)

1997

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is **a final decision** for the purposes of judicial review." (emphasis added)

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring **an action** against the Department on the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

7. Two cases relied upon by Plaintiff, *State v. Obexer & Sons*, 99 Nev. 233, 660 P.2d 981 (1983) and *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1989) were both decided before any of the legislative changes noted

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above. Specifically, the change in 1999 was meant to change the past practice where a taxpayer seeking a refund could go directly to district court after a denial by the Department without a contested case going before the Nevada Tax Commission. *See* Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General.

8. The legislative change made to NRS 372.680 in 1999 ensured that there would be the opportunity for an evidentiary hearing, findings of facts and conclusions of law and the opportunity for review by the Commission prior to a decision becoming final. With the change, the legislature limited the scope of NRS 372.680 and brought it within the umbrella of NRS Chapter 233B.

9. Plaintiff participated in an evidentiary hearing before the Commission. Plaintiff is not entitled to a second evidentiary hearing in district court, but is entitled to judicial review of the Commission's February 27, 2009 decision. *Campbell v. State of Nevada*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992).

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Therefore, this matter will proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B.

IT IS SO ORDERED.

Dated this 19th day of ~~October~~ November, 2009.

James T. Russell

JAMES T. RUSSELL
District Judge

Submitted by:

CATHERINE CORTEZ MASTO
Attorney General

By: J.C. Session

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON, Plaintiff, vs. THE STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION, Defendant.	Case No.: Dept No.: **COMPLAINT** **(NRS 372.680; NRS 374.685)**

COMES NOW Plaintiff, SOUTHERN CALIFORNIA EDISON, by and through its counsel of record, NORMAN J. AZEVEDO, ESQ., and hereby complains against Defendant, STATE OF NEVADA, Ex Rel. DEPARTMENT OF TAXATION, and alleges as follows:

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

1. Plaintiff Southern California Edison Company ("Edison") is a California corporation having its principal place of business in Los Angeles County, California. Southern California Edison is not a Debtor in bankruptcy.

2. Defendant State of Nevada ex rel. Department of Taxation (the "Department") is an agency of the executive branch of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including Chapters 372 and 374 of the Nevada Revised Statutes governing sales and use taxes and local school support taxes, respectively.

3. At all times relevant to this Complaint, the Mohave Project was a coal-fired power plant located on land within Clark County, Nevada.

4. Edison co-owned the Mohave Project with three other parties (collectively, the "Mohave

Co-Owners"): Nevada Power Company ("Nevada Power"), the Department of Water and Power of the City of Los Angeles ("DWP") and Salt River Project Agricultural Improvement and Power District ("Salt River"). Edison owned the majority interest (a 56% undivided interest) in the Mohave Project.

5. Edison operated the Mohave Project pursuant to the Mohave Project Operating Agreement effective May 1, 1969 and dated July 6, 1970 (the "Operating Agreement"). The Mohave Project ceased operations on December 31, 2005.

6. At all times relevant to this Complaint, all of the coal consumed at the Mohave Project was supplied by Peabody Western Coal Company ("Peabody") pursuant to the Amended Mohave Project Coal Supply Agreement dated May 26, 1976 between Peabody (as seller) and the Mohave Co-Owners (as buyers) (the "Amended Coal Supply Agreement").

7. As the operator of the Mohave Project, Edison was responsible for receiving and paying invoices from Peabody for coal purchased for use at the Mohave Project pursuant to the Amended Coal Supply Agreement. Accordingly, Peabody sent monthly bills to Edison for the coal delivered to the Mohave Project.

8. All of the coal sold by Peabody for use at the Mohave Project was extracted in Arizona at a mine operated by Peabody and transported by a third party from the mine to the Mohave Project.

9. Since 1970, Edison has paid Nevada use tax to the Department measured by the amount Peabody charged for the coal consumed at the Mohave Project.

10. For the monthly periods beginning March, 1998 through and including December, 2000, Edison paid a total of $23,896,668.08 in use tax to the Department on the coal Peabody sold for use at the Mohave Project.

11. Edison timely filed claims for refund of the use tax it paid on the coal with the Department for the periods March, 1998 through and including December, 2000.

12. By letter dated December 17, 2002, the Department denied the claims for refund filed for the periods March, 1998 through and including September, 1999. By letter dated December 30, 2002, the Department denied the claims for refund filed for the periods October, 1999 through

and including December, 1999.

13. In the December 17 and December 30, 2002 denial letters, the Department advised Edison that, if Edison desired to appeal the Department's decision, it had to file a petition for redetermination within 45 days pursuant to NRS 360.360. On January 31, 2003, Edison filed a timely petition for redetermination for the periods covered by the denial letters - March, 1998 through and including December, 1999.

14. By letter dated May 16, 2003, the Department denied the claims for refund for the periods January, 2000 through and including December, 2000. The Department concurrently added these periods to the petition for redetermination previously filed by Edison.

15. In a letter dated May 28, 2003, Edison was notified that the Department had assigned the petition for redetermination to a Department Hearing Officer.

16. In a letter dated July 2, 2003, the Department acknowledged that its denial of Edison's claims for refund should have been referred to the Nevada Tax Commission ("Commission") pursuant to NRS 360.245(1) and redirected Edison's case to the Commission for a hearing.

17. On December 8, 2003, the Commission held its first hearing on the Department's denial of the claims for refund, and referred the claims to a Hearing Officer.

18. The Hearing Officer conducted hearings on the claims for refund on December 22, 2003 and January 28, 2004 and issued a written decision on July 14, 2004 denying some of the claims in their entirety and allowing some of the claims in part.

19. On February 26, 2004, Edison timely filed claims for refund of the use tax it paid on the coal with the Department for the periods January, 2001 through and including September, 2003 in the total amount of $24,331,667.62. The Department denied these claims.

20. The Commission held a series of closed hearings on all of Edison's claims for refund that had been filed, i.e. for the periods March, 1998 through and including September, 2003, beginning on November 1, 2004 and continuing on February 7, 2005, April 5, 2005 and May 9, 2005.

21. At the May 9, 2005 hearing, the Commission granted Edison's claims for refund in their entirety.

22. On June 7, 2005, Edison timely filed claims seeking a refund of use tax it paid on the coal with the Department for the periods October, 2003 through and including March, 2005 in the total amount of $14,745,838.13. Edison stopped paying use tax after March, 2005.

23. On July 7, 2005, the Attorney General of the State of Nevada ("Attorney General") filed a complaint against the Commission in the First Judicial Court, Carson City, alleging that the Commission violated Nevada's Open Meeting Law (NRS 240.010 et seq.) when it granted Edison's claims for refund in closed session on May 9, 2005. Among other things, the Attorney General prayed for a judgment that would declare the Commission's action granting Edison's claims for refund void.

24. The Commission hired independent counsel to represent it in the litigation filed by the Attorney General.

25. Edison was the real party in interest in the litigation filed by the Attorney General.

26. Following trial on August 26, 2006, the District Court dismissed the Attorney General's complaint and entered judgment for the Commission and Edison.

27. The Attorney General appealed to the Supreme Court of Nevada. In an opinion filed on April 24, 2008, the Supreme Court reversed the District Court and found that the Commission violated the Open Meeting Law when it granted Edison's claims for refund in closed session.

28. Pursuant to the amnesty program set forth in the Emergency Regulation of the Commission (LCB File No. E002-08) and a stipulation entered into between Edison and the Department dated September 30, 2008, Edison paid $9,927,822.47 in use tax for coal purchased from Peabody for use at the Mohave Project for the periods March, 2005 through and including December, 2005 (the "Amnesty Payment"). Concurrently, with entering into the stipulation and making the Amnesty Payment, Edison timely filed claims for refund of the use tax it paid on the coal for the periods March, 2005 through and including December, 2005, i.e. the Amnesty Payment. Pursuant to the stipulation, if Edison prevails on its claims for refund of the Amnesty Payment, the State of Nevada is not required to refund interest with respect to the Amnesty Payment.

29. On remand from the decision of the Supreme Court, the Commission held open hearings

on the claims for refund on September 9, 2008 and December 1, 2008.

30. On December 1, 2008, the Commission voted to deny Edison's claims for refund.

31. NRS 372.680(1) and NRS 374.685(1) each provide: "within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada tax commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City ... for the recovery of the whole or any part of the amount with respect to which the claims has been disallowed."[1]

FIRST CLAIM FOR RELIEF

32. Plaintiff re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 31, inclusive.

33. Edison's use and consumption of coal purchased from Peabody is exempt from use tax under NRS 372.185(2) and 374.190(2). Under those statutes, use tax does not apply to property acquired outside of Nevada in a transaction that would not have been a taxable sale if it had occurred within this state. Under NRS 372.270 and 374.275, a purchase of coal or any other mineral from a mine located in Nevada, is not a taxable sale. Since an acquisition of coal from an in-state mine would not have been a taxable sale under Nevada law, Edison's use and consumption of coal purchased from Peabody's mine in Arizona is not subject to use tax.

34. Edison is entitled to recover a refund of $72,901,996.30 in use taxes it paid to the Department for the periods March, 1998 through and including December, 2005, together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

SECOND CLAIM FOR RELIEF

35. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 31, inclusive.

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[1] Edison does not believe that the Commission's vote denying Edison's claims at the December 1, 2008 meeting constitutes a "final decision" as that term is used in NRS 372.680(1) and NRS 374.685(1). Therefore, it is not Edison's present intent to serve this complaint on the Department until the Commission issues a written decision with findings of fact and conclusions of law. After review of such decision, Edison will either serve this or an amended complaint.

36. The application of Nevada's use tax to Edison's use and consumption of the coal acquired from Peabody discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution (U.S. Const. Art. 1 §8, cl. 3) because, as explained in paragraph 33 above, Nevada taxes the sales of minerals, including coal, extracted from mines in Nevada more favorably than it does the use or consumption of minerals, including coal, extracted and purchased from out-of-state mines for use in Nevada.

37. Edison is entitled to recover a refund of $ 72,901,996.30 in use taxes it paid to the Department for the periods March, 1998 through and including December, 2005, together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

THIRD CLAIM FOR RELIEF

38. Plaintiff re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 31, inclusive.

39. Edison reimbursed Peabody for the Arizona Transaction Privilege Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody had paid to the State of Arizona. The Arizona Transaction Privilege Tax is Arizona's sales tax. In paying Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona Privilege Tax in the sales price subject to use tax.

40. Edison should not have paid use tax on amounts paid to Peabody for the Arizona Transaction Privilege Tax because such amounts are not includable in the meaning of "sales price" under NRS 372.065.

41. In addition, Edison is entitled to a credit against the Nevada use tax for the Arizona Transaction Privilege Tax it reimbursed to Peabody because NAC 372.055 provides such a credit for "sales tax legitimately paid for the same purchase ... to a state or local government outside of Nevada."

42. Edison expects to establish at trial the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March, 1998 through and including December, 2005, together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

FOURTH CLAIM FOR RELIEF

43. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 31, inclusive.

44. Edison reimbursed Peabody for taxes imposed by the United States under the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 (collectively, the "Federal Taxes") on the purchase of coal from Peabody for use at the Mohave Project and that Peabody had paid to the United States. In paying the Nevada use tax, Edison included the Federal Taxes in the sales price subject to use tax.

45. Edison is entitled to exclude from gross receipts, the Federal Taxes that Edison reimbursed to Peabody because the Federal Taxes should not have been included in the sales price subject to Nevada use tax pursuant to NRS 372.065(3)(d).

46. Edison expects to establish at trial the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March, 1998 through and including December, 2005, together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

FIFTH CLAIM FOR RELIEF

47. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 though 31, inclusive.

48. Edison reimbursed Peabody for the Navajo Nation Business Activity Tax and Possessory Interest Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody had paid to the Navajo Nation. In paying the Nevada use tax, Edison included the amount reimbursed to Peabody for the Navajo Nation's Business Activity Tax and possessory interest tax in the sale price subject to use tax.

49. Edison should not have accrued use tax on amounts paid to Peabody for the Navajo Nation's Business Activity Tax and possessory interest tax because such amounts are not includable in the meaning of "sales price" under NRS 372.065.

50. Edison expects to establish at trial the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March, 1998 though and including December,

2005, together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

SIXTH CLAIM FOR RELIEF

51. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 though 31, inclusive.

52. Edison reimbursed Peabody for Arizona's Ad Valorem Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody had paid to the State of Arizona. In paying the Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona Ad Valorem Tax in the sales price subject to use tax.

53. Edison should not have paid use tax on amounts paid to Peabody for Arizona's Ad Valorem Tax because such amounts are not includable in the meaning of "sales price" under NRS 372.065.

54. Edison expects to establish at trial the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March, 1998 through and including December, 2005, together with interest at the appropriate statutory rate for periods other than the interest on the Amnesty Payment.

SEVENTH CLAIM FOR RELIEF

55. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 though 31, inclusive.

56. Edison paid use tax on amounts it paid for transportation costs to the third party that transported the coal from the mine operated by Peabody to the Mohave Plant.

57. Edison should not have paid use tax on amounts it paid for transportation costs pursuant to NRS 372.065 and NAC 372.101.

58. Edison expects to establish at trial the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March, 1998 through and including December,

..../

..../

...../

2005, together with interest at the appropriate statutory rate for periods other than interest on the Amnesty Payment.

WHEREFORE, Plaintiff requests that judgment be entered in its favor as follows:

1. That the Court ordered Defendant State of Nevada to issue Edison a refund of use tax previously paid in the total amount of $72,901,996.30 together with interest at the appropriate statutory rate other than interest on the Amnesty Payment.

2. For costs of suit; and

3. For such additional relief as the Court deems appropriate under the circumstances.

DATED this 15 day of January, 2009.

NORMAN J. AZEVEDO, ESQ.
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Attorney for Plaintiff

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STATE OF NEVADA

DEPARTMENT OF TAXATION

Southern California Edison	)	Account No: 465-197-254
Petitioner	)	
V.	)	
Department of Taxation	)	FINDINGS OF FACT, CONCLUSIONS
Respondent	)	OF LAW AND DECISION

Pursuant to a request for refund, administrative hearings were held on December 22, 2003, at 9:00 AM in Henderson, Nevada and January 28, 2004 at 10:00 AM in Reno, Nevada before Paul Ferrin, Hearing Officer. Appearing for the Petitioner, Southern California Edison (SCE), were Anthony L. Smith, Vice President, Tax, Edison International, Dolores A. Sandler, Tax Manager, Southern California Edison (Edison), Michael Monniger, Manager of Program Projects 2, David Pursell, Legal Assistant and Norman J. Azevedo, Esq. Appearing for the Department of Taxation (Department) were Linda S. Fleischmann, Tax Division Manager, Katy Phillips, Supervising Auditor, Josh Hicks, Deputy Attorney General and Gregory Zunino, Senior Deputy Attorney General.

ISSUES

The issues in this case are:

1. Whether SCE is entitled to a refund of use taxes paid for coal used in the Mohave Plant because the coal consumed at the Plant qualifies for the exemption in NRS 372.270 and 374.275? [1]

[1] NRS Chapter 372 will be utilized in this decision. However, similar provisions enacted in NRS Chapters 374, 377 and 377A are applicable to this decision also.

2. In the event that the coal is subject to use tax, should the taxable measure include the following:
    a. Taxes levied on or as a result of the extraction of coal from the mine by the U.S. Government, the State of Arizona and the Navajo Nation.
    b. Royalties paid to Peabody Coal Company (Peabody).
    c. Transportation charges for shipping the coal through the pipeline owned by Black Mesa Pipeline, Inc. (the Pipeline).
3. Did the Office of the Attorney General unlawfully disclose Edison's confidential information to Clark County District Attorney?
4. Is Edison precluded from amending its timely-filed administrative claims for refund?
5. Is the interest that is paid to Peabody for the amending of the invoices after the date the original billing is due, subject to the use tax as a portion of the sales price of the property?

OVERVIEW OF DECISION

The Department's interpretation, in this case, of NRS 372.270 conflicts with Article I, Section 8, Clause 3 of the United States Constitution, the Commerce Clause, and arrives at an unconstitutional result in this case. With NRS 372.270 being unconstitutional in this application, the refund request for coal is denied. The amounts of the charges intended to reimburse Peabody for the taxes it pays are a portion of the sales price of the property to SCE and subject to the use tax. None of the taxes paid by Peabody qualify for credits pursuant to NAC 372.055.[2] The royalties and transportation charges paid by SCE are also a part of the sales price of the property to SCE and

[2] Even if the taxes paid by Peabody could be allowed as credits, they could not be credited to SCE as they were not directly paid by them.

subject to the use tax. SCE's request to amend the refund claims as to the reason and the amounts is denied as outside the statute of limitations except for the period of September 1, 2000 to December 31, 2000. During the period of September 1, 2000 through December 31, 2000, SCE is entitled to a refund to the extent it accrued and paid use tax on interest charges paid as the result of invoicing corrections.

The Attorney General may have violated the TP's confidentially by disclosing information to the Clark County District Attorney. However, since the Nevada Tax Commission has not created a regulation for the noticing as required in NRS 360.245 and the Attorney General was attempting to deal with conflicting statutes I see no harm that was brought to SCE. In addition, the Hearing Officer does not have the jurisdiction over whether or not a misdemeanor has occurred. That issue must be brought to the courts.

The undersigned Hearing Officer having heard and considered the testimony presented and the arguments made, having reviewed and considered the exhibits admitted, and being fully advised in the premises, makes the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

1. SCE filed a request for refund (an amended return) for the period March 1, 1998, through March 31,.1998, for $247,399.06[3] or other varied amount on April 26, 2001. The reason stated for the refund request was SCE's "inadvertent failure to claim a credit against the use tax for sales tax legitimately paid for the same purchases of

[3] *The Department's exhibit A includes the amount requested for a refund less the collection allowance. That amount differs from the refund requests filed by SCE. That is true with all the requested refund amounts listed on Department's exhibit A per Ms. Phillips testimony on page 116 of the transcript.*

tangible personal property to another state. ... Southern California Edison Company ("SCE") legitimately paid Arizona sales tax to its vendor, Peabody Coal Company (see enclosed invoice), on coal products used at SCE's Mohave Generating Station, located in Clark County, Nevada. SCE also paid the Nevada use tax on these purchases. ..."

2. The Department replied on May 15, 2001 advising SCE that the refund request had been forwarded to the Department's auditor for further review. The letter also indicated that SCE would be notified of the results of that review.

3. On May 29, 2001, SCE filed an amended return for April 1998 as a claim for refund of $302,258.97 or other varied amount. The reason for the refund requested was the same as it Findings of Fact item number 1.

4. The Department replied on July 30, 2001 advising SCE that the refund request had been forwarded to the Department's auditor for further review. The letter also indicated that SCE would be notified of the results of that review.

5. On June 26, 2001, SCE filed amended returns for May, June and July of 1998 in the amounts of $200,184.91, $121,044.68 and $260,005.96 or other varied amounts. The reason for the request is the same as stated in Findings of Fact item number 1.

6. The Department replied on July 25, 2001 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE would be notified of the results of that review.

7. On October 25, 2001 SCE filed amended returns (request for refund) for the periods of August, September, October, November and December of 1998 in the amounts of $316,828.44, $304,541.17, $257,530.40, $343,679.91 and $289,287.78 or other varied amounts. The reason for the request is the same as stated in Findings of Fact item number 1.

8. The Department replied on November 30, 2001 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE

would be notified of the results of that review.

9. On December 5, 2001 SCE filed amended returns (request for refund) for the periods of January, February, March, April, May and June of 1999 for $298,007.99, $309,218.95, $275,947.42, $267,959.27, $177,066.12 and $162,720.40 or other varied amounts. The reason for the request is the same as stated in Findings of Fact item number 1.

10. The Department replied on January 14, 2002 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE would be notified of the results of that review.

11. On June 26, 2002 SCE filed amended returns (request for refund) for the periods July, August and September 1999 for $264,413.18, $191,488.60 and $314,907.38 or other varied amounts. The reason for the request is the same as stated in Findings of Fact item number 1.

12. The Department replied on August 7, 2002 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE would be notified of the results of that review.

13. On November 9, 2002 SCE filed amended returns (refund requests) for October, November and December 1999 for $342,402.11, $366,597.15 and $236,838.10 or other varied amounts. The reason for the request is the same as outlined in Findings of Fact item number 1.

14. The Department replied on December 19, 2002 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE would be notified of the results of that review.

15. On December 17, 2002, the Department denied refund request submitted for the periods of March 1, 1998 through September 30, 1999. SCE was advised that if they disagreed with the Department's decision, they could file an appeal within 45

days.[4]

16. On December 30, 2002, the Department denied the refund request submitted by SCE for the Periods of October 1, 1999 through December 31, 1999. SCE was advised that if they disagreed with the Department's decision, they could file an appeal within 45 days.

17. On January 31, 2003 SCE filed an appeal of the Departments denial of the refund requests.

18. On February 25, 2003, SCE filed amended returns (refund requests) for January through December 2000 for $325,771.71, $249,767.12, $271,515.30, $332,555.10, $197,942.25, $307,829.74, $331,050.65, $276,686.22, $359,105.11, $255,631.07, $312,409.96 and $306,361.47 or other varied amounts. The reason for the request was the same as outlined in Findings of Fact item number 1. However, in addition, SCE added this reason, "SCE's purchases of coal from Peabody were subject to taxes imposed by the United States, specifically, the taxes imposed by the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977. Peabody passed these taxes on to SCE as separately stated items on its invoices (see enclosed invoices) for the sale of coal products. SCE paid the Nevada use tax on these United States taxes. These United States taxes should not be included in the gross receipts subject to Nevada's use tax under NRS Section 372.265."

19. The Department replied on April 10, 2003 that the request for refund had been forwarded to the Department's auditor. The letter also indicated that SCE would be notified of the results of that review.

20. On March 7, 2003 the Supervising Auditor for the Petition Section

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[4] While the Department advised SCE that they had 45 days to file an appeal of the Department's denial of their refund claims and the Department is honoring that time frame, pursuant to NRS 360.245 the appeal should have been made within 30 days. The Department also sent SCE a petition for redetermination form that is designed for deficiency determinations. As the appeal is of an administrative decision, this form should not have been included with the denial letters.

acknowledged receipt of the petitions and requested additional information from the Department.

21. On May 15, 2003 SCE was notified that the two refund claims that were denied had been assigned to a hearing officer for a hearing.

22. On May 16, 2003, the Department advised SCE that their refund claims for the period of January 1, 2000 to December 31, 2000 were denied.

23. On May 28, 2003 the Hearing Officer sent SCE and the Department a letter requesting a pre-hearing statement be filed prior to July 14, 2003.

24. On July 2, 2003 the Department advised SCE that for denial of claims for refund the procedure for hearing pursuant to NRS 360.245 (1)a, was to proceed to a hearing before the Nevada Tax Commission (Commission) instead of a hearing officer. That letter also required a brief be filed by August 1, 2003.

25. On October 15, 2003 the Department advised SCE that an audit would be conducted of their records commencing on October 20, 2003.

26. On October 22, 2003 the Department notified SCE that the audit had been canceled.

27. On October 22, 2003 the Attorney General representing the Department informed SCE's counsel that the Department was uncertain as to the grounds for the requested refund other than Arizona's Transaction Privilege Tax, although other theories were introduced in a telephone conversation. The Parties agreed that a pre-hearing statement similar to ones used in hearings before a hearing officer would make the issues clearer when the matter was heard before the Commission.

28. SCE purchases the coal from Peabody which is located in Black Mesa, Arizona. The title to the coal is transferred to SCE at the Mohave Plant located in Clark

County, Nevada. SCE is to receive coal, coal slurry and water at the point of delivery.[5]

29. The coal is mined on the Navajo and Hopi Indian Reservations located in Arizona.

30. SCE reimburses Peabody for Arizona's Transaction Privilege Tax (TPT) that Peabody pays to the State of Arizona. The TPT is a tax for the privilege of doing business in Arizona.

31. SCE reimburses Peabody for the Ad Valorem Tax that Peabody pays to Arizona. The Ad Valorem tax is a property tax.

32. SCE reimburses Peabody for the taxes it pays to the United States under the Surface Mining & Reclamation Act of 1977. The reclamation fee is based upon the number of tons of coal produced.

33. SCE reimburses Peabody for the taxes it pays to the United States under the Black Lung Benefits Revenue Act of 1977. The tax for the Black Lung Benefits Revenue Act of 1977 is imposed on coal based upon a rate per ton of coal sold.

34. SCE reimburses Peabody for taxes imposed by the Navajo Nation. The Business Activity Tax (BAT) is a tax similar to Arizona's Transaction Privilege Tax and is imposed on the gross receipts of products sold, on or off the reservation, allowing for some very limited deductions.

35. SCE reimburses Peabody for taxes imposed by the Navajo Nation for the Possessory Interest Tax. The tax is imposed on possessory interests within the Navajo Nation.

36. SCE reimburses Peabody for the transportation of the coal through a pipeline owned by The Pipeline.

37. On October 27, 2003, SCE submitted revised claims for refund for the period

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[5] See Exhibit 2, Coal Supply Agreement dated January 6, 1967, section 4 A.

of March 1, 1998 through December 31, 2000. The amended claims did not specify why the amounts were revised.

38. The coal delivered to The Pipeline by Peabody is ground finer prior to its transportation into the pipeline. The additional grinding is done by The Pipeline. [6]

39. The water used by The Pipeline to transport the coal from Arizona to the Mohave Generating Station and to clean and test the pipeline is furnished by Peabody at a price of $.04 (four cents) per ton of coal delivered and $.0002 (.2 mills) per gallon to test, clean and flush the pipeline.[7]

40. Peabody charges SCE for corrections in invoice amounts from the original billing. Those changes are billed to SCE after the original billing (the original billing is done by the 10 of the month following the delivery). SCE pays Peabody interest on those corrections to the original invoiced amounts. The interest assessed by Peabody is after the sale of the coal.

41. On November 19, 2003 the Attorney General faxed a letter to the Clark County District Attorney regarding this case. The letter included:

a. Location where the coal consumed at the plant is extracted,

b. The contractual relationship between Peabody and SCE,

c. Details of contractual relationship regarding the reimbursement of taxes,

d. The amount of use tax paid by SCE between March 1998 and Dec. 2000,

e. The amount of the refund claims file by SCE,

f. The grounds for the refund claims previously filed by SCE.

42. SCE filed amended claims for refund on October 27, 2003 that included the

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[6] See Petitioners Exhibit 20, Coal Mining & Slurry Transportation System, showing the process of coal mining to crushing, to water being added to the coal for delivery to Mesa with additional grinding, to shipping via the pipeline to being burned at SCE. See also Petitioners Exhibit 16, the pipeline agreement between Peabody and Mesa, sections 2.3 and 3.1

[7] See amended contract between Peabody and Mesa at section 3.2.

issues outlined in the Issues section of this decision.

43. On April 7, 2004 the Hearing Officer issued a protective order on both parties in this case to insure that they do not contact or discuss this case with the Commission or the Clark County District Attorneys Office. This was done pursuant to NRS 233B.126, NRS 372.750 and NRS 360.245.

44. In SCE's brief to the Hearing Officer, they requested an order in the decision regarding whether they could stop accruing use tax on the coal purchased from Peabody and consumed in Nevada.

45. Any finding of fact hereinafter construed to constitute a conclusion of law is hereby adopted as such to the same extent as if originally so denominated.

CONCLUSIONS OF LAW

1. SCE's appeal of the Department's denial of its requests for refund for the period of April 1, 1998 through December 31, 2000 to the undersigned Hearing Officer of the Nevada Department of Taxation was timely filed and the determination of the merits of said appeal is properly within the jurisdiction of the undersigned Hearing Officer. SCE's request to amend the refund requests is also within the jurisdiction of the undersigned Hearing Officer. SCE's claim regarding disclosure of confidential information is not under the jurisdiction of the Hearing Officer.

2. Nevada Revised Statute (NRS) 372.025 provides, "1. ' Gross receipts' means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the

regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed'. (Emphasis Added) The Petitioner and the Department argue that this statute deals with the transactions between SCE and Peabody. However, this statute deals with sales transactions and the gross receipts from those transactions. If Peabody were required to collect Nevada sales tax on the transactions in question, SCE would not have accrued Nevada use tax and no refund claim would be necessary. This statute is not relevant to the refund claims submitted by SCE.

3. NRS 372.030 provides," "In this state" or "in the state" means within the exterior limits of the State of Nevada and includes all territory within these limits owned

by or ceded to the United States of America". The Mohave Project generating station is located within the State of Nevada in Clark County and within the jurisdiction of the Department of Taxation.

4. NRS 372.045 provides, "1. **"Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.**

2. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price is a purchase.

3. A transfer for a consideration of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication, is also a purchase". (Emphasis Added) SCE makes purchases of coal from Peabody.

5. NRS 372.050 provides, "1. "Retail sale" or "sale at retail" means a **sale for any purpose other than resale** in the regular course of business of tangible personal property.

2. The delivery in this state of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, is a retail sale in this state by the person making the delivery. He shall include the retail selling price of the property in his gross receipts". (Emphasis Added) The purchases of coal from Peabody are not sales for resale and are made in the regular course of Peabody's business and therefore are retail sales.

6. NRS 372.055 provides, "1. "Retailer" includes:

(a) **Every seller who makes any retail sale or sales of tangible personal property,** and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(b) Every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(c) Every person making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy.

2. When the Tax Commission determines that it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the Tax Commission may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this chapter.

3. A licensed optometrist or physician and surgeon is a consumer of, and shall not be considered, a retailer within the provisions of this chapter, with respect to the ophthalmic materials used or furnished by him in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye, including the adaptation of lenses or frames for the aid thereof". (Emphasis Added) Peabody is a retailer as the sales made to SCE were (and continue to be) at retail.

7. NRS 372.060 (1) provides, ""Sale" means and **includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration**". (Emphasis Added) Peabody makes sales of coal to SCE for use in SCE's generating station.

8. NRS 372.065 provides, "1. "Sales price" means the **total amount for which tangible property is sold, valued in money**, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) **The cost of the property sold.**

(b) **The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.**

(c) **The cost of transportation of the property prior to its purchase.**

2. The total amount for which property is sold includes all of the following:

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

(b) **Any amount for which credit is given to the purchaser by the seller.**

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

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

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) **The amount of any tax** (not including, however, any manufacturers' or importers' excise tax) **imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer".** (Emphasis Added) The coal purchased from Peabody by SCE includes the price of transportation to the site in Nevada.[8] It also includes all the taxes that are imposed by the Federal Government. The taxes imposed by the Federal Government are not taxes imposed with respect to the retail sales of the coal, but for the Black Lung Disability Fund and Reclamation Fee for the reclamation of abandoned mines. The taxes collected by the State of Arizona for the Transaction Privilege Tax are for the privilege of doing business in Arizona. The State of Arizona Ad Valorem Tax is property tax paid to the State of Arizona. The Possessory Interest Tax levied by the Navajo Nation is based upon the value of the property on the tribal lands. The Business Activity Tax imposed by the Navajo Nation is a tax on the privilege of doing business on the Navajo Nations lands. All of those parts go into creating the sales price for the coal that is paid by SCE. The royalties paid are also a component part of the sales price of the coal and shall be included in determining the sales price of the property. In *Oklahoma Tax Com'n v. Jefferson Lines, Inc.* 514 U.S. 175 (1995) the court stated that "Commerce clause does not forbid actual assessment of succession of taxes by different states on different events as same tangible object flow along." Therefore, the taxes paid to reimburse Peabody are to be included in the sales price of the property to compute the measure of the use tax due. The interest

[8] See amended contract between SCE and Peabody at section 3.1. Title passes to SCE at SCE's location.

charged to SCE on the correction invoices are after the sale and are imposed with respect to the delayed payment for coal delivered. Those amounts are not subject to the use tax.

9. NRS 372.185 provides, "1. An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property **purchased from any retailer** on or after July 1, 1955, for storage, use or other consumption **in this state** at the rate of 2 percent of the **sales price** of the property.

2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this state". (Emphasis Added) The use tax applies to the coal that was purchased from a retailer, Peabody, for the storage, use and consumption in Nevada on the sales price of the property. SCE argues that the purchase of the coal in Nevada would not be subject to the use tax as coal mined in Nevada would be exempt from the sales tax under NRS 372.270. However, that is not the case here. Nevada has never had a significant amount of coal mined in this state.[9] The coal that is located in this state is of such poor quality and quantity that is it not economical to mine. Therefore, any coal that is purchased in Nevada is not mined in this state and would not be subject to the exemption afforded in NRS 372.270. That would make any sale or purchase of coal in Nevada subject to the sales or use tax. Further, the coal that was sold to SCE is of a different size that was delivered to The Pipeline. The coal that is finally delivered to SCE is ground to a finer powder than that what was delivered to The Pipeline. In that context, the coal, even if it had been mined by Peabody in Nevada, is not the same type of product that would have been exempt from Nevada's sales and use tax statutes.[10] In addition, the coal is also mixed with water when it is received in Nevada, making it a product different than what would have been taxed pursuant to NRS 362, had the coal originally been subject to tax in Nevada.

10. NRS 362 covers the Net Proceeds of Minerals subject to tax based upon the net proceeds of a mine operation located within this state. The taxes are paid taking the

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[9] See SCE's Exhibit 5.

[10] See Attorney Generals Opinion No. 1955-72 dated 6/22/55. See questions 2, 3, and 4 and the portion of the opinion applicable to those questions.

gross proceeds of the mine subtracting certain allowable deductions. See NRS 362.120.

11. NRS 362.110 (1) provides, "1. Every person extracting any mineral in **this state** or receiving any royalty:..." (Emphasis Added) That section of the statute is clear that the taxes imposed by NRS 362 apply only to minerals extracted within this state. The coal at issue here was not mined in Nevada and is therefore not subject to NRS 362.

12. NRS 372.270 provides, "**There are exempted from the taxes** imposed by this chapter the gross receipts from the sale of, and the storage, **use or other consumption in this state** of, **the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS**". (Emphasis Added) The taxes levied pursuant to chapter 362 of NRS apply only to minerals that are mined in this state. The coal in this case was not mined in Nevada and is not subject to taxes levied pursuant to NRS 362.

13. NRS 372.635 provides, "1. **No refund may be allowed unless a claim for it is filed with the Department within 3 years after the last day of the month following the close of the period for which the overpayment was made.**

2. No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Department within that period, or unless the credit relates to a period for which a waiver is given pursuant to NRS 360.355". (Emphasis Added) SCE argues that once a claim is filed, that it can be amended and changed pursuant to the Nevada Supreme Court in the case of *Hansen-Neiderhauser V. Nev. Tax Comm'n, 81 Nev.307, 402P P.d 480 (1965)*(Hansen). However, since that case was ruled upon, the Nevada Tax Commission enacted NAC 360.480 in 1977. That NAC was modified in 1996, 2002 and 2003. The court case in Hansen does not provide enough information to determine if the reasons for the refund request or the amounts of the refund request changed as dramatically as did the SCE refund claims. The regulation regarding the refund claim came after the court case was decided. It is impossible for this Hearing Officer to conclude that a regulation which has been in effect for 27 years without legislative change[11] is rendered meaningless by a

[11] *See Bing Construction Company of Nevada vs. Nevada Department of Taxation* decided on March 24, 1993. In that case, the court noted that the Commissions regulation was in force for approximately 25

Nevada Supreme Court case that was decided 12 years prior to the enactment of the regulation.

NAC 360.480 provides, "1. Except as otherwise provided in NAC 360.490 to 360.496, inclusive, and 360.502 to 360.516, inclusive, a claim for a refund must be accompanied by:

(a) **A statement setting forth the amount of the claim;**

(b) **A statement setting forth all grounds upon which the claim is based;**

(c) **All evidence the claimant relied upon in determining the claim**, including affidavits of any witnesses; and

(d) Any other information and documentation requested by the Department.

2. A claim for a refund of interest or a penalty that was paid by the taxpayer related to a tax administered by the Department **must be filed within 3 years** after the date of payment of the interest or penalty". (Emphasis Added) SCE's refund claims outlined an amount of the claim originally and the grounds for that claim. Twenty-two months after the first claim was filed (the first claim was filed in April of 2001), SCE then files amended returns for different periods and changes the amounts requested and reasons for the refund request compared to the first set of refund claims. The new claims were for January through December 2000 and were filed in February of 2003. Then in October of 2003 the claims were modified to include additional amounts and additional reasons for the refund request. According to SCE, once a claim has been filed, that claim can at any time in the future be modified in amount and reason for the claim. They claim that according to *Hansen*, the claims can be adjusted at any time. However, NAC 360.480 (formally ruling 22 and NAC 360.415) was passed after the *Hansen* case and requires specific procedures for a refund claim. It is unreasonable of SCE to file a claim in one period and expect to continually modify it without ramifications. If that were the case, anyone could request a refund and for unlimited years try to determine the amount and the reason for the claim. The result would be to negate the statute limiting

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years and the legislature has not disturbed the regulation. By not doing so the legislature's acquiescence in an agency's reasonable interpretation indicates that the interpretation is consistent with legislative intent. The same can be said for NAC 372.480. While there have been changes since 1977, the requirements outlined in 1a, 1b,1c, and 1d have remained the same.

the periods of time within which a claim could be filed. Consequently, the claims will be considered by the Hearing Officer for the periods, amounts and reasons outlined in SCE's original claims. Amending the amounts of the refund requests and the reasons for those requests that are outside the 3 year statute of limitations is denied. Therefore, the first set of claims (March 1998 to December of 1999), are limited to the amounts of the refund requested and the asserted reason of the payment of sales taxes to Arizona. The second set of claims (January through December 2000) are limited to the reasons outlined in the requests for the period up through August 2000. For the periods starting on September 1, 2000 to December 2000, those periods were within the statute of limitations when the claim was filed and would constitute new claims for refund within the statute of limitations. Those periods are open to the amounts and reasons set forth in the October 27, 2003 correspondence from SCE's attorney.

14. NRS 360.380 provides, "The **Department may decrease or increase the amount of the determination** before it becomes final, but the amount may be increased only if a claim for the increase is asserted by **the Department** at or before the hearing". (Emphasis Added) SCE argues that they should be able to increase or decrease the amount of the refund request at any time before the refund amount becomes final based upon NRS 360.380. However, the plain wording of the statute allows the **Department** to increase or decrease an amount of a determination at or before a hearing or before the determination becomes final. Determinations outlined to be increased or decreased are outlined in NRS 360.300. As this is not a **determination** but a refund claim, this section of the statute does not apply.[12]

15. NRS 372.060 (1) provides, ""Sale" means and includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of **tangible personal property for a consideration**". (Emphasis Added) SCE argues that the transportation, royalties, and taxes paid to other jurisdictions are not tangible personal property and therefore not subject to the use tax.

[12] None of the denial letters issued to SCE indicated that any appeal or petition that they may file if they disagreed with the decision of the Department would give them status of a deficiency determination. Nor did the Department indicate that their request would give them rights to become the Department in increasing or decreasing a deficiency determination.

However, NRS 372.065[13] defines what is included in the sales price of property subject to the tax and it includes items that SCE is attempting to bifurcate from the tangible personal property of coal, coal slurry and water. Additionally, the charges for transportation, royalties and taxes paid by Peabody are all a consequence of, and listed on the invoices with charges for, SCE's purchase of coal, not random charges created by Peabody. All of the components necessary to be able to sell the coal are a part of the sales price, as defined by Nevada law, and cannot be viewed separately just to receive a tax benefit that isn't specified in the statutes.

16. SCE argues that the Business Activity Tax (BAT) imposed by the Navajo Nation is similar to the Net Proceeds of Mines (NPM) Tax imposed by the State of Nevada. However, the BAT more closely resembles the Transaction Privilege Tax levied by Arizona than it does the Nevada NPM. The tax is required to be paid on the "source-gains" of a "branch". See Petitioners Exhibit 17, Section 404.The statute has the following definitions:

> (a) "Branch" means any person engaged in trade, commerce, manufacture, power production, or any other productive activity, whether for profit or not, wholly or in part within the Navajo Nation".
>
> (b)""Source-gains" of a branch are the gross receipts of that branch from the sale, either within or without the Navajo Nation, of Navajo goods, or services, as those terms are defined in paragraphs (c) and (d) of this section, minus the deductions allowable under section 405".
>
> (c) "Navajo goods" are all personal property produced, processed, or extracted within the Navajo Nation, including coal, oil, uranium, gas, other natural resources and electrical power.
>
> (d) "Services" are all services performed within the Navajo Nation, including the transport or transmission by whatever means of coal, oil, uranium, gas, other natural resources and electrical power.[14]

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[13] See Section 8 of Conclusions of Law referring items referenced in this section.

[14] The statute has additional definitions (e) through (i), but they are not necessary to the determination in this case.

Credits that are allowed under the BAT in section 409 "Credits" include (a)(1) "If on receipts form selling coal severed from the Navajo Nation land a qualifying gross receipts, sales, business activity or similar tax has been levied by a state, the amount of state tax paid and not refunded may be credited against any Business Activity Tax due. The amount of the credit shall be equal to the lesser of twenty-five percent of the tax imposed by the state on the receipts or twenty-five percent of the Business Activity Tax". With the application and the credits that are allowed under the BAT, that tax more resembles the Transaction Privilege Tax imposed by Arizona than the NPM tax imposed by Nevada.

17. SCE indicates that the sales tax and use tax are complementary and spends a portion of his brief on this issue. The sales and use tax are complementary and that has been the position of the Department since the beginning of the tax in 1955.

18. NAC 372.055 provides, "In determining the amount of use tax that is due from a taxpayer, the Department will allow a **credit toward the amount due** to this State in an **amount equal to sales tax legitimately paid** for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department". (Emphasis Added) SCE argues that the payment of the TPT taxes are similar to sales taxes and should be allowed a credit for those amounts paid to Arizona. However, in the case *Arizona Dept. of Rev. v. Robinson's Hardware, 721 P.2d 137* (Ariz.App. 1986) the Arizona courts have continuously held that the TPT is not a sales tax. The conclusion was reached "for the simple reason that Arizona's transaction privilege tax is not a direct tax upon the goods appellant sells. Rather it is a tax directly and specifically on appellant for the privilege of conducting business in Arizona. Such privilege or license taxes are generally termed "indirect taxes"". [15] In the Arizona case of *City of Phoenix v. West Publishing Company*, 712 P.2d 944 (Ariz.App. 1986) the court said " it is undisputed that the tax assessed by the City is a business privilege tax which is an exaction for the privilege of doing business within the City Limits. **This is to be distinguished from a sales tax**, which is generally added to the selling price and is borne by the consumer, with the vendor being

[15] See footnote 4 of the courts decision.

made an agent of the taxing authority for purposes of collection. Also to be distinguished is a use tax which is complementary to the sales tax and is also borne by the consumer. The use tax is designed to reach out-of-state purchases made by residents within the local jurisdiction". (Emphasis Added) The Nevada Tax Commission (Commission) passed NAC 372.055 that allows credits towards the Nevada use tax on sales taxes legitimately paid to other jurisdictions. As the taxes in Arizona do not meet the requirements of the NAC 372.055, they are not allowed as an offset to the use taxes owed by SCE.

19. NAC 372.050 provides, "1. If tangible personal property is sold on credit, either under a conditional sale or lease contract or otherwise, the whole amount of the contract is taxable unless the retailer keeps adequate and complete records to show separately the sales price of the tangible personal property, and the insurance, interest, finance, carrying, and other charges made in the contract. If such records are kept by the retailer, the insurance, interest, finance, and carrying charges may be excluded from the computation of the tax.

2. The total amount of the tax on the entire sales price in credit transactions is due on the due date of the return to be filed after the close of the reporting period in which the sale was made.

3. No reduction in the amount of tax payable by the retailer is allowable by reason of his transfer at a discount of a conditional sale or lease contract or other evidence of indebtedness". SCE argues that the transactions between Peabody and SCE are credit transactions. I agree with that position. The amount of any interest charged SCE under the terms of the contract for payment on adjustments where interest is charged is not subject to the use tax. Those amounts are to be refunded based upon the final review of the claims that would include from September 2000 forward.

20. NRS 372.750 (1) provides, "... it is a misdemeanor for any member of the Tax Commission or officer, agent or employee of the Department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars

of it to be seen or examined by any person not connected with the Department". SCE argues that the Attorney General violated SCE's confidentiality by sending information regarding the refund request to the Clark County District Attorney. However, NRS 360.245 (6) and (7) provide, "The Nevada Tax Commission **shall provide by regulation** for:

(a) **Notice to be given to each county of any decision upon an appeal to the Commission that the Commission determines is likely to affect the revenue of the county or other local government.** The regulations must specify the form and contents of the notice and requirements for the number of days before a meeting of the Commission that the notice must be transmitted. If the parties to the appeal enter into a stipulation as to the issues that will be heard on appeal, the Commission shall transmit a copy of the notice to the district attorney of each county which the Commission determines is likely to be affected by the decision. Upon receipt of such a notice, the district attorney shall transmit a copy of the notice to each local government within the county which the Commission determines is likely to be affected by the decision. If there is no such stipulation, the Commission shall transmit a copy of the notice, accompanied by the names of the parties and the amount on appeal, if any, to the governing bodies of the counties and other local governments which the Commission determines are likely to be affected by the decision.

(b) The manner in which a county or other local government which is not a party to such an appeal may become a party, and the procedure for its participation in the appeal.

7. A county or other local government which is a party and is aggrieved by the decision of the Nevada Tax Commission is entitled to seek judicial review of the decision". (Emphasis Added) NRS 360.245 was changed in 1999 and there is not yet a regulation on how to notify counties or local governments when decisions of the Commission could affect them. The Attorney General was trying to inform Clark County that their revenue may be affected in accordance with NRS 360.245. However, since there is no regulation by the Commission on how that task is to be accomplished, the notifying of the Clark County District Attorney did not violated SCE's confidentially. (Note: The Department requested a protective order so that SCE's Attorney would not send information to the Commission Chairman or its members. A protective order was

issued for both parties to stop sending information relating to this case to any other parties.) While I do not believe that the Attorney General violated SCE's confidentially, that matter is one for the courts and not for this Hearing Officer to decide.

21. SCE has also requested an order that SCE does not have to continue to accrue use tax on its purchases of coal from Peabody. The Hearing Officer orders that, in accordance with this decision SCE continue to pay use tax on the coal purchased from Peabody until such time as this case becomes final. SCE is not required to accrue use tax on interest charges that Peabody issues on invoice corrections made to the amounts of coal sold to them.

22. SCE argues that Nevada's statute NRS 372.270 discriminates against interstate commerce in violation of the Article I, Section 8, Clause 3 of the United States Constitution, the Commerce Clause. Current Nevada law allows an exemption from the sales or use tax for products mined in Nevada **and** subject to the Net Proceeds of Minerals tax. That means that coal mined outside Nevada and sold in Nevada would bear a larger tax burden in Nevada because coal mined outside Nevada would not be eligible for the exemption granted for coal mined in Nevada. The Department argues that since there is no coal mining in Nevada, there could be no discrimination and SCE has not suffered to the benefit of intrastate commerce. The Department argues that since what is being purchased by SCE is coal slurry and not coal, the exemption would not apply in this case anyway. However, if it is decided by the Commission or the courts that what is being purchased is only coal and not coal, coal slurry and water, the question of discrimination still needs to be resolved. I find that the tangible personal property at issue here is coal and the fact that coal mined in another state would not be granted the same exemption as coal mined in Nevada creates a differing treatment of the coal. Therefore, in this instance, I find the Department's interpretation of NRS 372.270 to be unconstitutional. However, despite that finding, the refund claims of SCE do not have an argument that supports their ability to receive a refund claim based upon the Commerce Clause. In this case, since NRS 372.270 is not constitutional, no party would be able to receive an exemption from the sales tax. See *Worldcorp v. State of Nevada*, 113 Nev. 1032 (1997). If that section of the statute is unconstitutional, SCE's argument about differing treatment ceases to be relevant. The remaining statutes involved in this case determine the outcome outlined in the decision.

23. Any conclusion of law hereinafter construed to constitute a finding of fact is hereby adopted as such to the same extent as if originally so denominated.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that SCE's refund claims from March 1, 1998, through August 2000 are denied. The refund claims submitted for the period of September 1, 2000 through December 2000 are allowed only to the extent that SCE has paid Peabody interest on invoice corrections for that period. The remaining portions of the refund claims for the period of September 1, 2000 to December 31, 2000 are denied. The Department shall work with the Petitioner to arrive at a credit amount in accordance with this decision within the next than 30 days. Interest continues to accrue on any unpaid tax amount from the date the tax was overpaid until the date of payment. That amount shall be refunded to SCE.

APPEAL RIGHTS

This decision may be appealed to the Nevada Tax Commission. If the decision is appealed, the appeal must be filed with the Executive staff of the Department of Taxation within 30 days of the date after the date of service of this decision to SCE.

1. Pursuant to state law, the Decision on your petition for Redetermination becomes final thirty days after service upon you unless an appeal to the Nevada Tax Commission is filed within those 30 days. Interest continues to accrue on any amount of unpaid tax allowed by this Decision until the tax amount is paid.

2. The above general information is provided to you as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

DATED this **14th** day of **July** 2004.

FOR THE DEPARTMENT

Paul Ferrin

Hearing Officer

cc: Tax Commission Members

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the forgoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid to:

Norman J. Azevedo, Esq.

338 California Avenue

Reno, NV 89509

Dated at Carson City, Nevada, this **14th** day of **July** 2004.

Eric F. Fierro

Signature

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Writer's Direct Dial (775) 684-1222 Fax (775) 687-5798

MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Deputy Attorney General

SUBJECT: *Venue Sections of S.B. 362*

Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).

2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).

3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).

4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).

5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).[1] By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

> Sec. 13. NRS 361.435 is hereby amended to read as follows:
>
> 361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[, Nevada.]~~ *or Clark County, in any court of competent jurisdiction*

[1] It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

in Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may *file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may* bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the excise tax so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.*

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the amount so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.*

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter ~~[,]~~ *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark county* for the

recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter ~~[,]~~ *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

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Inter Alia
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THE BASICS OF NEVADA ADMINISTRATIVE LAW

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INTRODUCTION

Administrative law at the state level has grown exponentially since the adoption of the Administrative Procedure Act (APA) in 1965. [FN1] Administrative law is similarly pervasive at the local level, whether set by ordinance, agreement or informal policy or rules. [FN2] To the uninitiated, the administrative process must often appear to be suspiciously informal or bureaucratically byzantine. To the practiced, the process may seem to be both increasingly formal and less byzantine as the quasi-judicial functions of the sundry boards, commissions, hearing panels, and hearing officers of state and local governments become firmly implanted by case law and by experience. Perhaps the greatest gap between the uninitiated and the practiced attorney in the field is an understanding of the basic legal regime underlying the administrative process. If the basics are understood, an attorney will, at a minimum, know where to go and what to look for in guiding a client through the process. This article will outline some of the basics of Nevada administrative law.

THE PURPOSE AND APPLICABILITY OF THE APA

The purpose of the APA is to establish "minimum procedural requirements" for agency regulation-making and adjudication and for judicial review of both agency functions. [FN3] The minimum requirements are mandatory and "may not be ignored." [FN4] If the minimum procedural requirements have been met, an agency can argue that a presumption of validity attaches to the agency action. [FN5]

Although principles governing hearings and standards of judicial review may similarly apply to both state and local bodies, the APA does not, by its terms, apply to local bodies. [FN6] The Nevada Supreme Court, however, has recognized that the APA may serve as an appropriate guideline for a reviewing court's procedural treatment of a local government decision. [FN7]

The APA does apply to all agencies of the Nevada executive department except agencies specifically exempted by the legislature. [FN8] The major exemptions include the governor, the department of prisons, the University of Nevada System, the military department, the gaming control board, and the gaming commission. [FN9] The lesser exemptions include judicial review exemptions for the employment security department, the state industrial insurance system and the public service commission, as well as the quarantine and treatment orders issued by the board of sheep commissioners. [FN10]

REGULATION MAKING

The definition of a regulation is broad and includes "an 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." [FN11] The broad definition has been regularly interpreted in a broad manner. [FN12] For instance, in Coury v. Whittlesea-Bell Luxury Limousine the court held: "An agency makes a rule

when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function." [FN13]

A regulation does not include declaratory rulings, decisions in contested cases, internal management statements not affecting rights of the public, or intraagency memoranda. [FN14] Another exception, described in K-Mart Corp. v. State Indus. Ins. Sys., arises when an agency "undertakes to enforce or implement the necessary requirements of an existing statute." [FN15] This exception will likely only apply when the underlying basis of the agency action is mandatory and nondiscretionary, such as performing calculations according to the statutorily designated formula described in K-Mart Corp.

Agency Adoption Procedure

The procedure for adopting, amending or repealing a regulation is fairly straightforward. An agency, prior to acting upon the regulation, must provide thirty days notice of the intended action. [FN16] The notice must state the need for the regulation and its purpose, the terms or substance of the regulation or a description of the subject and issues involved, and the time, place and manner in which interested persons may comment on the regulation. [FN17] The regulation must be made available for public inspection and copying. [FN18] Interested persons must be allowed to comment either orally or in writing, and, additionally, an agency must hold a public hearing on the regulation. [FN19] The agency in required to "consider fully all written and oral submissions respecting the proposed regulation." [FN20] Again, these minimum procedural requirements are a prerequisite to the adoption of valid regulations. The failure to follow the requirements can result in the invalidation of the regulation in question. [FN21]

Legislative Review and Veto of Regulations

While the agency's public hearing and comment procedure is occurring, a simultaneous review of the agency action by the legislature is also occurring. The review procedure was enacted in 1977 and was intended to provide a legislative veto over executive regulations. [FN23]

The review begins prior to any agency action with the requirement that the agency submit to the legislative counsel the text of a new or amended regulation or the identity of a regulation to be repealed. [FN24] The legislative counsel reviews and revises the agency action during the thirty day public comment period.

Ostensibly, the purpose of the review is to ensure that the language is "clear, concise and suitable for incorporation in the Nevada Administrative Code" without altering the "meaning or effect without the consent of the agency." [FN25] In fact, the legislative counsel, at the direction of the legislative commission and in contrast to the directive of NRS 233B.063(1), routinely reviews a regulation "for conformity with legislative authority and intent" before the "mechanics of form and style are considered." [FN26] Not surprisingly, a conflict during this time period will revolve around, on the one hand, the legislative counsel's interpretation that the executive agency may not execute or enforce the laws as it is attempting to do through the regulation and, on the other hand, the agency's interpretation that the regulation is "within the language of a statute." [FN27]

The legislative counsel must complete the initial review within thirty days and the further review of any subsequent changes (such as those resulting from public comment) within another thirty days following the submission of those changes. [FN28] The agency cannot adopt, amend or repeal the regulation until after it has re-

ceived the approved text from the legislative counsel. [FN29]

After the legislative counsel review process is completed, the regulation is returned to the agency, and if the agency adopts the regulation as altered by the legislative counsel, another legislative review process immediately commences. Now, the agency must submit each adopted regulation (along with a mandatory [FN30] informational statement explaining why no changes were made to the regulation [FN31] and describing the solicitation of public comment as well as the economic consequences, enforcement costs, and any duplicative effects of the regulation [FN32]) to the director of the legislative counsel bureau. [FN33] The director then submits the regulation to the legislative commission, which may, in turn, refer the regulation to a joint interim committee, for review and approval. [FN34] The commission or committee is required to complete the review within thirty days after receipt of the regulation from the agency, and, if there is no objection, the director files the regulation within the next five days with the secretary of state. [FN35] If the commission "determines that the regulation does not conform to statutory authority or legislative intent," the regulation is returned to the agency with a statement of the commission's objections. [FN36] The agency then has the choice of revising the regulation "as recommended" by the commission or of declining to revise the regulation. [FN37] A revised regulation will be filed by the director within ten days of its receipt; an unrevised regulation will be filed within the same five day time period that an approved regulation has to be filed. [FN38] The commission reports all instances of an agency decision to stay with an unrevised regulations to the next session of the legislature. [FN39]

In reality, since the legislative counsel performs the authority and intent review prior to the adoption of the regulation (instead of at the post-adoption phase when the legislative commission, by statute, would perform that review) and at a time when only a form and style review is authorized by NRS 233B.063(1), a conflict between the legislative counsel and the agency over conformity with authority and intent will arise before the adoption of the regulation. Rather than the agency opting for the passive filing of an unrevised regulation and the submission of a report to the next legislature as provided for in NRS 233B.067(3) and NRS 233B.0675, the agency is confronted with the authority and intent conflict at a time when the agency cannot act under NRS 233B.064(1) until it receives the legislative counsel's alteration of the regulation. As a practical matter, the legislative counsel will alter both the meaning and effect (on the basis of a lack of conformity with statutory authority and intent) of a proposed regulation and force the agency either to accept the legislative counsel's revised version of the regulation (based on the counsel's interpretation of the scope of agency authority and intent) or to forego adopting a regulation the agency believes to be within its authority to adopt.

Challenges as a Result of Legislative Review and Veto

The legislative counsel's premature authority and intent review, which may conclude in the alteration of the meaning and effect of a still unadopted regulation, raises questions as to the validity of the altered regulation. The adopted regulation may be susceptible to statutory and constitutional challenges, which, along with standard challenges to the agency's adoption or interpretation of a regulation, can be advanced either in an administrative proceeding involving a client (such as a contested case) or as a separate case in district court under the special declaratory judgment provision of NRS 233B.110. [FN40]

The statutory challenge is straightforward. The first step is to ascertain from submitted and revised versions of the regulation and from correspondence between the legislative counsel and the agency whether or not the authority and intent review resulted in the alteration of the meaning or effect of the regulation. If the alteration oc-

curred, the argument is that NRS 233B.063(1) prohibits the alteration, that the legislative counsel has exceeded the review authority allowed by the statute, and that the regulation has not been promulgated in accordance with the requirements of NRS ch. 233B and is necessarily invalid. The legislative counsel will almost certainly reply that the legislative commission has the power to direct the counsel to conduct the premature review and that the direction supersedes the terms of NRS 233B.063(1). [FN41]

The more serious challenge is a constitutional attack based upon the separation of powers doctrine. The theory was clearly laid out and discussed in Roberts v. State, Univ. of Nev. Sys., No. 85-01022A (1st Jud.Dist.Ct. March 19, 1987) (Fondi, J.; decision granting summary judgment).

Roberts involved a state personnel department longevity pay regulation which, by specific language, excluded university professional employees. Both in 1982 and 1984 amendments to the regulation, the legislative counsel deleted the exclusionary language and substituted a provision applying the longevity pay plan to all classified and unclassified employees of the state. The professional employees at the university previously excluded under the regulation sued for longevity pay, claiming they were unclassified employees of the state. [FN42]

The district court came to several conclusions. First, it found that the power to enact regulations is an executive, not a legislative, function, and that the attempt to "vest final control over the adoption, modification or rejection of executive agency regulations" with the legislature violated Nev.Const. art. 3, § 1, the separation of powers provision. [FN43] Second, the court held that the delegated authority to enact executive branch regulations could not be abridged by the then current statute allowing the legislative commission to place a regulation in limbo until the next legislative session and the passage of a concurrent resolution declaring the regulation not effective. [FN44] Rather, the legislature was required to modify the executive agency enabling statute to correct any deficiencies in the agency's exercise of delegated powers by following constitutional provisions for the enactment of legislation, including the provision requiring gubernatorial approval of legislation. [FN45] Third, the court noted that the legislative counsel and legislative counsel bureau director were legislative employees, responsible to the legislature, not to the chief executive, and were incapable of exercising the executive regulation-making power. Accordingly, the separation of powers provision was violated by the statutory authorization of the legislative counsel to approve or revise regulations, [FN46] the prohibition on agency adoption of a regulation until the approval or revision has been gained, and the provision denying the effectiveness of a regulation until the director filed the regulation. [FN47] The court then declared all of the legislative review provisions, NRS 233B.062-.070, and the legislative counsel's revisions of the regulation in 1982 and 1984 to be invalid. [FN48]

The Nevada Supreme Court did not reach the constitutional issues. Instead, the court followed a statutory construction analysis to reach the conclusion that the personnel department's interpretation excluding the university employees from the pay plan was correct and was "entitled to great weight." [FN49] The effect of the analysis was to invalidate the legislative counsel's 1982 and 1984 revisions to the regulation. [FN50]

Legislative Efforts to Correct Separation of Powers Defects

After the passage of the legislative review and veto statutes in Nevada in 1977, the constitutional defects of such a procedure became much clearer in reported decisions. [FN51]

In 1985, the legislature moved, by joint resolution (S.J. Res. 6), to redress the defects through an amendment of Nev.Const.art. 3, § 1, the separation of powers provision. [FN52] The proposed amendment would have trans-

formed the traditional separation of powers doctrine by providing for direct legislative control over executive actions. It provided for the review of regulations by a "legislative agency" and for the suspension or nullification of any regulation at any time by a "legislative body" which is "authorized to act on behalf of both houses." [FN53] Presumably, the "legislative agency" is the legislative counsel, just as the "legislative body" is the legislative commission.

The proposed amendment, as required by Nev.Const.art. 16, § 1, was approved a second time by the 1987 legislature. [FN54] The amendment, also as required by Nev.Const. art. 16, § 1, was then put to the voters in the general election of November, 1988. The amendment was rejected by the electorate. Six months later, on May 9, 1989, the identical provision was once again reintroduced in the legislature only to be indefinitely postponed in committee. [FN55]

During the same 1987 session that S.J. Res. 6 was being approved for the second time, changes to NRS ch. 233B were being made shortly after, if not in response to, the district court decision in Roberts. One change involved a new statute ratifying all regulations adopted before May 15, 1987. [FN56] The purpose of the ratification was to ensure that regulations adopted under procedures which had recently been declared unconstitutional by the district court were given a legislative declaration of life. Another and more significant change was the replacement of the NRS 233B.0675(3) provision allowing the legislative commission to prevent the filing of an objected-to regulation and to hold that regulation in suspension until accepted or rejected by the next legislative session. [FN57] The replacement provision allows the regulation to be filed and requires notice of the filing of an objected-to and unrevised regulation to be given to the next legislative session. The provision does not specify what further steps the legislature will then take, but the possibilities soon became evident.

In the 1989 session, the legislature, following the modification of the legislative veto in 1987 and the defeat of S.J. Res. 6 in 1988, advanced a new approach to implementing the veto. In S.B. 530, the legislature sought to declare five specific regulations to be, in whole or part, "void as being in excess of the statutory authority under which they were adopted." [FN58] Four of the regulations had already gone through legislative review process, were adopted, and were in effect, [FN59] while the fifth was a temporary regulation adopted while the legislature was in session. [FN60] The legislative counsel was also directed to remove the invalidated provisions from the Nevada Administrative Code. [FN61] Presumably, regulations adopted without any authority are void ab initio. The effect of that result on any fees paid, penalties imposed, or decisions rendered under the regulations was not considered in the legislation. Because the bill died in committee, the question will not immediately arise. [FN62]

This form of legislation is, of course, another form of legislative veto applied this time not to proposed regulations but to previously adopted and effective regulations. It is not a modification of the enabling statutes of the various agencies that the district court in Roberts noted would be constitutionally acceptable. [FN63] It is a veto of an action taken by the executive to execute the law. The Nevada constitution vests the "supreme executive power" of the state in a "Chief Magistrate who shall be Governor." [FN64] The legislature, on the other hand, is vested with the "Legislative authority" of the state, which, although its only limits are mainly constitutional restrictions, is not a supernal power that can supersede the executive power at will. [FN65]

Clearly, the traditional separation of powers under which the legislature enacts laws and the executive executes laws is nearing metamorphosis in Nevada. Regulations will be a focal point of that transformation because regu-

lations are a basic means of seeing to the execution of enacted laws. The legislature simultaneously desires to delegate and to control the regulation-making process. Since there is little, if any, leeway in our constitutional tradition for dual control over the basic constitutional duty of seeing to the execution of laws, the legislature undoubtedly will continue to pursue the solution of amending the constitution to allow for such leeway. Perhaps, instead of the proposed amendment with its inherent tension of executive approval of a regulation followed by legislative disapproval, an amendment placing the full power and responsibility of regulation-making in the legislature--leaving the executive with the singular responsibility of enforcing regulations as written by the legislature--would demarcate the boundaries of constitutional duties and avoid the blurring of formerly separate powers of separate branches that the legislative veto entails.

THE HEARING PROCESS

For both state and local governments, a hearing marks the beginning of the adjudication of a case. Overall, the differences in state and local hearings are not great; an administrative hearing tends to be an administrative hearing. The state has simply had its minimum standards for the conduct of a hearing codified.

Notice and the Opportunity to Be Heard in a Contested Case

The state hearing process commences with a contested case. The definition of a contested case, as with the definition of regulation, is cast in broad language. It encompasses any proceeding, including rate making and licensing, in which the "legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." [FN66] Obviously, not every administrative decision will be the result of a contested case requiring notice and an opportunity to be heard. [FN67] A party to a contested case is "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." [FN68] Despite the wide sweep of these definitions, jurisdiction is always a fundamental question because an agency cannot enlarge its own subject matter jurisdiction even if parties or those claiming to be parties consent to the enlargement. [FN69]

A party to a contested case is entitled to notice and an opportunity to be heard. The entitlement is secured by the principle of due process (and has been in Nevada administrative cases from 1877 to the present). [FN70] It is also secured by NRS 233B.121.

From a constitutional standpoint, notice must be sufficient to make a party aware of the "matters to be considered" at a hearing and must protect against unfair surprise since the "crucial element is an adequate opportunity to prepare." [FN71] From a statutory standpoint, notice must state the "time, place and nature" of a hearing, the "legal authority and jurisdiction" for a hearing, the "particular sections" of statutes and regulations involved, and a "short and plain statement of the matters asserted." [FN72] From either standpoint, notice must be "reasonable," which refers to both the length of prehearing preparation time and the delineation of matters to be raised during the hearing. [FN73]

The opportunity to be heard must also be reasonable. [FN74] It includes the right to counsel, [FN75] the right to call, examine, and cross-examine witnesses, [FN76] the right to present evidence and defenses, [FN77] and the right not to have the foregoing rights violated by the consideration of evidence unbeknownst to a party. [FN78] The opportunity to be heard does not include a right to discovery [FN79] or, in the absence of explicit statutory authority, a right to subpoena witnesses, [FN80] and it probably does not include a right to representation by a non-attorney. [FN81] Nor does it include a right to a hearing before a tribunal free from the overlapping invest-

igative, prosecutorial, and judicial responsibilities common to most administrative agencies. [FN82] A party claiming a violation of the right to be heard will need to show prejudice from the claimed violation [FN83] and that the violation has not been waived. [FN84]

Evidence in a Contested Case

The standard governing the admission or exclusion of evidence is, of course, much more lenient in an administrative forum than in a judicial forum. As the supreme court long ago said of the public service commission: "True, they cannot dispense with the essential rules of evidence which conduce to a fair and impartial hearing, but, from the nature of their organization and the duties imposed upon them by statute they are essentially empowered with liberal discretion in passing upon the competency of evidence." [FN85]

That liberal discretion is likewise evident in the APA. NRS 233B.123(1) provides for the admission of evidence "if it is of a type commonly relied upon by reasonable and prudent men in the conduct of their affairs." That sort of evidence includes hearsay evidence. [FN86] Only "irrelevant, immaterial or unduly repetitious" evidence must be excluded. [FN87] Notice may be taken of "judicially cognizable facts" and of "generally recognized" technical and scientific facts within an agency's expertise. Rules of privilege must be followed. [FN88] Evidence that is, in essence, written testimony may be received. [FN90] Objections need only be noted in the record, not acted upon. [FN91] Accordingly, an administrative body's typical response to an objection is to note the objection and to act upon the objection, if at all, after the hearing and during the decision-making process.

Passing upon the credibility of witnesses and weighing the evidence has consistently been held to be within the exclusive province of the administrative body. [FN92] It can also draw reasonable inferences from presented evidence as well as resolve conflicting evidence. [FN93] The administrative body is not bound to "accept as true" even unrebutted expert testimony if it does not find the evidence credible. [FN94] Credible evidence does not, however, include the opinions of members of the body or the statements of counsel. [FN95]

The Decision of the Administrative Body

A final decision of an administrative agency, rendered either orally or in writing, must contain separately stated findings of fact and conclusions of law. [FN96] The supreme court has emphasized that this requirement serves several important functions. First, " f actual findings help assure reasoned decision making by the administrative agency." [FN97] Second, factual findings enable the parties to decide whether or not to pursue judicial review. [FN98] Third, factual findings enable courts to review the decision without intruding on the fact-finding function. [FN99] A failure to separately state findings will not be automatically fatal if the findings are detailed enough to still permit judicial review. [FN100] Nor will administrative agencies be required to reconcile their findings with all previous administrative actions since administrative agencies are not bound by the doctrine of stare decisis. [FN101]

The final decision must also actually be a final decision--a basic proposition that is occasionally overlooked in the rush to seek judicial review. [FN102] As the supreme court has stated: " T he qualities of administrative finality in an order or determination are essential to the invocation of the judicial review." [FN103] While there are ripeness concerns involved in the policy requiring a final decision, the policy is also related to the companion doctrine requiring the exhaustion of administrative remedies. (Although exhaustion may be hard to obtain in cases where the agency, under no statutory time constraint to render a decision, fails to produce a decision in a

timely manner.) [FN104] Both are aimed at achieving judicial economy on the principle that if available administrative remedies are fully pursued to a final decision judicial review may not even need to be sought by the parties. [FN105] Concern over exhaustion of administrative remedies, however, will be relaxed in certain situations, such as when pursuit of a remedy would be futile, or an administrative body lacks jurisdiction to grant a remedy, or the "issues relate solely to the interpretation or constitutionality of a statute." [FN106] In other cases, the failure to exhaust will be jurisdictional and judicial review will be precluded until exhaustion has occurred. [FN107] Finally, another type of reviewable, though not strictly final, decision is a "preliminary, procedural or intermediate act or ruling" for which review of the final decision in a case would not provide an adequate remedy. [FN108]

In summary, the hearing process must meet the fundamental due process requirements of notice and an opportunity to be heard. Yet an administrative hearing is not a judicial forum, as is most clearly indicated by the evidentiary standards applied in an administrative hearing. One of the central purposes of the administrative process is judicial economy, which is achieved by requiring a final decision prior to judicial review and the exhaustion of available administrative remedies.

JUDICIAL REVIEW

Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court. The means of accomplishing the review for a state agency are set out in the APA. The procedure for obtaining review of local government decisions is quite different and generally proceeds by complaint, declaratory judgment or use of an extraordinary writ. In either event, the standard of review to be applied by the district court is identical.

Steps Leading to a Court's Review

After the administrative body has issued a final decision, judicial review is appropriately sought. "Judicial review" is a literal term. It means that the court will conduct a review of the record leading to the decision of the administrative body.

Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. [FN109] Those reversals are entirely salutary. Trial de novo evades an administrative body's "judgment based upon its specialized experience and knowledge." [FN110] It is also a particularly direct intrusion on an agency's fact-finding function. [FN111] Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to a "meaningless, formal, preliminary" which places "upon the courts the full administrative burden of factual determination." [FN112] The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute. [FN113]

Once the avenue of trial de novo is dispensed with, the process of judicial review can begin. The process starts under the APA with the filing, within thirty days after service of the final decision, of a petition for judicial review by any person identified as a party of record or aggrieved by a final decision. [FN114] The typical petition simply outlines the contested case and results of the case and recites the grounds for remanding or setting aside

an administrative decision. [FN115] Venue is generally in Carson City, the county where the aggrieved party resides, or the county where the agency proceeding occurred. [FN116] Filing the petition within the thirty day period is critical because it will likely be considered mandatory and jurisdictional. [FN117] The petition must be served upon the agency and all parties within forty five days of filing (unless a longer period is allowed by the court). [FN118] Within twenty days after the service of the petition, the agency or any party desiring to respond must file and serve a statement of intent to participate in the review process. [FN119]

Filing the petition for review does not result in a stay. Rather, application for a stay must be made to the reviewing court. [FN120] A motion for the stay must be served on the agency and all parties of record at the time the petition for review is filed. [FN121] The court must consider the same factors as for a preliminary injunction under NRCP 65 and, additionally, must defer to the trier of fact and consider the risk to the public of granting a stay. [FN122] The petitioner must provide security before a stay can be granted. [FN123] A stay, once granted, preserves the status quo ante and precludes further modification of the administrative decision. [FN124]

The record must be prepared by the agency rendering the decision and transmitted to the court within thirty days (unless the court allows a longer period) after service of the petition. [FN125] An original or certified copy of the "entire" record, including transcripts, must be transmitted. [FN126] The record may be shortened by stipulation, with such stipulations being encouraged by cost assessments for unreasonable refusals along with the power of the court to subsequently correct errors and allow additions to the record. [FN127] The court cannot conduct a review unless the administrative record is before the court. [FN128]

A continuing source of confusion or vexation in the past has been a briefing schedule. Most parties could arrange a stipulation, while other parties were not at all eager to begin, much less complete, briefing, necessitating a motion requesting the court to set the schedule. Now, following the path of an Eighth Judicial District local rule, [FN129] the problem has been resolved by statute. A petitioner must now file an opening brief within forty days after the agency gives notice that the administrative record has been filed. [FN130] An opposition brief must be filed within thirty days after service of the opening brief, and a reply brief must be filed within thirty days after service of the opposition brief. [FN131] All briefs must follow the format for appellate briefs specified in NRAP 28. [FN132] Unless a party requests a hearing within seven days after filing of the reply brief, the case is deemed submitted. [FN133]

Judicial review of local administrative decisions may be gained by a standard complaint, [FN134] by a complaint for declaratory judgment. [FN135] certiorari [FN136] or mandamus (the last method being a popular judicial creation effective for nearly three decades in Nevada). [FN137] Again, trial de novo is improper in all instances, even in spite of the explicit application of the Nevada Rules of Civil Procedure to mandamus proceedings and the provision for trial over questions of fact for the same proceedings. [FN138] There are no provisions kindred to the APA provisions describing details such as the method for obtaining a stay, transmission of the record, or the opportunity for briefing and argument (although E.D.C.R. 2.15 arguably controls briefing schedules for local administrative cases in the Eighth Judicial District). If the parties cannot agree on how to handle the necessary details, standard motion practice will undoubtedly be fitted or refitted to the form until the completed judicial review emerges.

The District Court's Review

The district court, in reviewing the decision of either a state or a local administrative body, will be referred by

the parties to the same guiding principles. In numerous cases, those principles apply interchangeably to either sort of decision.

To begin, the burden of proof lies with the party seeking to reverse the administrative decision. [FN139] Any review must be limited to the record before the administrative body. [FN140] The district court may, prior to submission of the case, order a remand to the agency for the taking of further evidence if it is material and if there were "good reasons" it was not presented at the administrative hearing. [FN141] Similarly, the court may go outside of the record to take evidence in court of "alleged irregularities" in procedure before the administrative body. [FN142]

The standard of review applied by the district court will focus on two exchangeable tenets. One tenet is that if there is substantial evidence in the record supporting the decision of the administrative body, then the court may not substitute its judgment for that of the administrative body. [FN143] Substantial evidence has been defined as "that which 'a reasonable mind might accept as adequate to support a conclusion.'" [FN144] The other tenet is that the court will review the record as it existed before the administrative body to determine if there was an arbitrary or capricious exercise of discretion by the body. [FN145] Those terms have been also been defined: " A rbitrary (baseless, despotic) or capricious (caprice: 'a sudden turn of mind without apparent motive; a freak, whim, mere fancy')." [FN146]

The language of the APA standard of review is more detailed than either of those two familiar principles. The APA provides for remand or setting aside, in whole or in part, of a decision if the "substantial rights" of a party have been prejudiced by a decision that 1) violates constitutional or statutory provisions, 2) exceeds the agency's statutory authority, 3) involves unlawful procedure, 4) includes any other error of law, 5) is clearly erroneous in "view of the reliable, probative and substantial evidence" in the record, or 5) is arbitrary, capricious or is "characterized" by an abuse of discretion or an unwarranted exercise of discretion. [FN147] Until reversed or set aside, the decision is deemed "reasonable and lawful." [FN148]

Whichever principle of review is relied upon by the court, there are other, accompanying propositions which frequently receive consideration. Thus, the district court may not substitute its judgment for that of the administrative body on questions of fact, [FN149] even if some conflicting evidence exists in the record. [FN150] The court's function does not involve passing on the credibility of witnesses or weighing evidence, [FN151] but it does include "broad supervisory powers to insure that all relevant evidence is examined and considered" by the administrative body. [FN152] Factual findings which are supported by evidence are conclusive. [FN153] That general judicial deference to administrative fact-finding is founded upon the recognized need to give finality to judgments made with the "specialized experience and knowledge" of an administrative body [FN154] and to avoid foreclosing the independent judgment of the body on "matters within its competence." [FN155] Judicial deference also encompasses a presumption that the completed administrative action is valid. [FN156]

The district court is free to decide purely legal questions, but, even then, is required to give deference to the administrative body's conclusions of law "which will necessarily be closely related to the agency's view of the facts." [FN157] One such legal question is the administrative construction of a statute, which the court may review independently [FN158] while giving great deference to any administrative interpretation within the language of the statute. [FN159] Procedural questions likewise fall within the category of legal questions subject to an independent appellate review. [FN160]

Once the review is completed, the district court may take several actions. The case can be affirmed, remanded for further proceedings, or set aside in whole or in part if substantial rights of the appealing party have been prejudiced. [FN161] A court may also reverse and remand the decision for further proceedings although that procedure is not specifically authorized by statute. [FN162]

The final step in the process is, of course, an appeal to the supreme court. [FN163] That court has historically reviewed the record under the same standards it has set down for the district courts. [FN164]

In summary, judicial review should be a review of the record, not a trial de novo. The steps for obtaining review are set forth in detail in the APA, but are more varied in cases involving local administrative decisions. The district court review will necessarily concentrate on the record and the presence or absence of substantial evidence or arbitrary and capricious actions. The same standard of review will be applied on appeal to the Nevada Supreme Court.

CONCLUSION

This article is by no means a comprehensive survey of Nevada administrative law. Its purpose is to supply the basics of that body of law--the basics often, in the press of real life, being preferable to any available theoretical arcanum on the subject.

[FNa1]. Deputy Attorney General. The views expressed in this article are those of the author and do not necessarily represent the views of the Attorney General's Office.

[FN1]. See e.g., B. Chally, The Nevada Administrative Law Manual (1989) 77- 96 (72 cases applying NRS ch. 233B standard of review decided after the adoption of APA).

[FN2]. Clark County Code ch. 8.08 (liquor and gaming licensing procedures); Clark County-Public Employees Association Agreement art. 11 (grievance, appeal and arbitration procedures); Clark County Personnel Manual, Personnel Directive No. 7 at P-11 (post-termination appeal procedures).

[FN3]. NRS 233B.020(1). The supreme court has repeatedly recognized this purpose. Navarro v. State ex rel. Dep't of Human Resources Welfare Div., 98 Nev 562, 564, 655 P.2d 158 (1982); State Bd. of Equalization v. Sierra Pac. Power Co., 97 Nev. 461, 465, 634 P.2d 461 (1981).

[FN4]. Gibbens v. Archie, 92 Nev. 234, 235, 548 P.2d 1366 (1976).

[FN5]. Public Serv. Comm'n v. Southwest Gas Corp., 99 Nev. 268, 274, 662 P.2d 624 (1983) (agency order); see Department of Indus. Relations v. Circus Circus Enter., 101 Nev 405, 410 n.2, 705 P.2d 645 (1985) (regulations).

[FN6]. Washington v. Clark County Liquor & Gaming Licensing Bd., 100 Nev. 425, 428, 683 P.2d 31 (1984).

[FN7]. State ex rel. Sweikert v. Briare, 94 Nev. 752, 757, 588 P.2d 542 (1978) (remand in accordance with APA).

[FN8]. NRS 233B.020(1).

[FN9]. NRS 233B.039(1).

[FN10]. NRS 233B.039(4)(a)-(c) and (6).

[FN11]. NRS 233B.038.

[FN12]. Coury v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302, 305, 721 P.2d 375 (1986); K-Mart Corp. v. State Indus. Ins. Sys., 101 Nev. 12, 17, 693 P.2d 562 (1985); Public Service Comm'n v. Southwest Gas Corp., 99 Nev. 268, 273, 662 P.2d 624 (1983).

[FN13]. Coury, 102 Nev. at 305; see also Las Vegas Transit Sys., Inc. v. Las Vegas Strip Trolley, 105 Nev., 780 P.2d 1145, 1146 (1989) (Coury is "dispositive of the issue before us").

[FN14]. NRS 233B.038.

[FN15]. K-Mart Corp., 101 Nev. at 17.

[FN16]. NRS 233B.060(1).

[FN17]. NRS 233B.0603(1).

[FN18]. NRS 233B.0607.

[FN19]. NRS 233B.061.

[FN20]. Id.

[FN21]. Gibbens v. Archie, 92 Nev. 234, 235, 548 P.2d 1366 (1976).

[FN22]. State Bd. of Equalization v. Sierra Pac. Power Co., 97 Nev. 461, 465, 634 P.2d 461 (1981).

[FN23]. See 1987 Nev.Stat. ch. 659, § 4 (repealing procedure allowing legislative commission to postpone filing of regulation until the next legislature decides whether or not to declare, by concurrent resolution, that the regulation shall not be effective) and Legislative Commission, Review of Regulations of Executive Agencies, Bulletin No. 77-17 at 7 ("There has been no decision found . . . that even the strongest remedy, the suspensive veto, goes beyond the constitutional power of the legislature.").

[FN24]. NRS 233B.063(1). The reason the legislative counsel needs to review and approve the repeal of a regulation is unclear.

[FN25]. Id. The legislative counsel realizes that the reviewers may lack the expertise and technical background necessary to understand the substance or language of a regulation: "[Alteration of meaning or effect] may occur inadvertently because some regulations are very technical and the person reviewing the regulation is not an expert in the field." Legislative Counsel Bureau, Discussion of the Preparation of Administrative Regulations at 1. Conflicts inevitably occur. If the conflicts cannot be compromised, the agency is prohibited from adopting or amending the regulation. NRS 233B.064(1).

[FN26]. Legislative Counsel Bureau, Discussion of the Preparation of Administrative Regulations at 1.

[FN27]. Oliver v. Spitz, 76 Nev. 5. 10, 348 P.2d 158 (1960).

[FN28]. NRS 233B.063(2). This procedure is scrapped prior to and during a legislative session when the legislative counsel is occupied with providing services to legislators. Instead, the agency is free to take an unreviewed action (adoption, amendment or repeal) which is temporarily effective. NRS 233B.063(3). The period in which the agency action will be temporarily effective now extends nine and one-half months, from September 1 of, say, 1990 to June 15, 1991. Id. After September 1, 1991, the temporary regulation will expire and the agency must act again to adopt the temporary measure as permanent and submit the permanent action to the legislative counsel for review. Id.

[FN29]. NRS 233B.064(1).

[FN30]. NRS 233B.0665 requires the director to return any regulation submitted without the statement to the agency.

[FN31]. NRS 233B.066(3).

[FN32]. NRS 233B.066.

[FN33]. NRS 233B.067(1).

[FN34]. Id. The legislative commission is composed of twelve legislators and attends to numerous functions, including that of assisting "the legislature in retaining status coordinate with the executive and judicial branches of state government." NRS 218.660; NRS 218.681(1).

[FN35]. NRS 233B.067(3).

[FN36]. Id. Thus, the legislative review process takes a minimum, given no revisions or objections, of sixty one days to complete.

[FN37]. Id.

[FN38]. Id. Once filed, the secretary of state's "authenticated file stamp" raises a rebuttable presumption that all requirements for the effective adoption of the regulation have been met. NRS 233B.090; Dep't of Indus. Relations v. Circus Circus Enter., 101 Nev. 405, 410 n.2, 705 P.2d 645 (1985).

[FN39]. NRS 233B.0675; 1987 Nev.Stat. ch. 659, § 4, supra note 23.

[FN40]. The declaratory judgment provision can be used in an anticipatory manner when the regulation or its "proposed application . . . threatens to interfere with or impair" a client's rights or privileges. NRS 233B.110(1).

[FN41]. NRS 218.695(1) provides that the legislative counsel shall have "such other power and duties as may be assigned to him by the . . . legislative commission."

[FN42]. Roberts, Decision at 3-6; Roberts v. State, Univ. of Nev. Sys., 104 Nev. 33, 34-36, 752 P.2d 221 (1988).

[FN43]. Decision at 10. Nev.Const. art. 3, § 1 states: "The powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted."

[FN44]. Decision at 10-11; see 1987 Nev.Stat. ch. 659, § 4, supra note 23.

[FN45]. Decision at 10-11. The constitutional provisions cited were Nev.Const. art. 4, §§ 16, 17, 18, 23 and 35.

[FN46]. Id. at 11. The district court held that any revision or necessary approval by the legislative counsel violated the separation of powers provision. That position would encompass any objections based upon the premature authority and intent review now employed by the legislative counsel.

[FN47]. Id.

[FN48]. Id. at 12.

[FN49]. Roberts v. State, Univ. of Nev. Sys., 104 Nev. 33, 39, 752 P.2d 221 (1988).

[FN50]. Id. at 40.

[FN51]. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); State ex rel. Stephen v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984); Legislative Research Comm. v. Brown, 664 S.W.2d 907 (KY. 1984); General Assembly v. Byrne, 448 A.2d 438 (N.J. 1982); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981).

[FN52]. S.J.Res. 6, 62nd Sess., 1985 Nev.Stat. 2400.

[FN53]. Id.

[FN54]. S.J.Res. 6, 63rd Sess., 1987 Nev.Stat. 2365.

[FN55]. S.J.Res. 25, 64th Sess.; Hearing on S.J.Res. 25 Before the Senate Government Affairs Committee, 64th Sess. (June 7, 1989).

[FN56]. NRS 233B.0395.

[FN57]. 1987 Nev.Stat. ch. 659, § 4 (amending NRS 233B.0675).

[FN58]. S.B. 530, 64th Sess.

[FN59]. Id.

[FN60]. Id.

[FN61]. Legislative History of S.B. 530, 64th Sess. (1989) (NELIS).

[FN62]. Id.

[FN63]. Roberts, Decision at 10-11.

[FN64]. Nev.Const. art. 5, § 1.

[FN65]. Nev.Const. art. 4, § 1; Hard v. DePaoli, 56 Nev. 19, 26, 41 P.2d 1054 (1936) (legislative power is unlimited except as restricted by state or federal constitutions or federal law).

[FN66]. NRS 233B.032. Quite literally, if there is no opportunity for a hearing, a contested case will not exist and no judicial review under the APA may be had. State, Nev. State Purchasing Div. v. George's Equipment Co. Inc., 105 Nev. __, 783 P.2d 949, 952-53 (1989); Private Investigator's Licensing Bd. v. Atherley, 98 Nev. 514, 515, 654 P.2d 1019 (1982); Southwest Gas Corp. v. Public Serv. Comm'n, 92 Nev. 48, 56, 546 P.2d 1366 (1976).

[FN67]. Atherly, 98 Nev. at 515 (denial of license which did not require notice and opportunity to be heard prior to determination was not a contested case.

[FN68]. NRS 233B.035. Status as a party is important as a pre-requisite to seeking judicial review. Eikelberger v. Nevada Bd. of Accountancy, 91 Nev. 98, 99-100, 531 P.2d 853 (1975).

[FN69]. Southern Nev. Memorial Hosp. v. State, Dep't of Human Resources, 101 Nev. 387, 394, 705 P.2d 139 (1985).

[FN70]. State of Nevada v. Northern Belle Mill & Mining Co., 12 Nev. 89, 92-93 (1877); Spilotro v. State ex rel. Nevada Gaming Comm'n, 99 Nev. 187, 195, 661 P.2d 467 (1983).

[FN71]. Nevada Power Co. v. Public Serv. Comm'n, 91 Nev. 816, 824, 544 P.2d 428 (1975); Nevada State Apprenticeship Council v. Joint Apprenticeship & Training Comm., 94 Nev. 763, 765, 587 P.2d 1315 (1978).

[FN72]. NRS 233B.121(2).

[FN73]. NRS 233B.121(1); Northern Belle Mill & Mining Co., 12 Nev. at 92-93.

[FN74]. Checker, Inc. v. Public Serv. Comm'n, 84 Nev. 623, 634, 446 P.2d 981 (1968); Humboldt Land & Cattle Co. v. Sixth Judicial Dist. Court, 46 Nev. 396, 403-04, 224 P.2d 612 (1924).

[FN75]. NRS 233B.123(4); see Nevada Bd. of Osteopathic Medicine v. Graham, 98 Nev. 174, 175, 643 P.2d 1222 (1982).

[FN76]. NRS 233B.123(4); Graham, 98 Nev. at 175. NRS 233B.121(3) expressly provides for cross-examination beyond the scope of direct examination on relevant matters and for impeachment of any witness by any party.

[FN77]. NRS 233B.121(4); NRS 233B.123(4); Kochendorfer v. Board of County Commissioners, 93 Nev. 419, 424, 566 P.2d 1131 (1977).

[FN78]. Graham, 98 Nev. at 175; Southwest Gas Corp. v. Public Serv. Comm'n, 92 Nev. 48, 60, 546 P.2d 219 (1976) (notice and hearing required when considering matters outside of record on decision to dismiss).

[FN79]. Resnick v. Nevada Gaming Comm'n, 104 Nev. 60, 64-65, 752 P.2d 229 (1988) The Court held that the right of cross-examination does not carry with it a companion right of discovery to aid in cross-examination. Id. The Court also noted that the legislature had not provided for a right of administrative discovery and that commentary on the subject raised concerns over delay. Id. Some agencies allow discovery by specific regulation. See NAC § 607.430 (depositions allowed by labor commission).

[FN80]. Andrews v. Nevada Bd. of Cosmetology, 86 Nev. 207, 208, 467 P.2d 96 (1970).

[FN81]. See Nevada Op. Att'y Gen. No. 87-9 (May 11, 1987); cf. Hampton v. Brewer, 103 Nev. 73, 74, 733 P.2d 852, cert. denied, 107 S.Ct. 3187 (1987) (limited non-attorney representation allowed by statute).

[FN82]. Rudin v. Nevada Real Estate Advisory Comm'n, 86 Nev. 62, 565, 471 P.2d 658 (1970). Nor does bias appear from one deputy attorney general's representation of a commission while another deputy attorney general is prosecuting the case before the commission. Laman v. Nevada Real Estate Advisory Comm'n, 95 Nev. 50, 56-57, 589 P.2d 166 (1979).

[FN83]. Meinhold v. Clark County School Dist., 89 Nev. 56, 61, 506 P.2d 420 (1973) and Rudin, 86 Nev. at 565.

[FN84]. Meinhold, 89 Nev. at 60.

[FN85]. Garson v. Steamboat Canal Co., 43 Nev. 298, 309-10, 185 P. 801 (1919).

[FN86]. State of Nevada v. Rosenthal, 93 Nev. 36, 44, 559 P.2d 830 (1977). Hearsay, though, may not always be adequate to support a decision. Biegler v. Nevada Real Estate Div., 95 Nev. 691, 695, 601 P.2d 419 (1979) (uncorroborated hearsay will not support license suspension).

[FN87]. NRS 233B.123(1).

[FN88]. NRS 233B.123(5).

[FN89]. NRS 233B.123(1). The right to invoke the Fifth Amendment is also well-established. Laman v. Nevada Real Estate Advisory Comm'n, 95 Nev. 50, 55, 589 P.2d 166 (1979); Rudin v. Nevada Real Estate Advisory Comm'n, 86 Nev. 562, 566, 471 P.2d 658 (1970).

[FN90]. NRS 233B.123(1).

[FN91]. Id.

[FN92]. Local Gov't Employee-Management Relations Bd. v. General Sales Drivers, 98 Nev. 94, 98, 641 P.2d 478 (1982); City of N. Las Vegas v. Public Serv. Comm'n, 83 Nev. 278, 281, 429 P.2d 66 (1967). See NRS 233B.135(3) (court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact).

[FN93]. D & C Builders v. Cullinane, 98 Nev. 67, 71, 639 P.2d 544 (1982); Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262 (1979). An administrative body making a decision based on a hearing held by a hearing officer,

however, must have the recommendation or determination of the hearing officer in any case where the "evidence is conflicting or credibility is a determining factor." Molnar v. Board of Medical Examiners, 105 Nev. __, 773 P.2d 726, 727 (1989).

[FN94]. Public Serv. Comm'n v. Continental Tel. of Cal., 94 Nev. 345, 348, 580 P.2d 467 (1978).

[FN95]. City Council of Reno v. Travelers Hotel, 100 Nev. 436, 439, 683 P.2d 960 (1984). But see McKenzie v. Shelly, 77 Nev. 237, 240-41, 362 P.2d 268 (1961) (remarks of county commissioner familiar with neighborhood appropriately considered in zoning case).

[FN96]. NRS 233B.125; State, Dep't of Commerce v. Hyt, 96 Nev. 494, 496, 611 P.2d 1096 (1980). An administrative agency's power to make a decision carries with it the inherent power to reconsider the decision. L & T Corp. v. City of Henderson, 98 Nev. 501, 504-05, 654 P.2d 1015 (1982).

[FN97]. Nevada Bd. of Psychological Exam'rs v. Norman, 100 Nev. 241, 244, 679 P.2d 1263 (1984).

[FN98]. Id.

[FN99]. Id.

[FN100]. Gray Line Tours of S. Nev. v. Public Serv. Comm'n, 97 Nev. 200, 203, 626 P.2d 263 (1981).

[FN101]. Gray Line Tours, 97 Nev. 203.

[FN102]. See Gray Line Tours of S. Nev., Inc. v. Eighth Judicial Dist. Court, 99 Nev. 124, 126, 659 P.2d 304 (1983); but cf. Nevada Bd. of Psychological Exam'rs v. Norman, 100 Nev. 241, 245 n.2, 679 P.2d 1263 (1984) (license revocation without hearing followed by notice of revocation was a final decision because the board considered notice to be final and otherwise could immunize itself from judicial review by its own "procedural derelictions").

[FN103]. Public Serv. Comm'n v. Community Cable TV, 91 Nev. 32, 42, 530 P.2d 1392 (1975).

[FN104]. Gray Line Tours of S. Nev. v. Public Serv. Comm'n, 97 Nev. 200, 204, 626 P.2d 263 (1981) (four year delay in rendering decision did not result in denial of due process).

[FN105]. First Am. Title Co. v. State of Nevada, 91 Nev. 804, 806, 543 P.2d 1344 (1975).

[FN106]. Engelmann v. Westergard, 98 Nev. 348, 353, 647 P.2d 385 (1982); State of Nevada v. Glusman, 98 Nev. 412, 419, 651 P.2d 639 (1982).

[FN107]. State Indus. Ins. Sys. v. Sleeper, 100 Nev. 267, 269, 679 P.2d 1273 (1984); Gray Line Tours of S. Nev., Inc. v. Eighth Judicial Dist. Court, 99 Nev. 124, 126, 659 P.2d 304 (1983).

[FN108]. NRS 233B.130(1). Attempts to evade the statutory pro-vision for judicial review of interlocutory administrative decisions by mandamus or certiorari will almost automatically bring the response that statutory review is a plain, speedy and adequate remedy in law precluding the issuance of an extraordinary writ. Villa v. Arrizabalaga, 86 Nev. 137, 139, 466 P.2d 663 (1970); see NRS 34.020(2) and NRS 34.170.

[FN109]. Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549 (1982); Clark County Bd. of Comm'rs v. Taggart Constr. Co., 96 Nev. 732, 734, 615 P.2d 965 (1980); Nevada Indus. Comm'n v. O'Hare, 76 Nev. 107, 110-11, 349 P.2d 1058 (1960); Nevada Tax Comm'n v. Hicks, 73 Nev. 115, 123-24, 310 P.2d 852 (1957). That consistent position has been reinforced by the legislature's recent addition of language explicitly delineating the APA as the "exclusive means of judicial review of, or judicial action concerning a final decision in a contested case." NRS 233B.130(6).

[FN110]. O'Hare, 76 Nev. at 111.

[FN111]. Spilotro v. State ex rel. Nevada Gaming Comm'n, 99 Nev. 187, 190, 661 P.2d 467 (1983).

[FN112]. Hicks, 73 Nev. at 123.

[FN113]. See, e.g., NRS 607.215(5) (court may order trial de novo of labor commissioner decision) and 1989 Nev.Stat. ch. 716, §§ 11, 15 (repealing trial de novo provisions of NRS 483.520 and NRS 590.605(5)).

[FN114]. NRS 233B.130(1) and (2)(c). These and other amendments found in 1989 Nev.Stat. ch. 716 were prepared and proposed by the Administrative Law Committee of the State Bar. A cross-petition must be filed within ten days after service of the petition. NRS 233B.130(2)(c). The petition must name the agency and all parties of record as respondents. NRS 233.B130(2)(a). An agency does not come within the definition of a person. NRS 233B.037; Mead v. Nevada Dep't of Health, Welfare & Rehabilitation, 91 Nev. 152, 154- 55, 532 P.2d 611 (1975). An aggrieved party is one whose "rights, privileges, or duties" are affected by the decision. Eikelberger v. Nevada Bd. of Accountancy, 91 Nev. 98, 100, 531 P.2d 853 (1975).

[FN115]. NRS 233B.135(3).

[FN116]. NRS 233B.130(2)(b). Other statutes have special venue provisions. For instance, judicial review of an employment security department claim must, despite occasional hardship, be filed in the county where the appealed claim was first filed. Caruso v. Nevada Employment Sec. Dep't, 103 Nev. 75, 76, 734 P.2d 224 (1987).

[FN117]. Kame v. Employment Sec. Dep't, 105 Nev. __, 769 P.2d 66, 68 (1989). While Kame involved the employment security department review provision and not the APA, the court spoke in terms of administrative decisions in general and noted that "when a statute is silent, the time period for perfecting an appeal is generally considered mandatory, not procedural." Id. See also Crane v. Continental Tel. Co. of Cal., 105 Nev. __, 775 P.2d 705, 706 (1989) (failure to comply with PSC appeal period deprived court of jurisdiction since "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies" except where statutes provide for judicial review).

[FN118]. NRS 233B.130(5).

[FN119]. NRS 233B.130(3).

[FN120]. NRS 233B.140(1).

[FN121]. Id.

[FN122]. NRS 233B.140(2)(3).

[FN123]. NRS 233B.140(3).

[FN124]. Westside Charter Serv., Inc. v. Gray Line Tours, 99 Nev. 456, 460, 664 P.2d 351 (1983).

[FN125]. NRS 233B.131(1). Formerly, the identity of the responsible agency was not always clear when several agencies were involved either as parties or arbiters. State Indus. Ins. Sys. v. Thomas, 101 Nev. 293, 296 n.2, 701 P.2d 1012 (1985).

[FN126]. NRS 233B.131(1).

[FN127]. Id.

[FN128]. Diaz v. Golden Nugget, 103 Nev. 152, 154 n.1, 734 P.2d 720 (1987).

[FN129]. E.D.C.R. 2.15.

[FN130]. NRS 233B.133(1).

[FN131]. NRS 233B.133(2)(3).

[FN132]. NRS 233B.133(5).

[FN133]. NRS 233B.133(4).

[FN134]. McKenzie v. Shelly, 77 Nev. 237, 239, 362 P.2d 268 (1961).

[FN135]. Clark County Bd. of Comm'rs v. Taggart Constr. Co., 96 Nev. 732, 733, 615 P.2d 965 (1980).

[FN136]. Washington v. Clark County Liquor & Gaming Licensing Bd., 100 Nev. 425, 428, 683 P.2d 31 (1984).

[FN137]. NRS 34.160 provides for use of the writ to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." This language is concerned with discretionary acts, which mandamus traditionally may not be used to compel, and ministerial acts, which mandamus may compel. Young v. Board of County Comm'rs, 91 Nev. 52, 56, 530 P.2d 1203 (1975). The supreme court typically notes this statutorily-based use of mandamus and then describes the other use of mandamus: "That writ is also available to correct a manifest abuse of discretion by the governing body . . . ." Board of County Comm'rs v. Dayton Dev. Co., 91 Nev. 71, 75, 530 P.2d 1187 (1975). Henderson v. Henderson Auto, 77 Nev. 118, 122, 359 P.2d 743 (1961).

[FN138]. McKenzie, 77 Nev. at 241-42; Taggart Constr. Co., 96 Nev. at 732.

[FN139]. City Council of Reno v. Irvine, 102 Nev. 277, 279, 721 P.2d 371 (1986); Randano v. Nevada Real Estate Comm'n, 79 Nev. 132, 137, 379 P.2d 537 (1963). The burden of proof has also been statutorily placed on the party "attacking or resisting" the decision. NRS 233B.135(2).

[FN140]. City Council of Reno v. Travelers Hotel, 100 Nev. 436, 439, 683 P.2d 960 (1984); McCracken v. Cory, 99 Nev. 471, 473, 664 P.2d 349 (1983); NRS 233B.135(1)(a).

[FN141]. NRS 233B.131(2). If evidence is to be taken, remand to the administrative agency is mandatory. Nevada Indus. Comm'n v. Horn, 98 Nev. 469, 472, 653 P.2d 155 (1982). The need to remand to fill in "factual lacunae" may also appear in the course of judicial review. Westergard v. Barnes, 105 Nev. __, 784 P.2d 944, 946 (1989).

[FN142]. NRS 233B.135(1).

[FN143]. Employment Sec. Dep't v. Verrati, 104 Nev. 302, 304, 756 P.2d 1196 (1988); Lapinski v. City of Reno, 95 Nev. 898, 901, 603 P.2d 1088 (1979).

[FN144]. Nevada Employment Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence does not mean "any evidence." Law v. Nevada Gaming Comm'n, 100 Nev. 403, 406-07, 683 P.2d 1337 (1984).

[FN145]. Garman v. State, Employment Sec. Dep't, 102 Nev. 563, 565, 729 P.2d 1335 (1986); Titanium Metals Corp. v. Clark County Dist. Bd. of Health Air Pollution Control Hearing Bd., 99 Nev. 397, 399, 663 P.2d 355 (1983).

[FN146]. City Council v. Irvine, 102 Nev. 277, 278-79, 721 P.2d 371 (1986) (footnotes omitted). Or as the court has more recently put it: "To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved. . . . In this case, the record indicates that the board considered all of the evidence, pro and con, regarding Sergeant Meadow, before deciding to uphold his termination. Accordingly, the board did not act arbitrarily or capriciously, nor abused its discretion." Meadow v. Civil Serv. Bd., 105 Nev. __, 781 P.2d 772, 774 (1989).

[FN147]. NRS 233B.135(3).

[FN148]. NRS 233B.135(2).

[FN149]. State, Dep't of Motor Vehicles v. Kiffe, 101 Nev. 729, 733, 709 P.2d 1017 (1985); Washoe County v. John A. Dermody, Inc., 99 Nev. 608, 611, 668 P.2d 280 (1983); NRS 233B.135(3).

[FN150]. Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262 (1979).

[FN151]. Local Gov't Employee-Management Relations Bd. v. General Sales Drivers, 98 Nev. 94, 98, 641 P.2d 478 (1982).

[FN152]. Nevada Indus. Comm'n v. Reese, 93 Nev. 115, 126, 560 P.2d 1352 (1977).

[FN153]. Nevada Employment Sec. Dep't v. Nacheff, 104 Nev. 347, 350, 757 P.2d 787 (1988).

[FN154]. Nevada Indus. Comm'n v. O'Hare, 76 Nev. 107, 111, 349 P.2d 1058 (1960).

[FN155]. Washoe County v. John A. Dermody, Inc., 99 Nev. 608, 612, 668 P.2d 280 (1983).

[FN156]. Nova Horizon, Inc. v. City Council of Reno, 105 Nev. _, 769 P.2d 721, 722 (1989); Public Serv. Comm'n v. Southwest Gas Corp., 99 Nev. 268, 274, 662 P.2d 624 (1983). The presumption is somewhat equivocal, based as it is on the Court's emphasis that the presumption exists if a decision is supported by substantial evidence, was not an abuse of discretion, and was lawful.

[FN157]. State, Dep't of Motor Vehicles v. Torres, 105 Nev. _, 779 P.2d 959, 960-61 (1989); Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805 (1986).

[FN158]. Nevada Employment Sec. Dep't v. Capri Resorts, Inc., 104 Nev. 527, 528, 763 P.2d 50 (1988).

[FN159]. State ex rel. Nevada Tax Comm'n v. Saveway Super Serv. Stations, Inc., 99 Nev. 626, 630, 668 P.2d 291 (1983); see also Westergard v. Barnes, 105 Nev. ___, 784 P.2d 944, 947 (1989) ("An administrative construction of the language of a statute will not be readily disturbed by the courts.").

[FN160]. Department of Indus. Relations v. Circus Circus Enter., 101 Nev. 405, 409, 705 P.2d 645 (1985).

[FN161]. NRS 233B.135(3).

[FN162]. Board of Medical Examiners v. Potter, 99 Nev. 162, 166, 659 P.2d 868 (1983). Remand to a local administrative body is within the equitable powers of the district court. Clark County Liquor & Gaming Licensing Bd. v. Clark, 102 Nev. 654, 659, 730 P.2d 443 (1986).

[FN163]. NRS 233B.150.

[FN164]. Gandy v. State ex rel. Div. of Investigation & Narcotics, 96 Nev. 281, 282, 607 P.2d 581 (1980).

END OF DOCUMENT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Southern California Edison, Petitioners, vs. STATE OF NEVADA ex rel. Department of Taxation, Respondents.	Case No. 09 OC 00016 1B Department No. 1 Docket No. 55228

RESPONDENT'S APPENDIX IN OPPOSITION TO PETITIONER SOUTHERN CALIFORNIA EDISON'S ORIGINAL PETITION FOR WRIT OF MANDAMUS

Respondent State of Nevada ex rel., Department of Taxation (Department) submits this evidentiary appendix in support of its Opposition to Petitioner's Original Petition for Writ of Mandamus. Attached hereto are true and correct copies of:

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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

No.	Document Title	Bates Nos.
1	Findings of Fact, Conclusions of Law and Decision of the State of Nevada Department of Taxation, dated July 14, 2004	001 - 025
2	Findings of Fact, Conclusions of Law and Decision of February 27, 2009, from the Department of Taxation	026 - 028
3	Administrative Record Index and Additional Information Index	029 - 033
4	Complaint filed in the First Judicial District Court of Nevada January 15, 2009	034 - 042
5	Office of the Attorney General Memorandum dated May 7, 1999, to Assemblyman Bernie Anderson	043 – 046
6	Senate Committee on Taxation Minutes of March 23, 1999, relating to Senate Bill 362	047 – 049
7	Senate Bill No. 362 Bill Explanation	050 – 054
8	55-JUL Inter Alia 19 (July, 1990)	055 – 075
9	Sierra Pacific Power Co. v. Department of Taxation Motion to Dismiss or in the Alternative Proceed Pursuant to NRS Chapter 233B filed in the Second Judicial District Court of Nevada on January 20, 2010, by the Defendant	076 – 115
10	Harrah's Operating Company, Inc. v. Department of Taxation Motion to Dismiss filed in the Eighth Judicial District Court of Nevada on January 22, 2010, by the Defendant	116 - 136

Dated this 22nd day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 22 day of February, 2010, I served a copy of the foregoing by mailing a true copy of the foregoing in DVD format to the following:

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