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FILED

JAN 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

10 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

12 SOUTHERN CALIFORNIA EDISON,
13 Petitioner,

14 v.

15 THE FIRST JUDICIAL DISTRICT
16 COURT OF THE STATE OF NEVADA in
17 and for Carson City, and THE
18 HONORABLE JAMES T. RUSSELL,
Judge thereof,

18 Respondents.

Case No. 09-0C-00016-1B

Docket No.

55228

19 **ORIGINAL PETITION FOR WRIT OF MANDAMUS**

20 Southern California Edison ("Edison" or "Petitioner") hereby petitions this Court for a
21 Writ of Mandamus ordering Respondent (the "District Court") to try the case that Edison brought
22 against the Department of Taxation ("Department" or "Defendant"), for a refund of use tax
23 pursuant to NRS 372.680, as a civil action pursuant to the Nevada Rules of Civil Procedure
24 ("NRCPP") and not as a judicial review of the prior administrative decision of the Nevada Tax
25 Commission ("Commission"), and vacating the District Court's order that this action "proceed as
26 a Petition for Judicial Review pursuant to NRS Chapter 233B." Order to Proceed as a Petition for
27 Judicial Review, dated November 19, 2009 ¶ 5 (the "Order"). Petitioner has attached its
28 verification and proof of service, and requests that this Court order oral argument in this matter.

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

EDISON'S PETITION FOR A WRIT OF MANDAMUS

1A-00713

TABLE OF CONTENTS

ISSUE PRESENTED	2
INTRODUCTION	2
STATEMENT OF FACTS	4
DISCUSSION.....	6
I. RELIEF BY EXTRAORDINARY WRIT IS APPROPRIATE AND NECESSARY TO DEFINITELY CLARIFY THE NATURE OF THE JUDICIAL REMEDY PROVIDED BY NRS 372.680 FOR ALL TAXPAYERS, THE DISTRICT COURTS AND THE DEPARTMENT	6
II. NRS 372.680 UNEQUIVOCALLY AUTHORIZES A CIVIL ACTION AGAINST THE DEPARTMENT; THE JUDICIAL REVIEW STANDARDS IN THE APA ARE SIMPLY INAPPLICABLE.....	9
A. The Statutory Text and Relevant Nevada Case Law Establish that NRS 372.680 Entitles Taxpayers Seeking a Refund of Sales or Use Taxes to a Trial De Novo	9
B. When the Legislature Adopted NRS 372.680 From California's Statutory Scheme in 1955, It Was Already Well-Settled Law That the Action Authorized by the Statute Was a Trial De Novo.....	15
III. THE DISTRICT COURT ERRED IN CONCLUDING THAT A TAXPAYER IS NEVER ENTITLED TO MORE THAN ONE EVIDENTIARY HEARING	16
IV. THE ENACTMENT OF 233B.130(6) IN 1989 HAD NO EFFECT ON THE JUDICIAL REMEDY PROVIDED BY NRS 372.680	19
V. THE ENACTMENT OF NRS 360.245(5) AND 360.245(7) IN 1997 TO STOP THE DEPARTMENT FROM INFRINGING ON THE COMMISSION'S AUTHORITY HAD NO EFFECT ON THE JUDICIAL REMEDY PROVIDED BY NRS 372.680.....	21
VI. THE AMENDMENTS TO NRS 372.680 MADE BY S.B. 362 IN 1999 DID NOT CONVERT THE JUDICIAL REMEDY FROM AN ORIGINAL CIVIL ACTION AGAINST THE DEPARTMENT INTO A JUDICIAL REVIEW OF THE COMMISSION'S DECISION.....	24
CONCLUSION	28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
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1 an evidentiary hearing, in which the parties may submit all or a portion of the record developed
2 during the administrative process as evidence for the District Court's independent consideration,
3 but the District Court is not limited to a review of the record below and is not required to give any
4 deference to the Commission's decision. (BN 138-158.) The Department took the opposite
5 position, arguing that the District Court should conduct only a "judicial review" using the
6 standards set forth in NRS 233B.135, just as if Edison had been required to file a petition for
7 judicial review. (BN 159-169.) The District Court agreed with the Department's position and
8 issued its Order. (BN 001-006.)

9 The Department's arguments and the District Court's Order simply ignore the plain
10 language of NRS 372.680, and instead rely on a number of other statutes and a series of unrelated
11 legislative changes that occurred between 1989 and 1999 as authority for the position that NRS
12 372.680 should now be interpreted to require the District Court to proceed in accordance with
13 different standards imposed by a wholly separate statutory scheme, *i.e.*, the APA. But the Nevada
14 Legislature has not amended NRS 372.680 to provide the result desired by the Department and
15 upheld by the District Court. To the contrary, the Legislature has on several occasions passed on
16 the opportunity to make such an amendment and, in doing so, has acquiesced in this Court's
17 decisions prior to 1999 that are directly on point and support Edison's position. Thus, there is no
18 basis in the Nevada statutes for the District Court to treat the civil action Edison brought against
19 the Department pursuant to NRS 372.680 as a judicial review of the Commission's decision
20 denying its claims for refund.

21 Significantly, the Department's position contradicts the position it took before the
22 Commission (and the position it has taken in all prior cases with other taxpayers), namely that
23 "NRS 372.680 in now [sic] way purports to limit the district court's review to the administrative
24 record on appeal. Consequently, Edison would have an opportunity before the district court to
25 more fully develop the facts, if appropriate." (Department's Brief dated November 21, 2003, BN
26 125-126.) Indeed, even *after* filing its motion to dismiss Edison's case, the Department *continues*
27 to advise other taxpayers that the action authorized by NRS 372.680 is a new civil action and not
28

1 a judicial review proceeding.³

2 In accepting the Department's novel position, the District Court has effectively written
3 NRS 372.680 out of the statute books. Given the fundamental importance of this issue to all
4 taxpayers in the State of Nevada, including those who have filed, or will be filing, claims for
5 refund, and to immediately clarify the law for the districts courts and the Department, it is
6 appropriate for this Court to issue a Writ of Mandamus vacating the District Court's clearly
7 erroneous Order and directing the District Court to try Edison's case as a civil action pursuant to
8 the NRCP.

9 STATEMENT OF FACTS

10 Edison filed claims for refund of use taxes with the Department in respect of out-of-state
11 coal used and consumed at the Mohave Generating Station ("Mohave") in Clark County for the
12 periods March 1998 through and including December 2005.⁴ The Department denied Edison's
13 claims for the periods March 1998 through and including September 2003 (hereinafter, the
14 "Claims")⁵ and Edison appealed the Department's decision to the Commission. At a closed
15 hearing on May 9, 2005, the Commission voted to grant the Claims.

16 On July 7, 2005, the Attorney General of the State of Nevada filed a complaint against the
17 Commission in the First Judicial District Court, seeking to void the Commission's decision
18 granting the Claims on the ground that the Commission had violated Nevada's Open Meeting
19 Law (NRS 241.010 *et seq.*) when it granted the Claims in closed session. Following a bench trial
20 on August 26, 2006, the district court dismissed the Attorney General's complaint and entered
21 judgment for the Commission and Edison, which had intervened as the real party in interest. The

22 ³ On May 29, 2009 — over five weeks *after* the Department filed its motion to dismiss in this case — a
23 Department administrative law judge advised another taxpayer and the Deputy Attorney General representing
24 the Department that if the taxpayer's use tax claim for refund (currently being contested at the administrative
25 level) proceeded to district court, "it will be reviewed *de novo*" and "additional discovery will likely be allowed
at that time." (BN 444-445.) The Department administrative law judge copied the Senior Deputy Attorney
General on the letter, who is the counsel representing the Department in Edison's case.

26 ⁴ Edison co-owns Mohave with three other parties: Nevada Power Company (now part of NV Energy), the
Department of Water and Power of the City of Los Angeles and Salt River Project Agricultural Improvement
27 and Power District. Edison owned the majority interest (a 56% undivided interest) in, and was the operator of,
Mohave. Mohave ceased operations on December 31, 2005. (BN 010.)

28 ⁵ The Department is holding "in abeyance" the claims for refund Edison filed for the periods October 2003
through and including December 2005 pending resolution of this case.

1 Attorney General appealed and this Court reversed. *See Chanos v. Nevada Tax Comm'n*, 124
2 Nev. Adv. Rep. 22, 181 P.3d 675 (2008). As a result, the Commission's decision in favor of
3 Edison was voided.⁶

4 The Commission conducted new hearings in open session and, on December 1, 2008,
5 voted to deny Edison's Claims. On February 27, 2009, the Commission issued a written decision
6 denying Edison's Claims.⁷ Edison filed its initial complaint on January 15, 2009 and filed its
7 current amended complaint on March 27, 2009 after receiving the Commission's written decision
8 (the "Amended Complaint"). (BN 007-025.)

9 On April 20, 2009, the Department filed its motion to dismiss with prejudice, as discussed
10 above. (BN 029-043.) After briefing and oral argument (BN 044-120), the District Court found
11 that Edison properly commenced an action by filing a complaint against the Department in
12 accordance with NRS 372.680 and on June 30, 2009, issued its Order Denying Motion to
13 Dismiss. (BN 026-028.)

14 Pursuant to the Order Denying Motion to Dismiss, as discussed above, the parties filed
15 cross-motions on August 28, 2009 (BN 138-169) and cross-replies on September 11, 2009 (BN
16 170-195) addressing the nature of the proceedings in a sales or use tax refund action brought
17 under NRS 372.680. Following oral argument (BN 196-255), the District Court agreed with the
18 Department's position and issued its Order on November 19, 2009 (and served it on Edison on
19 November 24, 2009).⁸ (BN 001-006.)

20 On November 30, 2009, Edison filed a motion to stay the proceedings in the District Court
21 pending Edison's filing the instant petition for a writ of mandamus and, should this Court grant
22 Edison's writ petition, until final resolution of the writ. (BN 256-265.) The Department filed a

23 ⁶ The merits of Edison's Claims were not before this Court in *Chanos*.

24 ⁷ While the Department erroneously contends that only a subset of the Claims were before the Commission, this
25 contention is neither before the Court nor relevant to the issue raised by the Petition.

26 ⁸ It is not entirely clear from the District Court's Order whether it intended, for all purposes, to treat Edison's
27 civil action as a petition for judicial review or whether instead it only intended to confirm that its review of the
28 issues in dispute would be limited by the standards that would apply if this action had been originally
commenced by Edison as a petition for judicial review under the APA. For purposes of this Petition, the
distinction is irrelevant because, in either case, the District Court's Order would impose review standards in this
case that are contrary to, and directly undermine, the legislative intent reflected in the plain language of NRS
372.680.

1 notice of non-opposition to Edison's motion on December 18, 2009. (BN 266-267.) On
2 December 23, 2009, the District Court entered an order granting Edison's motion for stay. (BN
3 268.)

4 DISCUSSION

5 **I. RELIEF BY EXTRAORDINARY WRIT IS APPROPRIATE AND** 6 **NECESSARY TO DEFINITELY CLARIFY THE NATURE OF** 7 **THE JUDICIAL REMEDY PROVIDED BY NRS 372.680 FOR ALL** 8 **TAXPAYERS, THE DISTRICT COURTS AND THE** 9 **DEPARTMENT**

10 In general, this Court will not issue a writ when there is a "plain, speedy and adequate
11 remedy in the ordinary course of law" (NRS 34.170), such as the ability to appeal a district court
12 order following the entry of a final judgment. However, this Court will consider a writ, even
13 when there is a speedy and adequate remedy at law, when "an important issue of law needs
14 clarification, and public policy will be served by this court's invocation of its original
15 jurisdiction." *Dayside Inc. v. First Jud. Dist. Ct.*, 119 Nev. 404, 407 (2003), *overruled on other*
16 *grounds by Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. Adv. Rep. 92, 197
17 P.3d 1032 (2008).

18 Without a doubt, the parties' dispute over the nature of the judicial remedy available in a
19 sales or use tax refund action involves an important issue of law. The nature of a taxpayer's
20 judicial remedy concerns fundamental rights of taxpayers and the role of a district court in an
21 action seeking a refund of sales or use taxes. Furthermore, the issue needs clarification because
22 the District Court's Order contradicts the plain language of the relevant statutes, disregards a
23 decision of this Court that is directly on point, and is inconsistent with the decisions of other
24 district courts and the Department's position in all prior refund actions.

25 In the District Court, the Department argued, and the District Court agreed, that the
26 enactment of Senate Bill 362 in 1999 ("S.B. 362") indirectly changed the judicial remedy
27 afforded to a taxpayer under NRS 372.680 from a civil action against the Department conducted
28 pursuant to the NRCP to a judicial review of the Commission's decision pursuant to the APA.
NRS 372.680 has not been expressly subject to judicial interpretation by this Court since it was
amended by S.B. 362, and the changes made by S.B. 362 are at the heart of the Department's and

1 the District Court's interpretation of the statute. Prior to the enactment of S.B. 362, following
2 denial by the Department of the taxpayer's claim for refund of sales or use taxes, NRS 372.680
3 authorized the taxpayer to bring an action against the Department on the grounds set forth in its
4 refund claim. (BN. 419.) There is *no dispute* that prior to the enactment of S.B. 362, the
5 taxpayer's suit in district court was a new civil action, conducted pursuant to the NRCP.

6 S.B. 362 amended Nevada's administrative procedure applicable to claims for refund to
7 require a taxpayer to first appeal the Department's denial of its claim for refund to the
8 *Commission* before it could file an action in district court. *See* NRS 360.245(1). Accordingly,
9 NRS 372.680 was also amended to require a decision from the Commission on the taxpayer's
10 refund claim as a precondition to bringing an action against the Department on the grounds set
11 forth in the taxpayer's claim. The District Court agreed with the Department's argument that by
12 merely inserting the Commission into the administrative process, the Legislature intended to
13 completely change the nature of a taxpayer's civil action against the Department under NRS
14 372.680 to require the Court to conduct a "judicial review" of the Commission's decision
15 pursuant to NRS 233B.135. To the contrary, as discussed in Section II.A., *infra*, (1) the
16 Legislature simply added an additional administrative remedy for taxpayers to exhaust before
17 suing the Department in district court and (2) the Legislature could have — but did not — amend
18 NRS 372.680 to require taxpayers to instead file a "petition for judicial review pursuant to NRS
19 233B.130," which is statutory language the Legislature has used elsewhere to make the APA
20 applicable to a taxpayer, but it did not do so. *See* NRS 360.395. Accordingly, swift action by this
21 Court is necessary to definitively clarify the law — not only for Edison and the District Court, but
22 for all taxpayers, all district courts and the Department itself.

23 Indeed, this is a recurring issue — taxpayers regularly file sales and use tax claims for
24 refund with the Department and some of these claims are only finally resolved at the judicial
25 level. There have been multiple actions brought under NRS 372.680 since S.B. 362 was enacted,
26 there are currently multiple cases pending in the district courts and, on information and belief,
27 there are many claim for refund cases currently working their way through the administrative
28 process. For example, in addition to Edison's case, NV Energy filed a complaint against the

1 Department pursuant to NRS 372.680 on December 3, 2009 in the Second Judicial District, and
2 the Senior Deputy Attorney General assigned to Edison's case is also representing the
3 Department in the action brought by NV Energy. (BN 269-278.) Thus district courts throughout
4 the state have been and will be required to determine whether NRS 372.680 is a civil action
5 governed by the NRCP, or whether that statute only authorizes the more limited remedy of a
6 judicial review of the Commission's decision governed by the APA. Guidance from this Court
7 would also apply to many other statutes authorizing tax refunds, since such statutes are materially
8 identical to NRS 372.680.⁹

9 Resolution of this issue is also important to prevent the Department from taking
10 inconsistent positions from one case to the next, or even within the same case (which, as
11 discussed above, has occurred with respect to Edison's Claims), in violation of the Department's
12 statutory obligation to treat taxpayers with uniformity and consistency. *See* NRS 360.291(1)(a).
13 On knowledge and belief, every other case that has been brought under NRS 372.680 subsequent
14 to the enactment of S.B. 362 has been conducted as a new civil action and not as a mere judicial
15 review of the Commission's decision pursuant to the APA. *See Sparks Nugget, Inc. v. Nevada ex*
16 *rel. Dep't of Tax'n*, 124 Nev. Adv. Rep. 15, 179 P.3d 570 (2008); *Lohse v. Nevada ex rel. Dep't*
17 *of Tax'n*, Case No. CV-05-00376 (Nev. 2nd Jud. Dist., Jan. 18, 2007). (BN 315-320.)

18 In addition, there is currently pending in the Eighth Judicial District a tax refund action
19 brought by multiple taxpayers pursuant to NRS 368A.290, a statute materially identical to NRS
20 372.680 (*see* fn. 9, *supra*), to recover an overpayment of live entertainment tax that is going
21 forward as a new civil action for which a bench trial is scheduled to commence this year. (BN
22 279-310, 314.) The Department has also been advising taxpayers who are challenging the
23 Department's denials of their claims for refund at administrative level that if the case ends up in
24 district court, the case will be a new civil action. (BN 444-445.) It has given this advice even

25 ⁹ NRS 363A.190 (refund action for Nevada's financial institutions tax), NRS 363B.180 (refund action for
26 Nevada's business tax), and NRS 368A.290 (refund action for Nevada's live entertainment tax) are all
27 materially identical to NRS 372.680, authorizing the taxpayer to "bring an action against the department on the
28 grounds set forth in the claim" in district court following a denial of its refund claim by the Commission. In
addition, NRS 372.685 specifies an administrative procedure, and authorizes a refund action identical to the one
authorized by NRS 372.680, in circumstances where the Department fails to act on a taxpayer's sales or use tax
refund claim within a specified time period.

1 after it took the position in this case that an action under NRS 372.680 authorizes only a “judicial
2 review” of the Commission’s decision denying the taxpayer’s refund claim. *See* fn. 3, *supra*.

3 Accordingly, the Department’s litigation position in this case is flatly inconsistent with its
4 past practice, the advice it is giving to other taxpayers and with the position it is taking in at least
5 one pending case. A definitive ruling from this Court on this issue would therefore serve public
6 policy by providing taxpayers with certainty regarding their rights and remedies in district court,
7 and would ensure that the Department treats all taxpayers with uniformity and consistency on this
8 issue.

9 **II. NRS 372.680 UNEQUIVOCALLY AUTHORIZES A CIVIL**
10 **ACTION AGAINST THE DEPARTMENT; THE JUDICIAL**
11 **REVIEW STANDARDS IN THE APA ARE SIMPLY**
12 **INAPPLICABLE**

13 **A. The Statutory Text and Relevant Nevada Case Law Establish**
14 **that NRS 372.680 Entitles Taxpayers Seeking a Refund of**
15 **Sales or Use Taxes to a Trial De Novo**

16 The District Court erred in ruling that an action brought against the Department pursuant
17 to NRS 372.680 is governed by the APA’s judicial review standards. The plain language of NRS
18 372.680 and Nevada case law interpreting that provision and other similar Nevada tax refund
19 statutes compel the conclusion that NRS 372.680 permits the taxpayer to commence a new civil
20 action against the Department and not a mere judicial review of the Commission’s decision. NRS
21 372.680(1) provides, in relevant part, that “[w]ithin 90 days after a final decision upon a claim
22 filed pursuant to this chapter is rendered by the Nevada tax commission, *the claimant may bring*
23 *an action against the department on the grounds set forth in the claim in a court of competent*
jurisdiction . . . for the recovery of the whole or any part of the amount with respect to which the
claim has been disallowed.” (Emphasis added.)

24 The plain language of NRS 372.680 in no way describes an appeal from, or a judicial
25 review of, the legal or factual findings of the Commission. First, the NRCP defines an “action”
26 as a “civil action,” which is commenced by filing a complaint in district court against the
27 defendant. *See* NRCP 2 (“There shall be one form of action to be known as ‘civil action.’”);
28 NRCP 3 (“A civil action is commenced by filing a complaint with the court.”). NRS 372.690,

1 which governs how a refund must be credited or repaid if the taxpayer prevails in its sales or use
2 tax refund action, makes clear that the taxpayer is the “plaintiff” in an action brought under NRS
3 372.680. Thus, the taxpayer brings a civil action under NRS 372.680 as plaintiff against the
4 Department as defendant by filing a complaint. NRS 372.680 does not require the taxpayer to
5 name the Commission or any other party as a co-defendant. In a petition for judicial review, on
6 the other hand, the taxpayer is the “petitioner” and is required to name the body that rendered the
7 decision (in this case, the Commission) as primary “respondent,” as well as all parties of record to
8 the administrative proceeding. NRS 233B.130(2)(a). The judicial review procedures that follow
9 are governed by the APA, not the NRCP. *See* NRCP 81.

10 Second, NRS 372.680(1) requires a taxpayer to bring an action against the Department on
11 the grounds set forth in the taxpayer’s claims for refund, whereas NRS 233B.130(1) authorizes an
12 aggrieved party to seek judicial review of the administrative agency’s decision. Bringing an
13 “action against the department on the grounds set forth in the claim” is incompatible with
14 language requiring only a judicial review of the Commission’s decision. Indeed, Nevada’s
15 deficiency determination procedure makes clear that the Legislature knows how to specify
16 judicial review as the available judicial remedy for a taxpayer when it wants do to so. In the case
17 of deficiency determinations (*i.e.*, determinations by the Department that a taxpayer has
18 *underpaid* its tax liability), NRS 360.395 expressly provides that the taxpayer’s judicial remedy is
19 a “*judicial review pursuant to NRS 233B.130 from a final order of the Nevada tax commission*
20 *upon a petition for redetermination[.]*” (Emphasis added.) In contrast, NRS 372.680 uses
21 altogether different language in authorizing “an action against the department on the grounds set
22 forth in the claim.” When the Legislature amended NRS 372.680 in S.B. 362, it could have
23 amended the statute to include the language used in NRS 360.395, *but it intentionally did not.*

24 Third, the requirement that a taxpayer bring an action against the Department only “after
25 a final decision upon a claim filed pursuant to [NRS Chapter 372] is rendered by the Nevada tax
26 commission” is simply a condition precedent to bringing the civil action authorized by NRS
27 372.680. The reason for this is to require the taxpayer to exhaust administrative remedies, which
28 promotes judicial economy because, as discussed below in Section V, the Department cannot

1 appeal a Commission decision granting a taxpayer's claim for refund. *See* NRS 360.245(5). In
2 *Sparks Nugget, Inc. v. Nevada ex rel. Dep't of Tax'n*, 124 Nev. Adv. Rep. 15, 179 P.3d 570, 573
3 (2008), a case brought pursuant to NRS 372.680 to recover an overpayment of use taxes that was
4 tried in the district court as a civil action and not as a judicial review proceeding, this Court
5 described the taxpayer's administrative proceedings as follows:

6 "In May 2002, the Nugget filed a claim with the Tax Department, seeking a refund
7 of [use tax payments] . . . Following the denial of its claim, the Nugget
8 administratively appealed the Tax Department's decision to the tax commission.
9 That appeal proved unsuccessful, however, and having exhausted its
10 administrative remedies, the Nugget then sued the Tax Department in district
11 court, again seeking a refund of the use taxes that it had paid[.]" (Emphasis
12 added.)

13 Fourth, the District Court erred in ruling that NRS 372.680 "is, to some extent, only a
14 venue statute, informing a claimant that has received a denial from the Commission of its claim
15 for refund of sales or use tax where it may file its action to seek a recovery of taxes it has
16 overpaid." (Order, BN 002.) In addition to stating the possible venues in which an action can be
17 brought, NRS 372.680 identifies the manner in which a lawsuit under that statute is to be initiated
18 (through the commencement of an "action"), the timeframe in which the action can be brought
19 (within 90 days after a final decision is rendered by the Commission), against whom (the
20 Department) and on what grounds (the grounds set forth in the taxpayer's claim for refund). In
21 fact, the plain language of the NRS 372.680 and NRS 233B.130 shows that the *only* manner in
22 which they are alike is that the permissible venues are the same. NRS 372.680 would add *nothing*
23 to Nevada's statutory scheme if it were "only a venue statute."

24 This Court has repeatedly affirmed that Nevada tax refund actions, including sales or use
25 tax refund actions brought pursuant to NRS 372.680, are new proceedings in the district court,
26 and not judicial reviews of the Commission's decision, notwithstanding that in each such case the
27 taxpayer participated in hearings before, and received a final decision from, the Commission
28 before bringing its refund action against the Department.

In the seminal case of *State v. Obexer & Sons, Inc.*, 99 Nev. 233, 237 (1983), an action
for a refund of sales taxes brought under NRS 372.680, this Court held: "Actions to recover taxes

1 paid are equitable in nature, and *the burden of proof is on the taxpayer to show that the taxing*
2 *body holds money that in equity and good conscience it has no right to retain.*” (Emphasis
3 added.) Reaffirming this holding in *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev.
4 402, 404 (1988), this Court stated that “[t]he burden of proof so articulated, certainly implies that
5 *the burden is not that of showing a lack of substantial evidence, rather, it is to support the*
6 *elements of an independent action for restitution.*” (Emphasis added.) In *Obexer & Sons*, the
7 taxpayer had received a denial of its claim for refund from the Department and then from the
8 Commission; in the district court the parties stipulated to some facts and submitted a partial
9 administrative record and the case was resolved on summary judgment in favor of the taxpayer.
10 Summary judgment is a procedural device available in civil actions governed by the NRCPC, and
11 is not a permissible means of conducting a judicial review proceeding brought under the APA.

12 The Department and the District Court choose to ignore *Saveway*, which is directly on
13 point. In *Saveway*, the taxpayer paid fuel excise taxes and penalties assessed by the Department
14 pursuant to NRS Chapter 365 and filed an appeal with the Commission. After receiving an
15 adverse decision from the Commission, *Saveway* filed a petition for judicial review of the
16 Commission’s decision. The district court dismissed the petition and this Court affirmed because
17 “NRS 233B.130 is specifically limited by NRS 365.460, and under NRS 365.460 *Saveway*’s
18 remedy was to pay the excise tax under protest and bring an action against the state treasurer in
19 the district court[.]” *Id.* at 403-04. NRS 365.460 uses the same “may bring an action” language
20 as is found in NRS 372.680.¹⁰ In addition, NRS 365.470(1), like NRS 372.680(2), also provides
21 that the tax refund action is a taxpayer’s exclusive judicial remedy for recovering its excise tax
22 overpayment. *See* NRS 365.470(1) (“No action authorized by NRS 365.460 may be instituted
23 more than 90 days after the last day prescribed for the payment of the excise tax without penalty.
24 Failure to bring suit within the 90 days shall constitute a waiver of any and all demands against
25 the State on account of alleged overpayment of excise taxes.”)

26
27 ¹⁰ NRS 365.460 provides: “After payment of any excise tax under protest duly verified, served on the
28 department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the
excise tax may bring an action against the state treasurer in the district court in and for Carson City for the
recovery of the excise tax so paid under protest.”

1 In Saveway's subsequent refund action properly brought pursuant to NRS 365.460, the
2 district court nonetheless applied the standard of review set forth in NRS 233B.135 and granted
3 summary judgment against the taxpayer because the Commission's decision "was neither clearly
4 erroneous, arbitrary, nor capricious," even though the form of the taxpayer's action was "not a
5 complaint for judicial review." *Id.* at 404. This Court again reversed the district court's decision,
6 holding that the district court erred in applying NRS 233B.135's judicial review standard because
7 the action authorized by NRS 365.460 was "for the refund of a tax overpayment," and therefore
8 authorized a trial de novo, where the taxpayer's burden of proof "is not that of showing a lack of
9 substantial evidence, rather, it is to support the elements of an independent action for restitution."
10 *Id.* at 404 (citing *Obexer & Sons*, 99 Nev. at 237). Accordingly, this Court has already expressly
11 rejected — twice — the position urged by the Department and adopted by the District Court.
12 While *Saveway* addresses a different refund statute, that is a distinction without a difference.

13 Edison reviewed every action that it could find that has been brought under NRS 372.680
14 subsequent to the enactment of S.B. 362. Each of these actions has been conducted as a new civil
15 action against the Department governed by the NRCP, and not as a judicial review of the
16 Commission's decision subject to the APA. In *Sparks Nugget, supra*, the taxpayer filed a
17 complaint under NRS 372.680 against the Department after the Commission had denied its claim
18 for refund. The Department answered and the case was ultimately resolved on summary
19 judgment by the district court in favor of the Department, a judgment that was reversed by this
20 Court on appeal. As discussed above, this Court characterized the taxpayer's administrative
21 proceedings as simply the exhaustion of administrative remedies prior to bringing a civil action
22 against the Department. Furthermore, summary judgment is a civil trial procedure and has no
23 place in a judicial review proceeding.

24 The Department has participated in at least one other sales tax refund action brought
25 pursuant to NRS 372.680 since it was amended by S.B. 362. In *Lohse v. Nevada ex rel. Dep't of*
26 *Tax'n*, Case No. CV-05-00376 (Nev. 2nd Jud. Dist., Jan. 18, 2007), the Department moved to
27 prevent the taxpayer from presenting evidence at trial on its sales tax refund claim, arguing
28 primarily that, because the taxpayer had failed to conduct discovery, the case should be limited to

1 the record developed before the Department and Commission and should proceed in a manner
2 similar to a petition for judicial review. The district court rejected the Department's argument.
3 During the ensuing bench trial, both the taxpayer and the Department presented evidence and
4 testimony. The district court's Findings of Fact, Conclusions of Law and Judgment expressly
5 held:

6 "1. Plaintiffs fully exhausted all administrative remedies prior to bringing this
7 action under NRS 372.680.

8 2. An action brought pursuant to NRS 372.680 is an original proceeding, not an
9 appeal from a final decision by an administrative agency. *State of Nevada v.*
10 *Obexer & Sons, Inc.*, 99 Nev. 233, 237, 660 P.2d 981, 984 (1983). The Court is
not limited to a review of the record before the administrative agency; the Court is
free to take new evidence on issues of fact, and owes no deference to findings by
the administrative agency on issues of fact or on issues of law."

11 (BN 315-320.) The district court's decision in favor of the taxpayer was affirmed in an
12 unpublished opinion by this Court.¹¹ (BN 321-328.)

13 In sum, the plain language of NRS 372.680 is plainly incompatible with the judicial
14 review standards imposed by the APA, and Nevada case law that is directly on point confirms
15 that a tax refund action under NRS 372.680 is an original civil action, conducted pursuant to the
16 NRCP, without deference to the Commission's decision.

17 **B. When the Legislature Adopted NRS 372.680 From California's**
18 **Statutory Scheme in 1955, It Was Already Well-Settled Law That the**
19 **Action Authorized by the Statute Was a Trial De Novo**

20 Nevada modeled its Sales and Use Tax Act on existing California law in 1955. *See Nev.*
21 *A.G.O. 19* (Apr. 21, 1971) ("Nevada's Sales and Use Tax Act (Chapter 372 of the Nevada
22 Revised Statutes) enacted by the Legislature in 1955 was substantially an adoption of the Sales
23 and Use Tax Law then in effect in California."). NRS 372.680 was derived from, and is
materially identical to, California Revenue and Taxation Code ("RTC") § 6933, which provides:

24 Within 90 days after the mailing of the notice of the board's action
25 upon a claim filed pursuant to Article 1 (commencing with Section
26 6901), the claimant may *bring an action against the board*
27 *[referring to the California State Board of Equalization] on the*
grounds set forth in the claim in a court of competent jurisdiction

28 ¹¹ Edison does not cite to *Lohse* as precedent, but only as evidence that the issue raised by this Petition cries out
for immediate review by this Court to ensure uniformity of ruling among the district courts of this State.

1 in any city or city and county of this state in which the Attorney
2 General has an office for the recovery of the whole or any part of
3 the amount with respect to which the claim has been disallowed.
4 Failure to bring action within the time specified constitutes a
waiver of any demand against the state on account of alleged
overpayments. (Emphasis added.)

5 A statute “adopted from another jurisdiction will be presumed to have been adopted with
6 the construction placed upon it by the courts of that jurisdiction before its adoption.” *Ybarra v.*
7 *State*, 97 Nev. 247, 249 (1981). By the time of Nevada’s adoption of NRS Chapter 372 from
8 California in 1955, it was already well-established law in California that sales and use tax refund
9 actions are trials de novo. *See Marchica v. Bd. of Equalization*, 237 P.2d 725, 733 (Cal. Ct. App.
10 1951) (“[I]n a suit for refund the statute does not give any finality to the determination of the
11 board. The board does not exercise judicial power in administering the Sales Tax Act and the act,
12 in effect, in a suit for refund authorizes a hearing de novo.”). This Court relied on *Marchica*
13 when it held in *Saveway* that tax refund actions in Nevada are original civil actions conducted as
14 trials de novo rather than as judicial review proceedings subject to the APA. *See Saveway*, 104
15 Nev. at 404.

16 It is indisputable that the phrase in RTC § 6933 — “bring an action against the board on
17 the grounds set forth in the claim” — authorizes a civil action in a California superior court
18 governed by the California Rules of Civil Procedure. In an action brought under RTC § 6933, the
19 *trial court* is the finder of fact, notwithstanding that the California State Board of Equalization
20 (“Board”), California’s equivalent to the Commission, has held hearings and made findings
21 during the administrative process. As in the case of an action brought under NRS 372.680, in an
22 action brought in California under RTC § 6933, “the burden of proof is on the taxpayer . . . to
23 produce evidence from which a proper tax determination can be made. The taxpayer must
24 affirmatively establish the right to a refund by the preponderance of the evidence, and cannot
25 simply assert error and shift to the state the burden of justifying the tax.” *Paine v. Bd. of*
26 *Equalization*, 137 Cal. App. 3d 438, 442 (1982) (omitting citations). The trial court conducts a
27 bench trial and the parties may present evidence and witnesses. *See, e.g., Delta Air Lines, Inc. v.*
28

1 *Bd. of Equalization*, 214 Cal. App. 3d 518, 524 (1989) (following a hearing before and decision
2 from the Board, the taxpayer brought a refund action under RTC § 6933 and the “parties
3 stipulated to certain facts, presented agreed-upon exhibits and deposition testimony, as well as the
4 testimony of two witnesses.”); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 204 Cal. App.
5 3d 1269 (1988). *See also Fujitsu IT Holdings, Inc. v. Franchise Tax Bd.*, 120 Cal. App. 4th 459,
6 470 (2004) (income tax refund action under RTC § 19382 where the taxpayer appealed the
7 Franchise Tax Board’s decision to the Board and then the ensuing refund action in superior court
8 was tried “largely on stipulated facts, supplemented by the testimony of witnesses and
9 documentary evidence.”). While there is less controlling authority in Nevada, all of the authority
10 that exists indicates that an action under NRS 372.680 proceeds in the same manner as an action
11 under RTC § 6933.

12 **III. THE DISTRICT COURT ERRED IN CONCLUDING THAT A**
13 **TAXPAYER IS NEVER ENTITLED TO MORE THAN ONE**
14 **EVIDENTIARY HEARING**

15 The District Court cites *Campbell* as authority for the proposition that a taxpayer is never
16 entitled to an evidentiary hearing in district court if the Commission held an administrative
17 hearing on the taxpayer’s claims. (Order, BN 004.). When its unusual procedural history is
18 properly understood, *Campbell* clearly supports Edison’s position that NRS 372.680 constitutes a
19 civil action that provides for a trial de novo, regardless of whether an administrative hearing has
20 occurred.

21 The *Campbell* case began when the Department issued a deficiency determination
22 assessing additional tax on the Campbells pursuant to NRS 360.300. In general, a taxpayer may
23 appeal a deficiency determination by filing a petition for redetermination with the Department
24 and, if the Department affirms the deficiency, the taxpayer may appeal to the Commission. If the
25 Commission affirms the deficiency determination, the relevant statute makes it clear that the
26 taxpayer’s *only* judicial remedy is to file a petition for judicial review pursuant to NRS 233B.130.
27 *See* NRS 360.395(1) (“Before a person may seek judicial review pursuant to NRS 233B.130 from
28 a final order of the Nevada tax commission upon a petition for redetermination,” it must either

1 pay the amount of the determination or enter into a payment agreement with the Department.).¹²
2 When the Campbells received the deficiency determination, the Department advised them that
3 they could contest the deficiency by filing a petition for redetermination, but did not inform them
4 of their option — which no longer exists — to pay the deficiency assessment and file a claim for
5 refund.¹³ *Campbell*, 108 Nev. at 217. Following the advice they had been given by the
6 Department, the Campbells filed a petition for redetermination with the Department.

7 A Department hearing officer upheld the deficiency determination and the Campbells
8 appealed to the Commission. *Id.* Before the Commission denied their appeal, the Attorney
9 General's Office recommended to the Campbells that they pay the deficiency "to cut off the
10 accrual of additional penalties and interest." *Id.* The Campbells heeded this advice, paid the
11 deficiency and then filed a claim for refund, commencing a separate claim for refund procedure.
12 *Id.* at 217-18. The Department denied the refund claim and the Campbells then brought an action
13 in district court pursuant to NRS 372.680.¹⁴

14 Meanwhile, the Commission denied the Campbells' separate appeal of their deficiency
15 determination. Because the Campbells' *only* judicial remedy for challenging that decision was to
16 file a petition for judicial review pursuant to NRS 233B.130, and because they had failed to do so,
17 the Commission's decision upholding the Department's deficiency determination became final.
18 *See id.* at 218. Since the Commission's now final decision upholding the deficiency involved the
19 same issues that were before the district court in the Campbells' separate *refund action*, the
20 Department argued that administrative res judicata barred the refund action from proceeding.

21 However, as this Court recognized, the only reason the Campbells filed a refund action
22 instead of a petition for judicial review was because they had paid the assessed deficiency in
23 reliance on what this Court called the "disturbing" advice of the Attorney General's Office, which

24 ¹² No statute authorizes a taxpayer to "bring an action" against the Department following an adverse decision
25 from the Commission on a deficiency determination.

26 ¹³ Under current law, a taxpayer's only administrative option for contesting a deficiency determination is to file
a petition for redetermination. *See* NRS 360.360

27 ¹⁴ The *Campbell* case occurred prior to the enactment of S.B. 362. Thus, the Campbells were not required to
28 appeal the Department's denial of their refund claim to the Commission before bringing their action against the
Department pursuant to NRS 372.680. This change is not relevant to the District Court's reliance on *Campbell*,
because the Campbells had a hearing before the Commission anyway.

1 effectively left the Campbells without any remedy for challenging the Department's deficiency
2 tax assessment. As the Court explained:

3 Once paid, however, *the only statutory means provided for demanding and*
4 *obtaining a refund of any excess taxes paid are set forth in NRS 372.630-720.*
5 Therefore, the Campbells were left without means, under the Administrative
6 Procedure Act, to reclaim the taxes they believed to be improperly collected.

6 (Emphasis added.) Given the "unique circumstances involved," the Court "converted" the
7 Campbells' refund action to a petition for judicial review because that was the completely distinct
8 and exclusive judicial remedy that the Campbells were originally entitled to after the Commission
9 denied their appeal from the Department's decision upholding the deficiency determination.
10 Accordingly, the Campbells were not entitled to a second evidentiary hearing because they were
11 only entitled to judicial review of the Commission's decision.

12 Contrary to the District Court's and the Department's position, *Campbell* does not stand
13 for the proposition that a *properly* filed refund action — brought after the Commission holds a
14 hearing and denies a taxpayer's refund claim — may be "converted" into a petition for judicial
15 review. While, based on the facts in *Campbell*, this Court ruled that "the Campbells do not have a
16 right to a second evidentiary hearing" (*id.* at 219), this language was clearly directed to the fact
17 that the Campbells were contesting a deficiency determination in the district court and their
18 statutory remedy in that case was limited to judicial review of the Commission's decision
19 pursuant to the APA.

20 Edison, of course, filed claims for refund and did not receive a deficiency determination
21 from the Department. Since NRS 372.680 expressly directs the taxpayer to "bring an action
22 against the department" within 90 days after a "decision upon a claim filed pursuant to [NRS
23 Chapter 372] is rendered by the Nevada tax commission," the fact that the Commission has held
24 hearings on the taxpayer's claim for refund cannot preclude the proceeding in the district court
25 from being conducted as a new civil action against the Department. Indeed, in addition to
26 rendering the plain language of NRS 372.680 utterly meaningless, such a conclusion would
27 ignore this Court's recognition in *Campbell* that an action authorized by NRS 372.680 and a
28 "judicial review" are in fact separate and distinct judicial remedies. Thus, *Campbell* supports the

1 conclusion, reached by this Court in both *Obexer & Sons* and *Saveway*, that if a taxpayer properly
2 brings a tax refund action in district court following the Commission's denial of its *refund claim*,
3 it is entitled to a new civil action that includes an evidentiary hearing in the district court.

4 **IV. THE ENACTMENT OF 233B.130(6) IN 1989 HAD NO EFFECT ON**
5 **THE JUDICIAL REMEDY PROVIDED BY NRS 372.680**

6 The District Court cites to statutory amendments to the APA enacted in 1989 as part of
7 Assembly Bill 884 ("A.B. 884") as authority for its ruling that the Legislature intended to limit a
8 taxpayer's remedy to judicial review pursuant to the APA in a tax refund action. A.B. 884
9 removed language from NRS 233B.130(1) which stated that the APA "does not limit utilization
10 of trial de novo to review a final decision of the agency where provided by statute, but this
11 chapter provides an alternative means of review in those cases." In addition, A.B. 884 added
12 NRS 233B.130(6), which provides that the APA is the "exclusive means of judicial review of, or
13 judicial action concerning, a final decision in a contested case involving an agency to which this
14 chapter applies."

15 Neither of these amendments is relevant to a taxpayer's refund action. First, NRS 372.680
16 does not authorize a taxpayer to seek judicial review. Since the plain language of NRS 372.680
17 makes clear that the action in district court is not an appeal *from* the Commission's decision, but
18 is instead an original proceeding in the district court against the Department, neither the APA nor
19 its judicial review standards have any application to a refund action under NRS 372.680. Thus,
20 NRS 372.680 does not need to expressly state that a trial de novo is permitted to review an
21 agency decision because it does not authorize a judicial review proceeding in the first instance.

22 Second, as the District Court acknowledges in its Order, whether or not expressly
23 provided in the APA, when a petition for judicial review *is* the appropriate judicial remedy, the
24 judicial review standards imposed by the APA are trumped if a more specific statute imposes a
25 different standard. *See* NRS 233B.020(2) (stating that the APA "supplement[s] statutes
26 applicable to specific agencies" but "does not abrogate or limit additional requirements imposed
27 on such agencies by statute or otherwise recognized by law."); *Western Realty Co. v. City of*
28 *Reno*, 63 Nev. 330, 337 (1946) (providing that a specific statute "dealing expressly and in detail

1 with a particular subject,” controls over a “general provision relating only in general terms” to the
2 subject). NRS 372.680 imposes requirements that are inconsistent with the judicial review
3 standards imposed by the APA. *See* Section II, *supra*.

4 In addition, the District Court erred in ruling that NRS 233B.130(6) requires an action
5 brought under NRS 372.680 to be governed by the APA’s judicial review standards. NRS
6 233B.130(6) simply provides that the APA is the “exclusive means of judicial review of, or
7 judicial action concerning, a final decision in a contested case involving an agency to which this
8 chapter applies.” The plain language of NRS 372.680 in no way describes an appeal from, or a
9 judicial review of, the legal or factual findings of the Commission (instead treating the
10 Commission’s denial of a taxpayer’s refund claim as simply a prerequisite to “bring[ing] an
11 action against the department”); so NRS 233B.130(6) is simply inapplicable.

12 Nor does the action authorized by NRS 372.680 “concern[] a final decision in a contested
13 case,” because the district court’s role is to conduct a new trial against the Department on the
14 grounds set forth in the claims where the Commission’s decision receives no deference. The
15 District Court’s overbroad construction of NRS 233B.130(6) would mean that whenever a litigant
16 has received a decision from an administrative agency in a contested case, the litigant’s judicial
17 remedy must be limited to a “judicial review” in the district court in accordance with the APA’s
18 judicial review standards regardless of whether a separate and more specific statute plainly
19 provides the litigant with a different judicial remedy, *e.g.*, a new civil action in district court. *See*
20 NRS 233B.020(2) (providing that the APA does “not abrogate or limit additional requirements
21 imposed . . . by statute or otherwise recognized by law.”). Such a construction would abrogate
22 and nullify NRS 372.680 and all materially identical statutes authorizing tax refund actions. *See*
23 *id.*; fn. 9, *supra*.

24 **V. THE ENACTMENT OF NRS 360.245(5) AND 360.245(7) IN 1997**
25 **TO STOP THE DEPARTMENT FROM INFRINGING ON THE**
26 **COMMISSION’S AUTHORITY HAD NO EFFECT ON THE**
JUDICIAL REMEDY PROVIDED BY NRS 372.680

27 The Legislature enacted Senate Bill 375 (“S.B. 375”) in 1997, adding NRS 360.245(5),
28 which prohibits the Department from seeking judicial review of Commission decisions, and NRS

1 360.245(7), which specifically authorizes local governments that were parties to the proceeding
2 before the Commission to seek judicial review if they are aggrieved by the decision. Contrary to
3 the District Court's Order, neither of these provisions has any effect on the judicial remedy
4 provided by NRS 372.680

5 The Legislature enacted S.B. 375 to resolve a turf war between the Department and the
6 Commission that came to a head in *Dep't of Tax'n v. Newmont Gold Co.* (Nev. 1st Judicial Dist.,
7 Sept. 3, 1996). (BN 329-330.) In that case, the taxpayer (Newmont Gold) received a deficiency
8 determination following a sales tax audit by the Department. The taxpayer filed a petition for
9 redetermination and the matter was heard before a Department hearing officer. The hearing
10 officer upheld the deficiency determination and the taxpayer appealed to the Commission. The
11 Commission voted unanimously to reverse. The Department filed a petition for judicial review in
12 district court. The taxpayer filed a motion to dismiss, arguing that the Department had no
13 standing to file a petition for judicial review because the Commission is the statutory head of the
14 Department. The Department argued that, since "its members are not selected based upon their
15 tax law expertise, . . . the Commission's decisions should be appealable." The district court
16 granted the taxpayer's motion to dismiss because existing statutes "clearly established" the
17 Commission as the head of the Department and, thus, the "Department . . . can not be aggrieved
18 by a decision of [the Commission]."

19 NRS 360.245(5) precludes the Department from challenging Commission decisions in
20 court and, contrary to the District Court's Order, has no bearing on the judicial remedy afforded
21 to a taxpayer in a refund action under NRS 372.680. NRS 360.245(5) clarifies that only decisions
22 of the Commission, as opposed to "decisions of the executive director or other officer of the
23 department," (NRS 360.245(1)(a)), are subject to judicial review, and to expressly preclude the
24 Department from appealing decisions of the Commission that were adverse to the Department.
25 The plain language of the statute accomplishes the Legislature's objectives.

26 The first sentence of NRS 360.245(5), which states that "[a] decision of the
27 [Commission] is a final decision *for the purposes of judicial review*," must be read in connection
28 with NRS 360.245(1)(a), which states that "[a]ll decisions of the executive director or other

1 officer of the department made pursuant to this Title *are final unless appealed to the*
2 *[Commission]*.” (Emphases added.) These two provisions establish that a person aggrieved by
3 an administrative decision of the Department cannot appeal the Department’s decision to district
4 court. Rather, the aggrieved person must first appeal to the Commission.¹⁵ Furthermore, if the
5 Department’s decision becomes final because it is not appealed to the Commission pursuant to
6 NRS 360.245(1)(a), all avenues for further appeal are closed. In sum, the first sentence of NRS
7 360.245(5) provides that only a decision of the Commission is subject to judicial review; and not
8 that a decision of the Commission is only subject to judicial review.

9 The second sentence of NRS 360.245(5) — “The executive director or any other
10 employee or representative of the department shall not seek judicial review of such a decision” —
11 speaks for itself, and expressly prohibits the Department from seeking judicial review of
12 Commission decisions. Together, the two sentences of NRS 360.245(5) do no more than affirm
13 the Commission’s authority over the Department in the context of tax cases at the administrative
14 level by establishing the Commission’s decision as the final decision within the agency, and in no
15 way conflict with NRS 372.680. Importantly, NRS 360.245(5) neither authorizes any party to
16 seek judicial review nor states that a final decision of the Commission is *only* subject to judicial
17 review. Instead, one must consult other statutes to determine the specific judicial remedy that
18 applies in a particular set of circumstances.¹⁶ Nothing in NRS 360.245(5) has any bearing on the
19 judicial remedy afforded to a taxpayer in a refund action under NRS 372.680.

20 Likewise, NRS 360.245(7) has no relevance to a taxpayer’s refund action. NRS
21 360.245(7) provides: “A county or other local government which is a party and is aggrieved by
22

23 ¹⁵ As discussed at length in Section VI, *infra*, S.B. 362 amended NRS 372.680 and other tax refund statutes to
24 require denial of a taxpayer’s refund claim from the Commission before it can bring an action in district court
25 against the Department. This is consistent with the changes made by S.B. 375, ensuring that the Commission’s
26 decision, not the Department’s, is the final decision within the agency.

27 ¹⁶ For example, NRS 360.395 makes it clear that a taxpayer may file a petition for judicial review pursuant to
28 NRS 233B.130 following the Commission’s decision upholding a deficiency determination by the Department.
NRS 372.680 authorizes a taxpayer to bring an action against the Department on the grounds set forth in its
refund claims following the Commission’s denial of its refund claims. NRS 360.245(7) authorizes a county or
other local government that is a party to the proceeding before the Commission and aggrieved by the decision
to petition for judicial review. NRS 360.245(5), of course, prohibits the Department from filing a petition in
that case.

1 the decision of the Nevada Tax Commission is entitled to seek judicial review of the decision.”
2 Accordingly, if the Commission grants a taxpayer’s claim for refund, a county or local
3 government that was a party to the proceeding may file a petition for judicial review of the
4 Commission’s decision. The District Court ruled below that “[u]niform standards and uniform
5 application of the law demands that both the local government agencies and the taxpayers be
6 treated the same and supports treating the current action as a petition for judicial review.” (Order,
7 BN 002.)

8 The District Court’s ruling is plainly contrary to Nevada’s statutory scheme and is clearly
9 erroneous. The Legislature used different words in NRS 372.680 and NRS 360.245(7) in
10 providing local governments with the limited right “to seek judicial review of the decision” and in
11 providing taxpayers with the more expansive right to “bring an action against the department on
12 the grounds set forth in the claim” and thus clearly meant to provide different parties with
13 different judicial remedies. *See Butler v. State*, 120 Nev. 879, 892-93 (2004) (providing that
14 statutes must “not be read in a way that would render words or phrases superfluous or make a
15 provision nugatory.”).

16 NRS 360.245(7) was enacted in 1997 and the Legislature amended NRS 372.680 in the
17 following legislative session in 1999. If the Legislature had intended to create parity between the
18 judicial remedies for local governments and taxpayers, it could easily have done so by revising
19 NRS 372.680 in 1999 to provide the identical judicial remedy it had just made available to local
20 governments in the prior legislative session. The Legislature did not do so; it instead retained the
21 statutory language in NRS 372.680 that provides for bringing a civil action against the
22 Department.

23 Furthermore, and contrary to the District Court’s ruling, taxpayers pursuing a claim for
24 refund and local governments are not similarly situated. Unlike the taxpayer, a local government
25 that was a party to a refund claim proceeding before the Commission would not be suing for a tax
26 refund, *i.e.*, an equitable action for restitution. *See Obexer & Sons*, 99 Nev. at 237; *Saveway*, 104
27 Nev. at 404. A local government would only be alleging error with the Commission’s decision
28

1 (rather than seeking restitution) and therefore judicial review is the appropriate judicial remedy
2 for a local government. Nevada's statutory scheme provides for just this result.

3 **VI. THE AMENDMENTS TO NRS 372.680 MADE BY S.B. 362 DID**
4 **NOT CHANGE THE JUDICIAL REMEDY FROM AN ORIGINAL**
5 **CIVIL ACTION AGAINST THE DEPARTMENT INTO A**
6 **JUDICIAL REVIEW OF THE COMMISSION'S DECISION**

7 The District Court's conclusion that S.B. 362 "limited the scope of NRS 372.680 and
8 brought it within the umbrella of NRS Chapter 233B" is plainly wrong. (Order, BN 004.) The
9 amendments to NRS 372.680 made by S.B. 362 did not change the nature of the judicial remedy
10 afforded to a taxpayer. Both before and after S.B. 362, NRS 372.680(1) authorized a civil action
11 as follows: "the claimant may bring an action against the department on the grounds set forth in
12 the claim . . . for the recovery of the whole or any part of the amount with respect to which the
13 claim has been disallowed." Since the statute was enacted in 1955, its "may bring an action"
14 language has not been changed by the Legislature.

15 Prior to the enactment of S.B. 362, NRS 372.680 provided that a taxpayer whose claim for
16 refund of sales or use taxes had been denied by the *Department* may "bring an action against the
17 department on the grounds set forth in the claim *in a court of competent jurisdiction in Carson*
18 *City . . .*" (BN. 419.) After the passage of S.B. 362, NRS 372.680 provided (and continues to
19 provide) that a taxpayer whose claim for refund of sales or use taxes has been denied by the
20 *Commission* may "bring an action against the department on the grounds set forth in the claim *in*
21 *a court of competent jurisdiction in Carson City, the county of this state where the claimant*
22 *resides or maintains his principal place of business or a county in which any relevant*
23 *proceedings were conducted by the department . . .*"

24 As the italicized language shows, S.B. 362 amended NRS 372.680 in only two respects.
25 First, the reference to the "Department" was changed to the "Commission." This change was
26 required because S.B. 362 also amended NRS 360.245(1). (BN 404.) The amendment to NRS
27 360.245(1) provided that a taxpayer whose claim for refund was denied by the Department must
28 appeal it to the Commission. The jurisdictional prerequisite for the *district court action*
authorized by NRS 372.680 had to be changed accordingly. Second, the venues in which the

1 district court action could be brought were expanded to include jurisdictions in addition to Carson
2 City.

3 This change is a natural accompaniment to the changes made by the Legislature two years
4 earlier, in 1997, in S.B. 375 (discussed in Section V, *supra*), which clarified that the Commission
5 and not the Department has ultimate authority for determining how Nevada's tax laws are
6 interpreted, administered and enforced. Consistent with this Legislative determination, S.B. 362
7 ensured that the Commission's decision, not the Department's, would always be the final decision
8 within the agency, thus providing the Commission with the ability to ensure that all decisions of
9 the Department are consistent with the tax policy directives set by the Commission. In addition,
10 since the Department may not appeal a decision of the Commission (*see* NRS 360.245(5)), the
11 involvement of the Commission in the refund claim administrative process promotes judicial
12 economy by limiting the number of cases that require resolution by the courts.¹⁷

13 To support the position that the intent of the Legislature in amending NRS 372.680 was
14 to subject refund actions to the APA, the District Court and the Department rely exclusively on a
15 memorandum from then-Deputy Attorney General Norman J. Azevedo to the Chairman of the
16 Assembly Committee on Judiciary dated May 7, 1999 entitled "Venue Sections of S.B. 362" (the
17 "Venue Memorandum"). (BN 380-383.) The Venue Memorandum was provided in response to
18 specific questions relating to the venue provisions in S.B. 362, i.e., the amendments to existing
19 tax refund statutes that expanded the jurisdictions in which tax refund actions can be brought. *See*
20 Affidavit of Norman J. Azevedo, dated May 8, 2009 ("Affidavit") (BN 331, at ¶ 4.) As shown
21 above, in addition to inserting the Commission, the only other change to NRS 372.680 made by
22 S.B. 362 was to add additional venues for the action. Although there is a statement in the Venue
23 Memorandum, quoted in the District Court's Order suggesting that, following a final decision
24 from the Commission the taxpayer may file a petition for judicial review, that statement was part

25 ¹⁷ *See* Minutes, Assemb. Comm. on Tax'n, May 6, 1999 ("The change allowed the taxpayer to appeal to the
26 Tax Commission before the business and the state had incurred the legal expenses" of bringing (or defending)
27 an action in district court.). (BN 355.) *Accord. Atari, Inc. v. Bd. of Equalization*, 170 Cal. App. 3d 665, 673
28 (1985) ("Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the
State Board of Equalization so that the Board may be afforded the opportunity to rectify any mistake in tax
collection. Such a rule prevents having an overworked court consider issues and remedies available through
administrative channels.")

1 of an overview that was not specifically addressing actions seeking refunds of sales and use taxes
2 pursuant to NRS 372.680. (See Affidavit, BN 332-333, at ¶ 7b.)

3 In any event, the Venue Memorandum does not constitute legislative history and cannot
4 be viewed as reflecting the intent of the Legislature. It is well established that “testimony before
5 a committee is of little value in ascertaining legislative intent, at least where the committee fails
6 to prepare and distribute a report incorporating the substance of the testimony” and where the
7 party makes “no showing that [the] testimony was endorsed or relied on by the committees.” See
8 *Robert E. v. Justice Court*, 99 Nev. 443, 446 (1983). There is no evidence that anyone in the
9 Legislature relied on or endorsed the Venue Memorandum to reach the conclusions urged by the
10 Department and adopted by the District Court.

11 Had the Legislature intended to change the taxpayer’s judicial remedy from “an action
12 against the department” governed by the NRCP, to a judicial review of the Commission’s
13 decision subject to the APA, it would have amended the text of the statute to so state. None of
14 the amendments made by S.B. 362, however, add any reference to “judicial review” or the APA
15 to Nevada’s tax statutes, including NRS 372.680. Instead, the Legislature retained the taxpayer’s
16 right to “bring an action” against the Department on the grounds set forth in the claim after the
17 completion of the administrative process, rather than requiring a taxpayer to seek judicial review
18 of the Commission’s decision.¹⁸

19 In fact, one of the other tax refund statutes amended by S.B. 362 was NRS 365.460 — the
20 statute at issue in *Saveway*. (BN 418.) As discussed in Section II.A, in *Saveway* this Court held
21 that NRS 365.460 authorized an independent action for restitution and not judicial review of the
22 Commission’s decision pursuant to NRS 233B.135, even though in *Saveway* the taxpayer’s
23 refund claim had been reviewed and denied by the Commission. Subsequent to the *Saveway*
24 decision, S.B. 362 amended NRS 365.460 to require a taxpayer to appeal to and receive an
25

26 ¹⁸ This retention of language authorizing a civil action against the Department rather than judicial review of the
27 Commission’s decision was not a legislative oversight. In 2003, four years after S.B. 362 was enacted, the
28 Legislature enacted three new taxes — the tax on financial institutions, the business tax, and the tax on live
entertainment. For each new tax it enacted a statute authorizing a tax refund action that is identical to NRS
372.680, providing “an action against the department on the grounds set forth in the claim” following a final
decision from the Commission on the claim. See fn. 9, *supra*.

1 adverse decision from the Commission before bringing an action under NRS 365.460, but
2 retained the judicially interpreted “may bring an action” language describing the taxpayer’s
3 judicial remedy¹⁹:

4 “After payment of any excise tax under protest duly verified,
5 served on the department, and setting forth the grounds of
6 objection to the legality of the excise tax, the dealer paying the
7 excise tax may file an appeal with the Nevada tax commission
8 pursuant to NRS 360.245. If the dealer is aggrieved by the
9 decision of the commission rendered on appeal, he may bring an
10 action against the state treasurer . . . for the recovery of the excise
11 tax so paid under protest.” (BN 418.)

12 This Court has held that: “It is presumed that the legislature approves the supreme court’s
13 interpretation of a statutory provision when the legislature has amended the statute but did not
14 change the provision’s language subsequent to the court’s interpretation.” *Silvera v. Employers*
15 *Ins. Co. of Nevada*, 118 Nev. 105, 109 (2002). Although the Legislature amended NRS 365.460
16 after this Court’s decision in *Saveway* to require an appeal to the Commission before bringing an
17 action in district court, it did not amend the language in the statute that had been interpreted by
18 this Court to authorize an independent action for restitution rather than a judicial review
19 proceeding.

20 The Legislature’s deliberate decision to retain the language describing the taxpayer’s
21 judicial remedy in NRS 365.460 establishes beyond a doubt that the Legislature intended for
22 taxpayers filing claims for refund to be entitled to a new civil action, *i.e.*, a trial de novo,
23 following the completion of the administrative process. If the Legislature had wanted to overturn
24 this Court’s holding in *Saveway* when it enacted S.B. 362, it could have done so. But it did not.
25 Instead, it ratified *Saveway*. Accordingly, since NRS 365.460 is in all relevant respects identical
26 to NRS 372.680, for this reason and all the other reasons discussed above, the District Court erred
27 in ruling that by enacting S.B. 362 the Legislature indirectly changed the judicial remedy afforded
28 to a taxpayer by NRS 372.680 into a judicial review proceeding.

¹⁹ S.B. 362 set the amendments to NRS 365.460 to expire by limitation on December 31, 2001 because, beginning in 2002, the Department of Motor Vehicles took over administration of the motor fuel excise tax imposed by NRS Chapter 365. (See BN 437.) Accordingly, the current version of the statute no longer requires the taxpayer to appeal to the Commission before bringing an action in district court.

1 CONCLUSION

2 For all the reasons stated above, this Court should grant the Petition and issue a writ of
3 mandamus ordering the District Court to conduct Edison's use tax refund action under the
4 standard applicable to an original civil action brought under NRS 372.680, as governed by NRCP,
5 and not under the judicial review standard applicable to proceedings commenced under the APA.

6 Dated: January 8TH, 2010

7 By: 

8
9 NORMAN J. AZEVEDO
10 State Bar No. 3204
11 405 N. Nevada Street
12 Carson City, NV 89703
13 (775) 883-7000

14 Attorney for Petitioner

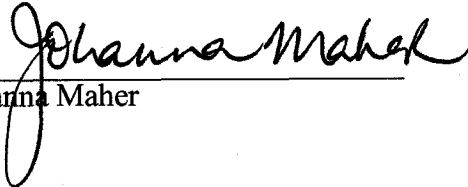
15 CC1:821262.2

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of January, 2010, I caused a hand-delivered copy of the foregoing to be delivered to the following:

The Honorable James T. Russell
First Judicial District Court
885 E. Musser Street
Carson City, NV 89701

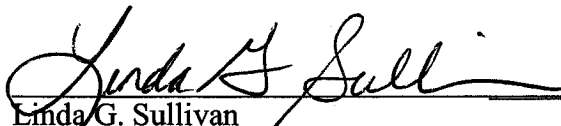
Gina Session, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701


Johanna Maher

VERIFICATION

Under penalties of perjury, the undersigned declares that she is the Senior Vice-President and Chief Financial Officer of the Petitioner in the within-captioned Petition for a Writ of Mandamus ("Petition"); that she has obtained copies of District Court papers relating to this Case No. 09-0C-00016-1B and that she is familiar with the facts set forth in this Petition and knows the contents thereof; that such facts are true to the best of her knowledge, and as to those factual allegations therein contained which are stated on information and belief, she believes them to be true as well.

Dated: January 7, 2010



Linda G. Sullivan
Senior Vice-President and Chief Financial Officer
Southern California Edison Company