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May 6, 2008

Governor Jim Gibbons  
Office of the Governor  
101 North Carson Street  
Carson City, Nevada 89701

Dear Governor Gibbons:

You have asked for an opinion on the procedures to be followed by the Governor when setting aside budget reserves which implicate the work program thresholds stated in NRS 353.220(4).

QUESTION

In light of the requirements of NRS 353.220, what procedures must the Governor follow to revise agency work programs to set aside budget reserves to address revenue shortfalls?

ANALYSIS

In an All Agency Memorandum dated January 14, 2008, State Budget Director Andrew Clinger directed the submission of work programs necessary to implement a 4.5 percent budget reduction in fiscal years 2008 and 2009. The Administration provided a report on the status of these budget cuts to the Interim Finance Committee (IFC) at its meeting on January 24, 2008. A work program is a group of documents used to make changes to the legislatively approved budget. See Work Program Manual, Fourth Edition, Page 5.<sup>1</sup> The process of creating, reviewing, and approving work programs is intended to ensure, among other things, that expenditures are within applicable appropriations, are used for legislatively approved purposes, that sufficient funds exist

<sup>1</sup> State Budget Division website:  
[http://budget.state.nv.us/WrkPrgmManual/work\\_program\\_manual\\_4th\\_edition\\_R1.pdf](http://budget.state.nv.us/WrkPrgmManual/work_program_manual_4th_edition_R1.pdf)

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to allow the expenditure and that changes in planned revenues and expenditures can be proposed, evaluated and authorized in a manner consistent with the State Budget Act. Work Program Manual, Fourth Edition, Page 7. Primarily, this is the duty of the Budget Director prior to submitting work programs for processing by the Controller.

NRS 353.220 sets forth the process for work programs. NRS 353.220 describes requirements for the creation, submission, and approval of work programs. Subsection 4 provides in part that, whenever a work program requests a revision that will ". . . increase or decrease by 10 percent or \$50,000, whichever is less, the expenditure level approved by the Legislature for any of the allotments within the work program, the request must be approved as provided in subsection 5 before any appropriated or authorized money may be encumbered for the revision." Subsection 5 sets forth three ways in which such a work program may be approved:

If a request for the revision of a work program requires additional approval as provided in subsection 4 and:

(a) Is necessary because of an *emergency* as defined in NRS 353.263 or for the protection of life or property, the Governor shall take reasonable and proper action to approve it and shall report the action, and his reasons for determining that immediate action was necessary, to the Interim Finance Committee at its first meeting after the action is taken. Action by the Governor pursuant to this paragraph constitutes approval of the revision, and other provisions of this chapter requiring approval before encumbering money for the revision do not apply.

(b) The Governor determines that the revision is necessary and *requires expeditious action*, he may certify that the request requires expeditious action by the Interim Finance Committee. Whenever the Governor so certifies, the Interim Finance Committee has 15 days after the request is submitted to its Secretary within which to consider the revision. Any request for revision which is not considered within the 15-day period shall be deemed approved.

(c) Does not qualify pursuant to paragraph (a) or (b), it must be submitted to the Interim Finance Committee. The Interim Finance Committee has 45 days after the request is submitted to its Secretary within which to consider the revision. Any request for revision which is not considered within the 45-day period shall be deemed approved. [Emphasis added.]

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Therefore, unless the Governor declares that a qualifying emergency situation exists under NRS 353.220(5)(a), a revision for a work program under section .220 must first be submitted to the IFC for approval.

While it appears the budget cut work programs require IFC approval pursuant to NRS 353.220, decreases which are placed into reserves have not historically been construed by the Legislative Counsel Bureau (LCB) as requiring IFC approval. It is also apparent from an examination of the Budget Act, as well as the historical practice and procedure involving the processing of work programs, that the Legislature treats work programs that increase authorized spending differently than work programs that reduce spending. For example, the aggregate of the "allotments" submitted in work programs pursuant to NRS 353.215 must not exceed the "total appropriation or other funds from any source whatever" and all expenditures to be made from legislative appropriations are to be made "on the basis of such allotments and not otherwise." On the other hand the Legislature granted substantial discretion in NRS 353.225 to set aside reserves out of legislative appropriations "in such amount as the [Budget] Chief may determine."<sup>2</sup>

It has been the common practice between the Budget Division and LCB that IFC approval is not required to revise budgets to place funds in reserve. This construction of the law has been included in the State's Work Program Manual, which contains in Appendix E a document entitled "Determining If IFC Approval is Required" containing a "decision tree" that indicates that if the revision "[i]ncreases revenue and places funds in reserve only" that "IFC approval [is] NOT required." Work Program Manual, p. 43. Additionally, the Department of Administration's Work Program Packet Checklist includes a check box that states "Does not require IFC approval because . . . [p]laces funds in reserve only." *Id.* p. 47. Although these Executive Branch documents are not binding on the Legislative Branch, it appears that the Legislature has been aware of this statutory construction and past practice and has accepted it.

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<sup>2</sup> Historically, the provisions of NRS 353.215, 353.220 and 353.225 were originally enacted together as sections 12, 13 and 14 of Senate Bill 229 in the 1949 Nevada Legislature. 1949 Nev. Stat. 602, 606. From 1949 until 1969, the statutes required the Governor to decide in advance of the fiscal year whether or not to set aside reserves "in making the original allotments." 1969 Nev. Stat. 1117. (Section 12 of this act strikes the language "in making original allotments" from NRS 353.225(1) under testimony by the Legislative Counsel Daykin that "[i]t permits work programs to be started any time during the fiscal year . . .") *Hearing on S.B. 143 Before the Assembly Committee on Government Affairs*, 1969 Leg., 55<sup>th</sup> Sess. 12 (March 21, 1969). The requirement of obtaining prior approval of work programs from the IFC was added to NRS 353.220 in 1979. 1979 Nev. Stat. 606, 609. Therefore, prior to 1979 the authority to approve work programs rested solely with the Governor and, between 1969 and 1979, the Governor possessed the sole discretion to order and approve work programs at any time during the biennium to affect NRS 353.225 reserves.

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Finally, we note that IFC did not formally object to Mr. Clinger's report on the subject work programs at its January meeting.<sup>3</sup> Past construction of NRS 353.220 has produced a long standing practice and procedure that neither the Legislature nor the IFC have required their prior approval for work programs implementing reserves. Nonetheless, since the instant question is now raised and the past practice brought to our attention, we must opine that the requirements of NRS 353.220 are clear. Where a statute is clear on its face, we may not look for a meaning beyond the statute itself. *Worldcorp v. State, Dep't of Taxation*, 113 Nev. 1032, 944 P.2d 824 (1997). Accordingly, we conclude as follows:

#### CONCLUSION

If the Governor determines that an NRS 353.220(4) work program is necessary because of a qualifying emergency situation, he may approve the revision and make a later report to the IFC. NRS 353.220(5)(a). If the Governor determines that an NRS 353.220(4) work program revision is necessary and requires expeditious action, he must submit a request to the IFC stating same, and IFC must act within 15 days or the request is deemed approved. NRS 353.220(5)(b). Finally, if the Governor determines that an NRS 353.220(4) work program revision is not necessary to meet a qualifying emergency situation and does not otherwise require expeditious action, he must present the request to the IFC, which has 45 days to act or the request is deemed approved.

Sincerely,

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Attorney General

By:

  
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JAMES T. SPENCER  
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<sup>3</sup> Any supposition that the inaction of the IFC on this item may have demonstrated its willful acquiescence to the item's approval was subsequently dispelled by a March 31, 2008, letter from IFC Chairman Morse Arberry to the Governor wherein he demanded that such work program revisions be formally approved by the IFC before being placed in reserve, referencing NRS 353.220.