

# THE BATTLE BORN BUDGET: LEGISLATING IN WAKE OF THE CLEAN WATER COALITION CASE

BY MICHAEL R. KEALY, ESQ.

The 2011 regular session of the Nevada Legislature ended with some unexpected high drama when the Nevada Supreme Court issued its ruling in *Clean Water Coalition v. The M Resort*, 127 Nev. \_\_\_, 255 P.3d 247 (Adv. Op. No. 24, May 26, 2011) (*Clean Water Coalition*). The Nevada Supreme Court declared a law that had directed southern Nevada's Clean Water Coalition (CWC) to pay \$62 million of local funds into the State's general fund unconstitutional. The law was a legislative sweep of CWC's funds, enacted as Section 18 of Assembly Bill 6 (A.B.6), in the 26th Special Session (2010), and was part of the Legislature's effort to solve a statewide budget shortfall exceeding \$800 million. The CWC refused to pay, sued the Nevada Legislature and others, and the case ultimately made its way to the Nevada Supreme Court during the 2011 legislative session.



With only two weeks remaining in the 2011 regular session, Nevada's lawmakers were stalemated on irreconcilable budget issues.<sup>1</sup> At the heart of the stalemate were taxes of about \$626 million, approved in 2009, set to expire on June 30, 2011. Ironically, one thing that both sides of the political aisle agreed upon was that \$656 million in revenue could be obtained from legislative sweeps of funds from the coffers of various local governments and political subdivisions. Sweeps had been used previously as a shortcut to alleviate revenue shortfall. The two political parties were positioned for a budget showdown.

When the decision was handed down, the Nevada Supreme Court ruled that the legislative sweep of the CWC's funds in A.B.6 was unconstitutional as a special and local law, and as a tax. The assumed validity of such sweeps of local funds, as part of the 2011 budgeting process, suddenly disappeared. Lawmakers were now faced with an *additional* \$656 million hole in the budget, with time rapidly running out for the regular 2011 legislative session.<sup>2</sup> Just a few days later, the stalemate evaporated and Governor Brian Sandoval announced a broad compromise resulting in a balanced budget.<sup>3</sup> The compromise included an extension of the \$626 million that were expiring.

What does *Clean Water Coalition* mean for future legislation, and the potential for legislative sweeps? Dale

Erquiaga, former senior adviser to Sandoval, observed that the mechanism of sweeping local coffers to balance the state budget had been used by prior legislatures.<sup>4</sup> Will the next legislature proceed differently when balancing the budget during the 2013 legislative session, or are its hands tied in light of *Clean Water Coalition*? The forecast for the upcoming session calls for real, painful compromises and protracted budget battles. As in the past few sessions, the state legislature has a democratic majority and the governor is a Republican. There are many newly elected legislators with promises to keep.

Some may suggest that *Clean Water Coalition* has limited application to future legislation because the case was fact-specific and unique in its context. The particular language of A.B.6, specifically naming and targeting the CWC funds, was unusual and certainly contributed to its demise as a law. On the other hand, Erquiaga and others have predicted that the decision may "forever change the way we budget in the state of Nevada."<sup>5</sup> Clark and Washoe Counties believed that *Clean Water Coalition* set a precedent when they asserted claims against the state of Nevada collectively exceeding \$120 million, arising from local tax revenues swept by the state Legislature from those counties in the 2009 legislative session. Washoe County settled its revised claim of \$17.9 million with the state for approximately \$7.2 million, consisting of \$1.25 million in cash and \$6 million in allocations for road projects in Washoe County.<sup>6</sup> Clark County chose to pursue litigation against the state claiming \$102.5 million, which was recently settled with the state agreeing to provide \$35 million to a Clark County airport connector project and adjusting its Medicaid funding formula to save Clark County nearly \$16 million in a short period of time.<sup>7</sup>

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These two settlements totaling approximately \$58.5 million were a byproduct of *Clean Water Coalition*. Together with the extension of sun-setting taxes in the 2011 session, the *Clean Water Coalition*'s reach has extended far beyond the confines of A.B.6 and the CWC's \$62 million. The constitutional limits on legislative power explained in *Clean Water Coalition* will not likely be forgotten by lawmakers when they consider local governmental accounts as a potential source of budget balancing. Unlike past Nevada Legislatures, the 2013 Legislature will not be able to resort to special or local laws to raise revenue for the state general fund. And lawmakers will do well to proceed with caution on legislation that could later be revealed as an unintended tax.

## General Laws Must Be Used

The use of special or local laws as a crutch to balance the state's general budget by confiscating local funds was halted by *Clean Water Coalition*. When general laws can be made applicable, they must be utilized. A "general law" is one that "applies equally to all persons embraced in a class..."<sup>8</sup> If legislators seek to obtain local funds for transfer to the state's general fund, a general law must be drafted rather than taking a more surgical approach by targeting the funds of a particular government entity or locality. Drafting general laws may be possible, but not necessarily easy. Whether the Legislature uses county population levels or some other objective criteria to define the class of local government entities that must pay their funds to the state, any effort at sweeping local funds will require that it apply equally to all persons in the state, within the properly defined class. *Clean Water Coalition* may well be perceived by political subdivisions, counties and municipalities as a protective buffer when the state begins counting local funds during the budgeting process.

## Beware of the Tax Behind the Curtain

Many legislators seek to avoid attaching their names to any legislation that may be characterized as a tax. The assembly bill that targeted the CWC's funds was passed by a super majority, including many lawmakers generally resistant to taxes. However, the Nevada Supreme Court pulled back the curtain on A.B.6 and revealed a tax.

The funds originated as fees for waste water treatment services and utilities paid by residents of southern Nevada. But when the fees were ordered into the state's general fund for statewide use, they became a tax. This is because

the funds were changed from local fees for local services to statewide general revenue to be applied for the benefit of the entire state. The ultimate and actual use of the funds is critical to the determination of whether or not the funds are taxes.<sup>9</sup> Special and local laws cannot be used to assess and collect taxes; taxes must be exacted through laws that are general, and uniform.<sup>10</sup>

*Clean Water Coalition* presents heightened scrutiny for future legislative sweeps, to assure that the legislation is not a tax in disguise. Any Nevada lawmaker pledging to refrain from enacting or increasing taxes must consider whether a legislative sweep is a veiled tax under the *Clean Water Coalition* precedent. This will require attention to the origin of the funds sought, the destination of the funds, the ultimate use and true purpose of the funds and the criteria set forth in the proposed legislation that renders it a general law with uniform application.

## Conclusion

Assessing the relative impact of *Clean Water Coalition* upon the future drafting of legislation in Nevada may best be attempted after the conclusion of the 2013 Nevada legislative session. Hopefully, some improved transparency in legislation directing Nevadans' money to the state's general fund will be the overriding consequence of the unanimous decision by the Nevada Supreme Court. Given the difficult process of balancing the state's budget, we can view the next legislative session as a success, in comparison to the last session, if it concludes without court battles between our state and local government entities over the constitutionality of various budget related bills. ■

- 1 <http://www.rgj.com/article/20110524/NEWS11/110524051/Budget-stalemate-deadline-looms-Nevada-Legislature>.
- 2 <http://www.lasvegassun.com/news/2011/may/27/sandoval-advisor-court-ruling-blows-hole-budget-10/>.
- 3 <http://www.lasvegassun.com/news/2011/may/26/timing-court-ruling-break-budget-stalemate-no-coin/>.
- 4 <http://www.nevadanews-bureau.com/2011/05/27/gov-sandoval-taking-two-pronged-approach-to-addressing-potential-656-million-budget-shortfall/>.
- 5 *Id.*; See "Denied: How a key state Supreme Court decision may change the legislature forever." (Steve Sebelius); <http://www.desertcompanion.com/article.cfm?ArticleID=167>.
- 6 <http://www.nevadanews-bureau.com/2012/09/11/state-board-settles-tax-dispute-with-washoe-county-for-7-25-million/>.
- 7 <http://www.rgj.com/viewart/20121123/NEWS/311230049/Clark-County-state-settle-tax-dispute>.
- 8 *Clean Water Coalition*, 127 Nev. at \_\_\_\_, 255 P.3d at 254; (citing *Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah, 1990)).
- 9 *Clean Water Coalition*, 127 Nev. at \_\_\_\_, 255 P.3d at 259.
- 10 *Id.* at 256; Nev. Const. Art. 4 § 20; Nev. Const. Art. 4 § 21.



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