

**REPORT TO THE  
UTAH LEGISLATURE**

Report No. 99-09

**A Performance Audit  
of  
Asset Forfeiture Procedures**

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# Digest of A Performance Audit of Asset Forfeiture Procedures

There is little support for allegations that police are abusing their authority to seize and forfeit property. Sufficient oversight is provided from law enforcement agencies, internal controls, county prosecutors and the courts to prevent abuse of individual rights. However, some agencies need to improve the oversight and control of property taken into custody. In addition, many agencies are not using asset forfeiture proceeds according to requirements of the **Utah Code**. Although this report provides suggestions for how agencies can come into compliance with the law, legislators may consider clarifying rules for the distribution and use of forfeited assets.

The following summarizes the key findings and recommendations of this report:

## **Forfeitures Do Not Appear to Violate Individual Rights.**

Contrary to what is said by critics of Utah's asset forfeiture laws, the law enforcement community is not abusing their authority to seize and forfeit assets. It has been alleged that in 80 percent of the cases, in which property was forfeited, the owner of the property was not charged with a crime. Our review of 65 asset forfeiture cases show that 91 percent of those from whom property was seized were also arrested and charged with crimes. The remaining 9 percent showed substantial evidence that property seized was used in violation of state law. We conclude the oversight being provided by county attorneys and the courts greatly reduces the likelihood that law enforcement is misusing the statute.

County attorneys can improve the oversight of asset forfeiture by requiring a single deputy county attorney to assume responsibility for prosecuting all asset forfeiture cases. In addition, we question the practice of some law enforcement agencies charging an impound fee on vehicles after the courts have denied a forfeiture request.

## **Recommendations:**

1. We recommend each county attorney assign a single deputy county attorney to oversee all asset forfeiture cases.
2. We recommend law enforcement agencies revise impound charges so innocent property owners are not required to pay to retrieve their property.

**Isolated Asset Management Problems Persist.** Although allegations concerning police abuse of seized property are greatly overstated, some agencies need to improve the oversight of seized property. We were able to locate all of the seized assets in the 65 cases we reviewed, but also found a few isolated problems. There are two task force agencies, in particular, that have problems with the management of seized assets. One agency has been spending seized cash before it is forfeited to them. Another agency has lost items from its evidence room, lost seized cash and retained seized property even though forfeiture against the property was not filed in court within the required 90-day deadline.

## **Recommendations:**

1. We recommend law enforcement agencies adopt and enforce formal procedures for the oversight of seized assets.
2. We recommend law enforcement agencies consider it a conflict of interest for officers to directly or indirectly purchase items seized by the agency.
3. We recommend law enforcement agencies make sure all seized items are placed in a secure environment, such as an evidence room. Contraband and hazardous material should be destroyed if not needed as evidence.

**Forfeiture Procedures Can Be Improved.** Some of the goals of the statute are not being accomplished. The statute requires the courts verify that agencies have a need for forfeited assets before awarding the assets to them, however, this requirement is rarely carried out. In addition, confusion regarding the requirements in the statute regarding the disposal of forfeited assets has led the critics of asset forfeiture laws to misinterpret the statute's intent. They erroneously

claim that all forfeited assets must be deposited with the Utah Division of Finance. Although the statute does not require forfeited assets be deposited with the Division of Finance, legislators may want to reconsider the rules regarding the distribution of forfeited assets so the goals of the statute are accomplished.

The statute also places certain conditions on how forfeited assets may be used. For example, the law requires forfeited assets only be used for enforcing the state's narcotics laws. In addition, proceeds from asset forfeiture must be used to supplement and not replace existing revenues. Finally, proceeds cannot be used to pay informants. We found many of these problems are due to law enforcement agencies not complying with these rules. Agencies often do not treat proceeds from asset forfeitures as restricted funds. This report describes the steps each agency should take in order to comply with the legal requirements placed on forfeited assets.

#### **Recommendations:**

1. We recommend law enforcement agencies maintain a separate account for all funds obtained through state forfeitures or provide other memoranda to document how forfeited assets were used.
2. We recommend law enforcement agencies limit the use of forfeited assets to expenditures which supplement, rather than supplant, their normal operating budget.
3. We recommend law enforcement agencies limit the use of forfeited assets to expenditures directly related to the enforcement of controlled substances laws or to the share of department-wide expenses that can be allocated to the narcotics unit.
4. We recommend the Legislature consider requiring an elected body oversee each law enforcement agencies use of forfeited assets.
5. We recommend the Legislature consider placing limits on the amount of forfeited assets an agency can accumulate. The Legislature could impose a cap on reserves of 25 percent of the agency's annual operating budget and/or require forfeiture proceeds be spent within two years. Excess forfeiture funds could then be distributed to other agencies or programs.

6. We recommend the Legislature consider relocating the oversight for and distribution of excess asset forfeitures to the Commission on Criminal and Juvenile Justice.

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# Chapter I

## Introduction

Contrary to what is said by critics of Utah's asset forfeiture laws, the law enforcement community is not abusing their authority to seize and forfeit assets. Although we found isolated problems with the accounting and management of seized property in a few jurisdictions, for the most part, agencies can account for the assets they have seized. Although the law does not require forfeited assets be deposited with the Division of Finance, we did not find strict compliance with the law nor have the goals of the legislation been fully realized.

### Forfeiture Is a Tool for Narcotics Enforcement

Asset forfeiture is the legal authority government has to take assets that have been used in illegal activity. There are three purposes for asset forfeiture. First, it punishes criminals by denying them the profits from their illegal activities; second, it prevents further illegal activity by denying criminals the tools they need to commit crimes; and third, it helps cover the costs of enforcing controlled substances laws.

Several types of illegal activity can result in the forfeiture of assets. In Utah, however, most forfeitures result from illegal drug activity, and these drug-related forfeitures are the focus of this report. Specifically, **Utah Code 58-37** gives police authority to seize:

- Vehicles used to transport illegal drugs;
- Property used in manufacture or sale of illegal drugs; and,
- The proceeds from the sale of illegal drugs.

While police have the authority to seize assets, the actual award of property is overseen by the courts. Assets are not forfeited until a judge determines through a preponderance of evidence that the assets were used either to transport or manufacture controlled substances or were acquired from the proceeds of illegal activity.

## Utah Law Enforcement Uses Asset Forfeiture

It is difficult to know exactly how many assets are seized and forfeited in the state of Utah each year. Most law enforcement agencies are not required to report the value of assets forfeited to them. However, a significant portion of asset seizures in Utah are made by special narcotics task forces that operate in each county or region of the state. These multi-jurisdictional agencies are supposed to report their forfeitures to the Commission on Criminal and Juvenile Justice (CCJJ) each quarter. Figure 1 shows the amounts of forfeitures reported by each task force to CCJJ for fiscal year 1999.

**Figure 1. Estimated Value of Task Force Asset Forfeitures.** Each narcotics task force reported the following estimated value of the assets forfeited to them in fiscal year 1999.

Fiscal Year In 1999  
narcotics task  
forces in Utah  
received forfeitures  
worth \$726,525

Task Force	Currency	Property/ Other	Vehicles	Weapons	Total
Cache/Rich/ Box Elder	\$ 2,986				\$ 2,986
Carbon/Emery	2,427				2,427
Davis Metro	5,100		10,090	2,175	17,365
DEA/Metro*	62,877		40,491		103,368
Grand/San Juan					
Iron/Garfield					
Kane County	6,400			1,250	7,650
Major Felony	13,338	117,000	10,000		140,338
Sevier/Wayne	18,650		16,070	305	35,025
Uintah/Duchesne	36,998	5,000	10,000	5,000	56,998
Utah County	28,278		1,220	100	29,598
Wasatch County					
Washington Co.	13,064		7,000		20,064
Weber/Morgan	<u>255,303</u>	<u>17,251</u>	<u>36,173</u>	<u>1,979</u>	<u>310,706</u>
<b>Total:</b>	<b>\$445,421</b>	<b>\$139,251</b>	<b>\$131,044</b>	<b>\$10,809</b>	<b>\$726,525</b>

\* Salt Lake County

Source: Commission on Criminal and Juvenile Justice (CCJJ)

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Vehicle forfeitures average \$570, with the most valuable vehicle at \$29,000.

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Figure 1 shows the estimated value of assets forfeited to narcotics task force agencies, a statewide total of \$726,525 for fiscal year 1999. Of that amount, the majority of forfeitures were in the form of cash, with another \$131,044 in seized vehicles. The most valuable vehicle forfeited had an estimated worth of \$29,225; however, we found that such seizures are far from typical. In 1999 the average value of the 230 vehicles forfeited was just \$570.

Although the task forces handle most major drug cases, Utah's cities and counties also have drug enforcement cases which result in forfeited assets as well. The only way to know how much they generate in asset forfeitures is to ask the individual cities and counties. Salt Lake City's Police Department reports they obtained forfeitures valued at \$199,636 in 1999. The vice unit of the Salt Lake City Police Department generated an additional \$14,312 in forfeitures. West Valley City was awarded \$45,304 in forfeitures during calendar year 1998.

Salt Lake City and West Valley City, however, are not typical of most cities in the state. Police chiefs from some of the smaller communities told us they receive only a few thousand dollars in asset forfeitures each year, if that much.

On the other hand, occasionally a small city, county or task force may have a case that results in a large forfeiture. For example, homes are rarely seized in Utah because most drug dealers do not have much equity in the homes in which they reside. Occasionally drug crimes result in the forfeiture of a home with a great deal of equity. While these types of forfeitures rarely happen, they can result in a great windfall to the jurisdiction that investigated the case.

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Utah's largest forfeiture, to date, was \$866,000.

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One Sandy City case, for example, resulted in a large forfeiture. Sandy City Police found \$866,000 in cash and three refrigerators full of marijuana in a storage shed. The money was eventually forfeited and divided between the four local and federal law enforcement agencies connected to the case. Sandy City's share was \$322,370, which is about 40 times the \$6,000 to \$10,000 they normally seize each year.

## **Federal Forfeitures Fall Outside of State Law**

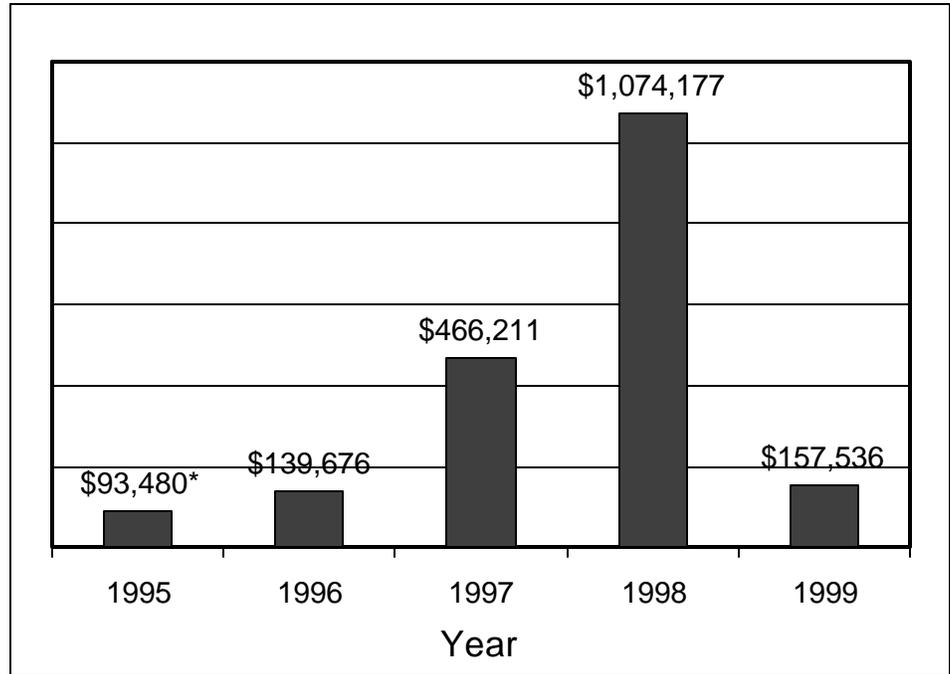
Forfeitures can be prosecuted at the federal level when assets are seized in a criminal case involving local law enforcement agencies and the federal government. For example, the federal Drug Enforcement Agency (DEA) operates a joint narcotics task force called the DEA/Metro Narcotics Task Force. DEA/Metro is a joint operation in which officers from DEA, the Salt Lake County Sheriff's Office and local police departments work together in the same multi-jurisdictional agency. Their forfeiture cases are generally handled through the federal courts. However, sometimes federal forfeitures are handled through an administrative proceeding.

The Federal Bureau of Investigation (FBI) often assists local law enforcement agencies in prosecuting drug cases. These cases usually result in a criminal charge as well as an action seeking the forfeiture of assets. The forfeiture may be handled in federal court with the criminal charges or the FBI may process the forfeiture through their own internal administrative proceedings.

When cases are handled through a cooperative effort between state and federal agencies, the forfeited assets are divided between the agencies according to an "equitable sharing" formula developed by the U.S. Department of Justice. Figure 2 shows the total amount of forfeitures that have come under the federal equitable sharing program since 1995.

**Figure 2. Proceeds from Federal Equitable Sharing in Utah.**

Allocation of forfeitures from cases handled jointly by federal and Utah law enforcement agencies.



\* excludes first three months of fiscal year 1995.

Figure 2 identifies the value of assets that were awarded through the federal equitable sharing program. These are forfeitures that were prosecuted at the federal level. A total of \$1,931,080, or an average of \$399,534 per year has been received for the past five years. The data show wide swings in the amount of federal forfeitures from year-to-year. For example, the rise in 1998 was mainly due to a single case, mentioned previously, which resulted in a total of \$671,429 being awarded to Sandy City and the Salt Lake County Sheriff's Office. Although federal cases can be a significant source of forfeited assets, in most years and for most jurisdictions they are not significant when compared to forfeitures obtained under state law.

**Asset Forfeiture Has Come Under Criticism**

In recent years there has been a growing concern with police authority to take personal property. Critics of asset forfeiture laws have alluded to numerous examples of "innocent" people whose property has been seized,

and are portrayed as victims of an overzealous war on drugs. Critics question whether sufficient controls are in place to prevent police from abusing the privilege of seizing assets because law enforcement agencies directly benefit from forfeiture proceeds. As a result of these concerns, both the United States Congress and the Utah State Legislature have considered legislation which would strengthen the oversight and control of asset forfeiture and limit the circumstances in which assets could be seized by police. Federal agencies report they provide adequate protection to innocent owners and innocent third parties. They say that provisions in federal forfeiture code, as well as a petition process through the United States Attorney General's Office minimize potential abuses.

### **Federal Legislation Is Being Considered**

Concerns about citizens being deprived of private property through abusive forfeiture actions has led certain members of congress to sponsor revisions to federal forfeiture rules. Forfeiture reformers state that "our civil asset forfeiture laws are being used in terribly unjust ways, and are depriving innocent citizens of their property with nothing that can be called due process. This is wrong and it must be stopped." Proposed legislation would place the burden of proof for forfeitures on the government, raise the standard of proof from "preponderance of evidence" to "beyond a reasonable doubt," create a statutory proportionality test, and restrict federal adoptions of state forfeiture cases. In addition, it would shift most civil forfeitures to criminal forfeitures and require all proceeds be deposited into a general treasury.

### **Federal Agencies Report Adequate Controls Already Exist**

Federal forfeiture custodians maintain that current forfeiture code has sufficient controls to prevent abuses and modification is unnecessary. They claim officers are required to have "probable cause" to initiate a search or seizure, and that innocent owner and innocent third party provisions are already built into federal forfeiture code. Federal officials state that abuses are minimal because of a petition process whereby the United States Attorney General has authority to remit property back to innocent owners, third party interests or those who believe their property has been seized unjustly. The U.S. Department of Justice also imposes strict guidelines and rules on how the proceeds from asset forfeiture are to be accounted for and spent.

## **Concerns with Asset Forfeiture Have Been Brought to the Utah Legislature**

During the 1999 legislative session, critics of Utah's asset forfeiture laws testified to the House Government Operations Standing Committee that "80 percent of the property forfeited in the U.S. is seized from owners who are never charged with a crime." They referred to instances where they believe Utah citizens had their property forfeited without charges being filed. They claim that "no-knock warrants, warrantless searches without probable cause, and other forms of 'crime war' zealotry" exist in Utah.

Critics of asset forfeiture frequently site a 1991 report by the Pittsburgh Press which details numerous cases of innocent people losing property, homes or cash to seizures for little or no reason. They claim law enforcement "officers often succumb to budget pressures and the temptation of bounty in the form of seized assets for their departments."

Critics of asset forfeiture also presented legislators with numerous accounts of police abuse to support the following claims:

- Property can be forfeited when the police contract with confidential informants, often convicted criminals who generate secret "evidence." The criminal can then be paid with the proceeds from the sale of the seized property.
- Due process rights are not always respected in forfeiture cases.
- Drug dealers appreciate asset forfeiture because it allows them to trade property derived from the drug trade in exchange for reduced sentences and prison time.
- The conduct of the law enforcement agencies implies no sense of accountability for their actions and no concern for harm done to innocent people.
- One of the state's primary controls over asset forfeiture is not enforced: the law requiring that all forfeited assets be deposited

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**Critics charge that Utah police have abused their authority to seize the assets of private citizens.**

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with the Division of Finance before it can be distributed. This is not done.

- Police are seizing highly valuable assets such as homes, ranches and expensive cars for incidental drug offenses.
- Law enforcement agencies can seize and forfeit property without judicial oversight or approval.
- Innocent bystanders can lose their homes, apartments and other real estate even if they did not know someone else was using illegal drugs on their property.

In order to place tighter controls over asset forfeitures, legislators were asked to consider revising the current statute. However, amendments to the bill could not be completed before the end of the session. In anticipation of a new round of legislation for the year 2000 session, legislators asked for this legislative audit. Audit staff were asked to verify the accuracy of the allegations that made, identify weaknesses in the state's forfeiture laws and determine whether those laws are being followed.

## Audit Scope and Objectives

Audit staff were given the following specific objectives:

1. Determine whether asset forfeiture procedures used by law enforcement agencies comply with state law.
2. Determine if the rights of private property owners are respected when assets are seized and forfeited.
3. Determine if law enforcement agencies follow procedures that ensure proper accountability and oversight of forfeited assets. Of particular interest is whether agencies can account for all assets forfeited.
4. Determine if agencies, with the power to seize assets, are self-funded and/or are under the direction of an elected official.

To accomplish these objectives, audit staff tried to: (1) verify allegations made; (2) review criminal case files involving asset seizures; (3) interview key law enforcement personnel; and, (4) examine financial and budget records documenting the use of asset forfeiture proceeds.

Because most asset forfeitures in Utah are made by special narcotics task forces and local government agencies who enforce the Utah Controlled Substances Act, the case file review was limited to the following jurisdictions:

Three narcotics task forces in urban counties along the Wasatch Front:

- Weber/Morgan Task Force
- Davis Metro Narcotics Task Force
- Utah County Task Force

Two narcotics task forces in rural areas:

- Uintah/Duchesne Task Force
- Central Utah Narcotics Strike Force

Two narcotics units within local government:

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Audit staff reviewed 65 seizure cases statewide, reviewed police procedures, and examined financial records.

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- Major Felony/Drug Unit, Salt Lake County Sheriff
- Narcotics Unit, Salt Lake City Police Department

From each agency, ten criminal cases were selected from those involving the seizure of assets. These included five seizure cases selected at random and five cases with the highest value of assets seized. Because Uintah/Duchesne only had 5 forfeiture cases during FY 1998-99, that was all we were able to review. As a result, the total number of cases reviewed was 65 rather than 70.

We also examined the manner in which each jurisdiction used the proceeds from asset forfeiture. Our financial review was made at each of the seven jurisdictions described above and in three other jurisdictions: the DEA/Metro Narcotics Task Force, West Valley City, and the Utah County Sheriff's Office.

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## Chapter II

# Forfeitures Do Not Appear to Violate Individual Rights

Contrary to what is said by critics of Utah's asset forfeiture laws, the law enforcement community is not abusing its authority to seize and forfeit assets. Law enforcement is not taking the property of individuals without due process. Except in very rare cases, individuals from whom assets were forfeited were also convicted of a crime. We did not find a single innocent bystander who lost their property to asset forfeiture.

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Claims that police abuse asset forfeiture laws are unfounded.

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The critics of asset forfeiture tell a different story. They cite studies which claim 80 percent of those from whom property is forfeited were not charged or arrested for a crime. This large number, they say, shows that law enforcement officers are more concerned about seizing assets than they are about apprehending criminals. Because asset forfeiture is handled through a civil procedure that requires a lower standard of evidence, critics say police pursue asset forfeitures even when they can not prove criminal charges. Critics also claim agencies use administrative forfeiture proceedings to obtain property without having to prove their cases in court.

Our review of dozens of seizure cases revealed that nearly all forfeiture cases coincided with a criminal charge. In addition, appropriate police procedures were used in every case reviewed. Occasionally mistakes are made, but there is sufficient oversight provided by the internal procedures of each law enforcement agency, by the prosecuting attorneys and the courts to prevent officers from being overly zealous in the seizure of property.

Administrative forfeitures are not possible under Utah law. However, two forfeitures of the 65 reviewed were handled through a federal agency's administrative forfeiture process. In both cases the administrative option was necessary because they were handled jointly by a local narcotics task force and a federal agency. The administrative option was not the preferred option of the task force and was not pursued, as some allege, to circumvent state law.

## Controls Over Police Seizures Are Adequate

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Forfeitures receive oversight from internal agency controls, county attorneys and the courts.

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Sufficient controls are in place to prevent law enforcement agencies from abusing their authority to seize assets. First, police officers generally understand the conditions that must be met before an arrest can be made and property seized. In addition, we found that county prosecutors (at least those with expertise in asset forfeiture) provide effective oversight of local law enforcement agencies. If a case is weak or property was seized inappropriately, prosecutors generally are not willing to pursue the case. Finally, because no property can be forfeited without court approval, the courts offer another important control over the seizure practices of local law enforcement.

### Police Officers Follow the Rules

Contrary to what has been alleged, police officers use appropriate investigative procedures and are meeting the required conditions before they seize property. Of the 65 seizure cases reviewed, not a single case was found where police used inappropriate procedures, such as conducting searches without cause or relying solely on the information provided by confidential informants, as the basis for making a seizure.

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Review of 65 police seizure cases found no police abuse.

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In response to allegations that police were violating the rights of individuals when seizing personal property, we conducted a review of 65 seizure cases in seven different law enforcement jurisdictions. In each case we identified events that led up to the seizure of property. In each case, it was determined whether: 1) the police had “probable cause” to seize the asset and 2) if the information provided by a confidential informant was used without any corroborating evidence. In each case, police had probable cause to make the seizure. Although confidential informants were a source of information in many of the cases reviewed, there was not a single case in which police did not corroborate the information provided.

**Police Validate Information from Informants.** Police often use information provided by confidential informants to identify those engaged in illegal drug activity. Critics of asset forfeiture suggest that police can make an arrest and seize property based solely on the information provided by confidential informants. Critics charge that informants are

often convicted criminals who have little motivation to give accurate information because they are paid regardless of how the provided information is used. Although police may follow up on leads if an informant has a history of providing accurate information, we did not find any case in which an arrest was made or assets were seized based solely on information from a confidential informant.

The **Utah Constitution** requires police officers to prove probable cause in order to search a person, home, or vehicle. Utah case law provides numerous examples detailing what is and is not probable cause. The courts, which issue search warrants often require numerous detailed “controlled buys” involving informants. These informants usually wear hidden microphones to record the transaction and purchase illegal narcotics with police-issued cash that have recorded serial numbers. Usually multiple “buys” of illegal narcotics from the same person or residence occur before a search warrant will be issued from a judge.

Police must also show probable cause to search a vehicle as well. Utah case law notes that there must be an “articulable, individualized suspicion of wrongdoing to establish probable cause.” In each case reviewed, the “probable cause” requirement was followed. Police could cite clear probable cause for investigating each of the cases we reviewed.

### **County Prosecutors Provide Oversight of Police Activities**

County attorneys also provide an effective control over the actions of local police and whether seizures are performed appropriately. Because county attorneys are responsible for prosecuting these cases, it is their responsibility to communicate to local police the requirements that must be met if a forfeiture case is to be successfully prosecuted.

In dozens of interviews with police throughout the state, officers were asked to explain the requirements that must be met before property can be seized. Although the practices were somewhat different from county to county, their responses seemed to reflect the policy of the local county attorney’s office and the courts in those jurisdictions.

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Forfeiture practices are often based on local county attorney’s interpretation of previous court actions.

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In the case of vehicle seizures, police enforcement levels are determined by the county attorney's determination of what the local court will allow. As examples:

- In Davis County, the officer must find at least .25 grams of cocaine (equal to one-fourth of a sugar packet found in restaurants), one-eighth ounce of marijuana (equal in size to a roll of dimes) before seizing a car.
- In Uintah County police must find drugs which have a market value equal to the value of the vehicle being seized.
- In Weber County police seize vehicles used to transport any amount of drugs.

While all three practices are consistent with state law, each reflect the different policies of county prosecutors and the courts in those jurisdictions, showing the extent to which the courts and county attorneys influence police procedures.

**County Attorneys Reject Many Forfeiture Cases.** The fact that county attorneys' often reject forfeiture cases suggests that they are providing a level of control over the actions of local law enforcement. For example, the Salt Lake County attorney can identify a dozen recent cases in which he required the seized property be returned. These cases include:

- A case where a seized car was returned to its rightful owner because drugs were found on the driver who was test-driving the car.
- A case where the attorney ordered property returned to a woman whose car was seized for transporting illegal drugs. The woman's father, however, explained that the car was his, showing that his name was on the title, not his daughter's. While there was evidence that the father had given the car to his daughter, the vehicle was returned because it was impossible to prove that she really owned it or that the father knew she was transporting illegal drugs.

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County attorneys  
will not pursue  
forfeiture cases if  
proper procedures  
were not followed.

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Furthermore, it is not uncommon for deputy county attorneys to be on hand at the execution of a search warrant on a major case. Their presence, during seizures, is to make sure correct procedures are followed when

officers make the arrest, gather evidence, and to ensure property is seized appropriately.

**Quality of Oversight Varies from County to County.** It is important to note that the oversight provided by the county attorney is much stronger in some jurisdictions than in others. Counties such as Salt Lake and Weber have a single deputy county attorney who oversees all asset forfeiture cases. These deputy county attorneys have developed expertise in the area of asset forfeiture and are able to provide better oversight than their colleagues in other jurisdictions who do not have that level of expertise. Their expertise makes it much less likely that police in these jurisdictions will make questionable seizures.

In contrast, there are jurisdictions where the responsibility for asset forfeiture is rotated among several deputy county attorneys. Rotation often means attorneys handling task force cases have little experience in asset forfeiture. In our opinion, these counties are at greater risk of having their law enforcement personnel make inappropriate seizures.

### **Courts Provide Additional Oversight of Asset Forfeiture**

Even if an inexperienced county prosecutor pursues a weak forfeiture case, the courts still provide an extra level of oversight. Although critics have said otherwise, all forfeitures handled under Utah statute must be approved by state courts. Under Utah statute, agencies cannot obtain a forfeiture without court approval. Sometimes local agencies work cooperatively with federal agencies where court approval is not always necessary.

Some federal agencies can pursue an administrative forfeiture without taking the case to federal court. We could not identify any instances where local law enforcement transferred cases to federal entities in an effort to bypass Utah's court system.

**Utah Code Requires All Forfeiture Actions Be Filed with a Court of Record.** **Utah Code** 58-37-13 (9) requires all forfeitures to be prepared by the county or district attorney or the Utah Attorney General's Office. The attorney must file the forfeiture action with "a court of record where the property was seized or is to be seized." **Utah Code** also requires all

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The best oversight is in jurisdictions where one deputy county attorney oversees all asset forfeiture cases.

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State forfeitures cannot occur without court review and approval.

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forfeiture cases to be “filed where the criminal charges rose, regardless of the location of the property.”

Federal forfeiture procedures differ markedly from Utah’s asset forfeiture laws and procedures. Federal law allows some federal agencies to seize and forfeit property without judicial involvement. Forfeitures where a federal agency can both seize and forfeit property usually fall under customs laws and “include conveyances used to import, export, transport, or store any controlled substance.” In other words, there are some situations where federal entities can both seize and forfeit property without a court proceeding.

**Utah Forfeiture Cases Have Judicial Oversight.** In each of the 65 cases reviewed, the **Utah Code** was followed. Sixty-three of the cases were prosecuted under Utah law in state courts and the other two were federal seizure cases. Every forfeiture case reviewed included a “Judgement Of Forfeiture” ruling, indicating the forfeiture was reviewed and approved by the court. As a result, we find no support for allegations that law enforcement is forfeiting property without going through the judicial system. Even when there is a plea bargain agreement between the prosecutor and defense, the court must approve any forfeitures.

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Utah courts have  
ordered seized  
property returned.

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Occasionally, plea-bargain agreements are made in which the forfeiture case and the criminal charges are negotiated together. These agreements usually involve dropping or reducing criminal charges in exchange for probation, community service, and/or the forfeiture of any seized property. While there are some who are concerned that prosecutors may agree to reduced criminal charges in exchange for the defendants agreement to forfeiture, such agreements must still be approved by the courts.

**Courts Often Require Seized Property Returned.** Our review of forfeiture cases uncovered many instances in which the judge required police to return property that had been seized. Judicial decisions to return property indicate Utah courts scrutinize forfeiture cases presented to them. For example:

- The court in the Uintah Basin rejected requests for forfeiture in four of the five cases reviewed. Apparently, the judge in that region

has adopted a very conservative set of requirements which must be met before he will grant a forfeiture.

- In a recent case, a U.S. district judge dismissed evidence against the driver of a vehicle who had his car stopped on I-15. The judge ruled that the police officer obtained consent to search the vehicle because “coercive tactics” were used and ordered the vehicle returned.

These cases and others in which the courts have rejected forfeiture claims show the Utah court system is carrying out its responsibility to protect individual rights in asset forfeiture cases.

**Some Federal Agencies Can Forfeit Property Administratively.** Of the 65 seizure cases reviewed, two were handled through administrative forfeitures by the Federal Bureau of Investigation. The practice of allowing an agency to forfeit assets by its own staff led some to question the legitimacy of the agency’s actions. Federal agencies report they provide adequate protection to innocent owners and innocent third parties. Provisions in federal forfeiture code, as well as a petition process through the United States Attorney General’s Office, minimize potential abuses. However, county prosecutors and courts provide a higher level of oversight in the state system. Legislators should be aware that federal legislation is being considered which may alter a federal agency’s ability to conduct administrative forfeitures.

As mentioned, we found two cases that went through an administrative forfeiture. However, these cases fail to show that the administrative process offers less scrutiny and due process. In both cases the defendants were major distributors of illegal drugs. However, forfeitures were not automatic in either case. In one cases the administrative proceedings did not uphold the forfeiture case for most of the seized property. Prosecution of the other case has not been completed because the FBI is attempting to carry out all the required steps necessary to provide due process.

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Federal  
forfeitures need  
not be processed  
through courts.

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## Forfeitures Do Not Victimize the Innocent

Contrary to what some have claimed, local law enforcement is not using Utah's asset forfeiture laws to victimize innocent people. Concerns have been raised regarding the possible violation of rights and due-process of property owners who have had their property seized. Critics claim that property is seized and forfeited without just cause and innocent property owners' rights are being compromised by law enforcement's zeal to curb the drug epidemic. We found little support for these allegations.

### Property of Innocent Owners is Not Forfeited in Utah

Critics of Utah's asset forfeiture laws have given testimony, before a legislative committee, that no criminal arrest is made in 80 percent of the forfeiture cases. Our review of 65 asset forfeiture cases did not find any cases where Utah citizens had property seized or forfeited without being charged with a crime. Ninety-one percent of the seizure cases resulted in arrests and charges against the individual whose property was seized or forfeited. The remaining 9 percent showed substantial evidence that the seized property was used in violation of state law. In addition, we determined that each of the seizures were justified according to **Utah Code**. In each case reviewed the seized property was either: 1) used to transport illegal narcotics; 2) purchased from the proceeds from illegal narcotics sale; or, 3) found in close proximity to illegal narcotics.

**Third-party Property Owners must Know of Illegal Conduct for Forfeiture.** Our sample did not identify a single case where an innocent third party property owner had property seized and forfeited. Critics of Utah's asset forfeiture laws claim innocent third parties can have their property seized by police even if they do not know their property was being used illegally. However, **Utah Code** 58-37-13(h) (ii) does not allow forfeiture of innocent owners property, stating:

*An interest in property may not be forfeited under this subsection if the interest holder did not know or have reason to know of the conduct which made the property subject to forfeiture, or did not willingly consent to the conduct.*

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Difficulty in proving third-party involvement virtually eliminates third-party property seizure.

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Interviews with county attorneys and the Utah Attorney General's Office indicate that the law enforcement community interprets the law to mean that they, not the accused individual, must prove that a third-party owner knew and willingly consented to the illegal activity before their property can be forfeited. Nearly every attorney interviewed commented on the difficulty of proving that a third-party knew or consented to the drug activity. The result is that property used in a crime is usually returned to the rightful owner unless the attorney can prove they knew of the illegal activity. Even if the attorney suspects that the owner was party to illegal activity, if the owner of a vehicle says that he/she had no knowledge that drugs were in their car, the vehicle will be returned.

**Review of Allegations Show No Forfeitures of an Innocent Third-party.** Our review also discredited many of the accounts of wrongdoing told by critics of asset forfeiture. For example, critics cite the case of an elderly couple who owned rental property that was seized when a building inspector found what he thought to be drug paraphernalia in one of the units. We were unable to find instances where this situation, described above, occurred.

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Property seized  
from innocent  
bystanders is  
always returned.

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In contrast, we did find several cases where police did not seize property when they found a third-party owner was not involved in the alleged drug activity. The Weber-Morgan Narcotics Strike Force had a case where nearly one pound of cocaine (439 grams, with an estimated street value of \$44,000) was found. The cocaine and the \$130,000 cash found with the drugs were seized and later forfeited, but never was there any action against the apartment owner. The apartment was never seized and police records indicate the owner had no further dealings with the Weber-Morgan Strike Force once law enforcement seized the cocaine and ill-gotten cash.

Utah forfeiture opponents list another example of abuse where an unsuspecting driver had his car seized because trace amounts of illegal narcotics were found in his vehicle. These drugs were present because of the drug activities of the previous owner. Critics report the car was "seized by the state, never again to be seen by its owner, who was never charged with any criminal act." Again, we were unable to document the source of this allegation. Our case review did show instances where a third party's vehicle was seized but later returned. Law enforcement records also

indicate leased and liened vehicles owned by a dealership or bank were returned to the proper owners.

**Police Commonly Return Third-party Assets.** Not only were there no cases in which an innocent third-party had their property forfeited, there were many cases reviewed where police returned property as shown below:

- An individual who had substantial amounts of marijuana in a truck he purchased three hours earlier from a Utah auto dealership lost his rights to the vehicle because of the amount owed to the dealership. Records indicated the dealership was contacted about the situation and asked to come and pick up the vehicle.
- Property was seized from an individual in the Vernal area who had substantial amounts of narcotics and cash from the sale of illegal drugs. The police seized the person's property, as well as the trailer the accused lived in. However, because the accused was delinquent on his child support payments and owed a substantial amount in back payments, the police department and county prosecutor decided not to pursue forfeiture of the property but asked the court to award it to the ex-wife as payment for needed child support monies.

These examples, as well as others reviewed, indicate police are making an effort to handle forfeiture cases appropriately and are not as aggressive in pursuing forfeitures as some have claimed.

**Police Did Not Seize Elderly Woman's Home.** Forfeiture opponents' statements of police abuse appear exaggerated. Testimony outlining alleged asset forfeiture abuses to the Utah House of Representatives Government Operations Standing Committee cited a recent case in Salt Lake County where an elderly woman's home was "confiscated and forfeited" because her son was manufacturing methamphetamine "in an outfield." It was reported that the Utah Coalition of Senior Citizens was asked to find a place for the woman to go because the police were evicting her and forfeiting her home. Testimony stated that "no charges were ever filed against that lady, and it's just not right to take innocent people's property."

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Allegations of elderly woman's home being forfeited was unfounded.

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Court documents, however, indicate that the woman was never removed from her home. The home was not forfeited and the woman still retains full ownership. The Salt Lake County Attorney's Office did become a temporary trustee of the property to legally prevent her son from residing at the home. The son's repeated manufacture of methamphetamine on his mother's property and safety concerns for his mother and the 19 children in the neighborhood were reasons given for preventing the woman's son from living at her residence.

Police had legal grounds to forfeit the property, yet chose not to. Court documents show that

*"the registered owner of said residence has knowingly allowed her son to continuously use the premises for the manufacture and production of methamphetamine, a Schedule II controlled substance, despite two warnings from law enforcement and despite an explosion and fire at the premises. The real estate is being used, with the owner's knowledge and acquiescence, to manufacture, produce and distribute methamphetamine."*

### **Impound Fees on Returned Vehicles Unfair**

We question the fairness of imposing a fee when assets are seized and then returned without a forfeiture ruling from the courts. It is a common practice to charge a daily impound fee or even a flat \$250 fee even when the vehicle turns out to be owned by an innocent third party and the case is either not pursued or the forfeiture is denied by the court. While not as serious a problem as other claims made by asset forfeiture critics, we question whether it is fair to charge an impound fee to innocent people who have their property seized.

### **Police Have Not Been Overly Aggressive**

The critics of Utah's asset forfeiture laws have inaccurately portrayed the law enforcement community as being overzealous in their efforts to seize assets. They claim because proceeds of asset forfeiture directly benefit law enforcement, police are overly aggressive in the pursuit of property. They claim law enforcement is so aggressive in their pursuit of financial gain

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Police do not seize high-value property for minor violations.

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that they seek forfeiture of highly valuable assets for relatively incidental narcotics laws violations.

We found law enforcement officers generally recognize they benefit from asset forfeiture. However, individually there is little benefit to the officers. Because it may take several years to prosecute a case, the agency they work for see no immediate benefit from their actions. In fact, because most seized assets are of such a small value, police often regard asset seizure as being more trouble than it is worth. To a certain extent the misperception about asset forfeiture is created by news accounts which portray police as being overly aggressive and defendants as victims.

Our case review indicates law enforcement's primary concern is ridding communities of crime rather than enlarging departmental budgets through asset forfeiture. When taken on a case-by-case basis, we found initial seizure and subsequent forfeiture rulings issued through the courts appear appropriate and police are not seizing highly valuable assets for minor violations. We did not encounter instances where law enforcement were overly aggressive or excessive in their initial seizure and forfeiture filings. In Chapter IV we do express concern that some departments do rely heavily on forfeiture monies to keep their drug interdiction programs running. Reliance on forfeiture monies could be a serious problem if no oversight was being provided by prosecuting attorneys and the courts.

### **Valuable Assets Are Not Seized for Minor Offenses**

Interviews with county attorneys seem to support our findings that police are not seizing valuable assets for relatively minor drug infractions. In addition, our case file review did not reveal any instance where highly valuable assets, such as homes or cars, were seized and subsequently forfeited for small violations.

Davis County, for example, has minimum illegal narcotics requirements before a vehicle can be seized. Davis Metro Narcotics Strike Force vehicle seizures require that there must be at least 1/8 ounce of marijuana or more (equivalent in size to one five-dollar roll of dimes), and/or 1/4 gram or more (equivalent to 1/4 of a sugar packet found in restaurants) of methamphetamine, cocaine, "crack" or heroin before a vehicle can be seized. County attorneys state that they will not take cases into court that appear weak or excessive.

Salt Lake City Police Department and the Salt Lake County Attorney generally will not seize property for forfeiture unless at least \$500 worth of narcotics are found. Because of the high cost of storing and maintaining assets until the forfeiture case has made its way through the courts, some agencies have minimum narcotic quantity or dollar value standards.

### **Seizures Are Often a Drain on Law Enforcement Agencies**

Our case review did not reveal large dollar amounts being forfeited but showed those convicted of drug crimes had relatively few assets. Reports from the seizing agencies indicate many forfeitures do not provide a large amount of cash, vehicles and other valuable property. Instead, the average vehicle that is seized is only worth \$570. In addition, many criminal cases result in the seizure of relatively low valued items. Often seized property with a low dollar value is a problem because the court process can take a long time before law enforcement can liquidate the assets. When agencies are finally able to sell or auction forfeited property, there isn't much value left over for the drug unit once impound fees and upkeep costs are paid.

Many agencies stated that often it is not worth their time to seize property unless significant amounts of drugs are involved. Motivation for seizing homes does not appear to be for financial gain, but to rid communities of institutionalized drug houses that plague neighborhoods. Many of the cars, homes and other assets initially seized are contaminated with toxic chemicals, so law enforcement often decide not to seek forfeiture because of the high cost and potential liability of maintaining those assets.

### **Law Enforcement Can't Publicly Comment on Forfeiture Cases**

One reason why the public may get the impression that law enforcement officers are overzealous when they seize assets is that the police can not defend themselves in public when a case is in court. While private citizens have the ability to speak to the press about cases against them, prosecuting attorneys and law enforcement officers are prohibited from disclosing information about the case, including evidence found and the reasons for seizing the assets. The courts take the position that a person is "innocent until proven guilty," and that public comments about a case by prosecutors and police may inhibit the individual's ability to receive a fair

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News reporting of police seizures often relies on one-sided information.

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and impartial trial. The inability of law enforcement officials to correct misinformation given to the public may have contributed to the perception that private citizens can have their property seized for seemingly minor infractions of the law. Limits on the amount of information law enforcement can offer is reflected in news accounts which primarily focus on the case from the defendant's point of view.

**Some News Accounts Are Unfounded.** We encountered several cases where seizures of property have been reported as being excessive when, in fact, law enforcement was acting appropriately. One case brought to our attention was the seizure of a 160-acre ranch in Garfield County. The county's law enforcement officers obtained information about marijuana growing on the individual's property, obtained a search warrant and found the illegal crop. The property was seized and forfeiture proceedings were to take place after the individual's case was adjudicated. Forfeiture opponents and the defendant expressed outrage as they characterized the seizure as a "land grab" to "liquidate the ranch" when "you could hold that entire bundle of 67 [marijuana] plants in one hand." Some media reports made it appear that the forfeiture of a ranch for such a small amount of marijuana was excessive and not proportional to the crime.

The accused repeatedly stated that he did not know the marijuana was growing on the property, as it was growing in a thicket of trees not far from a trail leading to public lands behind his property. He stated, "*I can't believe they're trying to take [the ranch] away from me; I didn't even know the [marijuana] was growing there.*" He also stated that "*plants need tending,*" and the marijuana could have been planted by tourists who occasionally used his ranch.

However, court documents reveal that the marijuana crop had a fence around it, complete with a watering system, gardening tools to aid in its growth, and rat bait to keep rodents from destroying the crop. Marijuana starts were found in the shed along with a watering can. Marijuana and numerous bags of seeds, some labeled "best seeds," were found throughout the defendant's home.

Racks for drying the harvested marijuana and "seal-a-meal" type machines for packaging the marijuana for transport and sale were also found at the home. Other evidence also indicated the individual was heavily involved in the sale and trafficking of contraband narcotics. Relatively little, if any,

of the evidence listed above was ever made public because of law enforcement's and the prosecuting attorney's inability to comment on the particulars of the case. This example is simply one of many cases where reported information differed significantly from the case particulars.

In conclusion, law enforcement agencies are not guilty of an overzealous desire to obtain forfeited assets. There is sufficient oversight provided by internal agency controls, county prosecutors, and the courts to protect individual rights. Chapter III discusses the management of forfeited assets and shows where controls over seized property can be improved.

**Recommendations:**

1. We recommend each county attorney assign a single deputy county attorney to oversee all asset forfeiture cases.
2. We recommend law enforcement agencies review impound charges so innocent property owners are not required to pay to retrieve their property.

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## **Chapter III**

# **Isolated Asset Management Problems Persist**

Although we found nothing as serious as the allegations that have been made, Utah's law enforcement community can still make a few improvements in their oversight of seized assets. We were able to locate all seized assets in the 65 cases reviewed. However, we did find a few isolated problems. Two task force agencies, in particular, have problems managing seized assets. One agency has been spending seized, but not yet forfeited, cash. Another agency has lost items from its evidence room, lost seized cash, and has retained property after the filing date for a forfeiture has passed.

### **No Abuse of Seized Assets Found in Review of Cases**

Procedures for handling seized property, at most law enforcement agencies, are sufficient to ensure that property is not lost or abused. This conclusion is based on our review of accounting for seized property from 65 criminal cases in seven different jurisdictions. In addition, we reviewed controls over seized assets in each of the seven jurisdictions and in three other law enforcement agencies as well. For the most part, all ten agencies had necessary safeguards to protect assets they had seized.

Our review focused on three main areas:

- Cataloging Seized Assets
- Property Kept in a Secure Environment
- Proper and Timely Disposal of Seized Property

#### **Cataloging of Seized Assets Appears Proper**

With few exceptions, each of the law enforcement agencies we audited were able to adequately account for the assets they had seized. In each

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Review of cases  
found proper  
safeguards over  
seized assets.

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Seized cash is either invested or secured in safes.

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case, all of the seized vehicles, cash, and personal property were quickly located and inspected, or records relating to the sale or return of the property were available.

**Seized Cash Is Deposited in a Financial Institution or Kept in a Safe.**

In each case reviewed, we were able to verify that each deposit of seized cash matched the amount listed in the police reports. When cash is seized, two or more officers usually make an immediate, on-site count of the currency. Some agencies even video tape the actual counting of the money in order to document the process. Typically, seized cash is then placed into a safe for a day or two until the county prosecutor decides whether it needs to be returned to the owner, retained as evidence, or deposited in a bank. In most cases, seized cash is deposited within a few days into an interest-bearing account maintained for seized cash only.

In some of the cases we reviewed the courts had already awarded the cash to the seizing agency. We verified whether there was a forfeiture judgement awarding the cash to the agency and whether the correct amount had been transferred from the seizure account into the agency's regular account. Of the 65 cases we sampled, there was no instance of erroneous accounting of seized cash.

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Except in rare circumstances, seized cash should be deposited in a bank.

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Some law enforcement agencies are unsure how to handle seized cash. A few agencies keep the money in a safe or even in the evidence room with all of the other evidence seized in the case. While there is nothing illegal about placing seized cash in a safe, the courts have ruled that it is acceptable to deposit seized cash in an interest-bearing account. In order to document the deposit was made, agencies should keep the deposit slip with the case records. Holding a deposit slip as record appears to be an acceptable approach to handling seized cash.

**Vehicles Are Kept in Secure Impound Lots.** We verified that each seized vehicle was in the possession of the seizing agency and was properly safeguarded. If the courts had declined the request for forfeiture, we verified that the vehicle had been returned to the owner. If the vehicle had been forfeited to the agency, we verified that the agency had a forfeiture judgement and that the vehicle had been sold through a public auction.

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Each seized vehicle was found on the agency's impound lot.

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Each agency is storing its seized vehicles in a secure environment within a fenced and gated impound lot, with access to the lot strictly controlled.

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Delays make it difficult to keep seized vehicles in working condition.

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Many seized vehicles have such large outstanding loans on them that the agencies immediately turned them over to the lien holder. In a few cases, we discovered that prosecutors declined to seek the forfeiture when they realized that it would pose an inconvenience to the family of the person from whom the vehicle had been seized. Each agency was also able to provide documentation showing that these vehicles had been returned.

One concern is that seized vehicles are not always receiving the care necessary to maintain their value. It is in the best interest of the agency to properly maintain seized vehicles. We found a few seized cars that had been in police impound lots for two or three years. Even though each of the agencies we visited reported that they winterize the vehicles in the fall, many appear to be deteriorating from lack of care. Although most acknowledge that a lack of maintenance is a problem, they tend to blame the lengthy court process or inaction by county prosecutors for delaying resolution of forfeiture cases, and, thus, improper care of the vehicles.

**Property Is Kept in a Secure Environment.** Each agency was also able to locate all personal property seized in the cases we reviewed. Personal items are seized by police if there is reason to believe that they have been used to commit a crime, purchased from the proceeds of illegal drug sales, or can be used as evidence.

Personal items most often seized include materials used to package and make illegal drugs, or to carry out their associated illegal activities. These items might include kitchen utensils, cell phones, pagers, scales, drug paraphernalia, and packaging material. Police may also seize personal items if officers can show they were purchased with the proceeds from illegal drug sales. For example, police have seized stereos, televisions and a wave runner that were shown to have been purchased from the proceeds of drug sales. Generally, personal items are kept in the agency's evidence room or impound lot.

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Improper storage of hazardous chemicals puts officers and other evidence at risk.

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**Improper Storage of Hazardous Materials.** We did find a few evidence rooms where hazardous chemicals were being stored. Storage of these chemicals can create a hazardous environment and pose a danger for evidence room staff. For example, crystal iodine is a precursor chemical for making methamphetamine. One Salt Lake County health department official explained that crystal iodine is a material that must be handled with great care. The National Institute for Occupational Health has also issued

warnings about the health hazards of exposure to crystal iodine. However, we found two instances in which crystal iodine was being stored, without any special treatment, along side regular items in the evidence room. In both cases, we observed a leeching of yellow iodine stain on other items close to the container holding the crystal iodine.

We strongly recommend each law enforcement agency work with their county health department to ensure items maintained in their evidence rooms are handled and stored safely. In addition, each agency should work with their county prosecutors to determine whether all precursor chemicals and narcotics really need to be kept as evidence or whether some items can be tested by the crime lab and then destroyed.

### **Isolated Problems at Two Agencies**

Although each of the items in our test of seizure cases was properly accounted for, we found a few situations outside our case review that suggest at least some seized assets are not properly safeguarded. Many of the problems were brought to our attention by law enforcement officials themselves who had already taken corrective action.

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**Two agencies have had problems with improper care of seized assets.**

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The most serious problems were found with the narcotics task forces in Davis County and Utah County. The Davis Metro Narcotics Strike Force has been spending seized cash before the courts have formally awarded it to them, which is not in keeping with the state statute. In addition, the Utah County Major Crimes Task Force has a history of problems with the management of its seized assets. Several years ago the agency took custody of some items without going through the forfeiture process. More recently, the task force discovered a discrepancy of \$1,900 between the amount of seized cash in its vault and the amount listed in police reports. We also found several seized items that were being held by the Utah County Major Crimes Task Force even though the deadline for filing a forfeiture had passed.

### **Some Seized Cash Has Inappropriately Been Used Before Being Forfeited by the Courts**

The Davis County Metro Narcotics Strike Force has inappropriately spent seized cash before it has been formally forfeited to them by the courts.

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A Davis County task force has used seized cash inappropriately.

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Ideally, seized funds should be deposited into a special holding account until they are forfeited by the courts. Instead, the Davis Metro Narcotics Strike Force deposits seized cash directly into its regular savings and checking accounts. The seized cash is then used to help pay the agency's normal operating expenses even though the courts have not given them formal custody of the seized cash.

Task force officials told us that they recognize not all seizures will result in a forfeiture and that some of the seized cash may need to be returned. When required to return seized cash, the task force charges the return as an agency expense.

The practice of using seized cash before it is forfeited is not consistent with the requirements of the **Utah Code**. Seized property, including cash, cannot be considered the property of a seizing agency until the courts say it is. Specifically, **Utah Code** 58-37-13 (5) states:

- (5) Property taken or detained under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this chapter, the appropriate person or agency may:*
- (a) place the property under seal;*
  - (b) remove the property to a place designated by it or the warrant under which it was seized; or*
  - (c) take custody of the property and remove it to an appropriate location for disposition in accordance with law.*

The above section of the statute requires agencies to properly safeguard seized assets, either in a safe or in a separate holding account, until the courts decide whether they are to be forfeited or returned to the person from whom they were seized. Only after the court awards it to the agency may the cash then be deposited into the agency's own account and used to supplement narcotics enforcement efforts.

### **Seized Assets Sold Without Forfeiture Judgements from the Courts**

One of the allegations we were asked to investigate was that the Utah County Narcotics Enforcement Team (the predecessor to the Utah County Major Crimes Task Force) had taken seized property without

obtaining a forfeiture judgement from the courts. We verified that the task force did in fact sell the seized property without a court-ordered forfeiture judgement. We also found that some but not all of the proceeds from the sale of that property were deposited in the task force accounts. It was impossible to verify what happened to the funds that were not deposited into task force accounts.

This allegation concerning the Utah County Narcotics Enforcement Team (NET) came from a distributor of chemical products and lab equipment in Orem. From 1988 until 1990 the chemical company helped the DEA and the NET apprehend those who came to the company seeking the opportunity to purchase precursor chemicals for the manufacture of methamphetamine. When individuals asked to purchase such chemicals and when there was evidence that they planned to use the chemicals for the manufacture of illegal drugs, the employees would then report the customer to the local authorities who would apprehend them.

Former employees of the company provided us with documentation showing NET officers made several seizures of chemicals and lab equipment that had been sold by the company. The documents also show that soon after the seizures were made the police returned the seized property to the chemical company and requested that the company buy back those items. The allegation was that the items were being returned before NET officers could have obtained a forfeiture judgement from the courts. In addition, the employees of the chemical company report that some of the payments to NET were made in the form of cash, and they suspect the cash was never deposited into the task force's account.

We interviewed a number of former NET officers who told us that there had been an understanding that the chemical company would buy back the chemicals and equipment from officers after they had seized the materials from those attempting to make illegal purchases. They acknowledged that these returns were often made within days of a seizure. We were told that at the same time the task force was making these returns of chemicals and lab equipment, they were also investigating the chemical company for making illegal sales behind the backs of police with whom they were supposed to be cooperating.

Former NET officers acknowledged that it was probably not the best practice to sell seized items without a forfeiture judgement and to sell the

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Agency sale of non-forfeited chemicals was inappropriate.

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Proceeds from inappropriate chemical sales could not be accounted for.

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chemicals back to a company they suspected of wrong doing. They told us that they decided to resell the chemicals because they were considered hazardous and were difficult to store safely. NET officers also explained they needed the funds to help support the task force.

We tried to verify whether three payments to the NET were deposited into the appropriate accounts. Pleasant Grove City was managing the finances of the NET at that time and was able to provide documentation that one of the payments was deposited into the NET's account. However, no evidence of deposits for two other payments existed. One payment, a check for \$2,612.16, was personally endorsed by the task force director and deposited at a bank which was not the bank where Pleasant Grove City had its accounts. The other payment was \$881 and appears to have been made in cash. We could not find a deposit corresponding to that amount in the NET accounts.

Some officers formerly associated with the NET told us that the former director may have maintained a separate account for seized cash at another bank which was outside the purview of Pleasant Grove City. However, we were unable to identify any records mentioning this account or how those funds might have been spent. Task force minutes from that time period suggest that the NET was not keeping track of how much seized property had been acquired and how it had been spent once forfeited.

### **Evidence Missing from the Evidence Room**

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Lack of evidence room controls resulted in missing evidence.

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In early 1998, the Utah County Major Crimes Task Force discovered items missing from its evidence room at their headquarters at the Pleasant Grove Police Department. When they first suspected a problem, they invited the Utah County Sheriff to conduct an inventory of all items in the task force evidence room. The investigation resulted in a report identifying six pages of cases with missing items.

Since the County Sheriff's report was released, the Pleasant Grove City Police Department (who had provided administrative support to the task force) has attempted to locate the missing items. They determined that some of the items shown as missing were, in fact, the result of poor record keeping. They claim that the task force didn't lose the items, they just didn't keep adequate records of when the items were forfeited to the agency or returned to the owner.

The Pleasant Grove Police Department still has not been able to identify what happened to many items, such as large quantities of pills. Some Pleasant Grove Officials suspect that former members of the task force may have taken the items.

In retrospect, officials from the task force and the Pleasant Grove Police Department recognize that they did not have adequate controls over the evidence room. Although the evidence room was locked, the key for the room was readily available to any officer who needed to get an item. They simply got the key from the receptionist's top desk drawer. In addition, no attempt was made to account for the flow of items in and out of the evidence room. The lack of adequate controls, combined with an attitude that members of the task force could trust each other, resulted in the possible theft of at least some evidence room items.

During the past year, the Utah County Sheriff has been maintaining evidence and seized property collected by the task force. The new evidence room has secure access, items are well organized and a careful record is made of each item that enters or leaves the evidence room. As a result, we had no difficulty finding each piece of property identified in our case review.

### **Missing Cash Has Resulted in Asset Losses**

Officials from the Utah County Major Crimes Task Force also report that they found a discrepancy between the amount of seized cash in their safe and the amount that was supposed to have been seized. The task force once kept all seized cash in a safe located at its headquarters. In the spring of 1999, the amount of seized cash had grown to about \$140,000, and it was decided that the cash needed to be deposited into an interest-bearing savings account. However, when they counted the money in preparation to make the deposit they discovered the actual cash held was \$1,900 less than the amount recorded in the police reports.

The agency believes that there are two cases which account for the lost cash. In one case, the cash appears to have been sealed in an evidence bag and left by mistake at the seizure site. In another case, the task force believes that the cash was not correctly counted after it had been seized. However, neither case could be verified.

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Improved  
procedures needed  
for counting seized  
cash in the field.

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Recently, the task force began placing all of its seized cash into a separate account managed by Orem City. We have spoken with the accountant at Orem City and reviewed the procedures used from the time cash is seized until it is deposited with Orem City. We believe that the controls are now in place to properly safeguard seized cash.

Several law enforcement agencies have stated that it is often difficult to make an accurate on-site count of seized cash. Such seizures often occur while police are carrying out a search warrant late at night, in locations not well suited for accurate accounting. Rather than trying to count the cash at the site, some agencies are exploring alternative cash-handling procedures. One such method involves collecting and sealing cash on-site and counting it later in a controlled environment.

### **Property Has Not Been Returned to Owners**

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Poor communication  
between task force  
and attorneys has  
resulted in cases not  
being filed, property  
not being returned.

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Although we reviewed ten of the Utah County Major Crimes Task Force's seizure cases and verified that they could account for each item seized, in two of the cases the task force should not have had the property to begin with because the forfeiture action had not been filed within the required time frame. **Utah Code 58-37-13 (4)** requires forfeiture cases be filed in a state court "within 90 days of the seizure." In one case, a forfeiture action was filed a year after the seizure had been made. In another case, task force officials thought the case had been sent to the county attorney. However, when we visited with the county attorney's office, they did not have the case on file. As a result, this second case also was not filed within the required 90-days of the date the items were seized.

Because of the mis-communication between the task force and the county attorney's office, the task force has seized property in its custody that they will probably not be able to forfeit. It is possible, however, that the court could grant an exception or that the defense might allow the forfeiture be included with the criminal charges in a plea bargain agreement.

To avoid repeating this problem, the task force and the county attorney need to improve their communication with each other. We did not find this problem in counties where a single deputy county attorney was responsible for all cases coming out of the county's narcotics task force.

## Allegations of Abuse Are Overstated

Although allegations that police use seized property for their personal use are overstated, we did find support for a few of these allegations. While the problems are not as serious as have been alleged to legislators, they do suggest that law enforcement agencies need to strengthen their controls over seized property.

We reviewed specific allegations that officers were abusing or misusing seized property. The allegations focused mainly upon the following:

- Seized assets having been lost or stolen.
- Law enforcement officers have taken seized assets for their personal use.
- Seized assets have been sold through below-market sales to officers, their friends and families.
- Seized assets are not maintained in order to preserve asset value.

Our review revealed that most allegations of abuse were either incorrect or overstated. We verified some of the stories of officers abusing or stealing property that had been seized. We found that these cases were actually quite rare and were many years old. In addition, officers who were found abusing seized property have been prosecuted. Allegations of abuse are not as wide spread as some have suggested and that a system is in place to hold officers accountable when they do misuse seized property. There have been enough problems, however, to suggest that law enforcement agencies need to improve controls over seized assets.

**Three Instances of Officer Abuse of Seized Property.** We verified three instances where enforcement officers were alleged to have used seized property for their personal use. In two instances the officers were terminated for their behavior. In the third case of reported missing evidence in Utah County Major Crimes Task Force, officials found the evidence missing but could not verify, due to poor controls over the evidence room, which officer, if any, had taken the missing items. While these cases show that law enforcement agencies are prepared to take action against officers who misuse seized property, it also show that controls over

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Allegations of  
forfeiture law  
abuses are  
incorrect or over-  
stated.

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Prohibiting police officers from purchasing forfeited assets would help reduce criticism.

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seized property may need to be enhanced. Because our review did not identify any evidence of officers using seized property for personal use, we believe that the problem is not widespread as some would have legislators believe.

**Below-market Deals Are Rare.** Although it is an exaggeration to say that police commonly purchase seized property through an inside sale for below-market prices, our review identified a few isolated cases of police purchasing forfeited property at questionable prices. We found most forfeited property is sold to the public at police auctions. If well advertised, such sales should guarantee that the police department is getting a market price for the seized items. However, some agencies report that their police officers are allowed to purchase items sold at auctions, but they must bid on the items as any member of the public would.

There is no Utah law prohibiting police officers from purchasing items at a public auction, but it does appear to be a questionable practice. To avoid criticism, Utah's law enforcement community may want to adopt a policy similar to one recommended by the California District Attorney's Association that "no department personnel shall purchase, directly or indirectly, property seized by the agency."

Officials with the Utah County Major Crimes Task Force told us that several years ago officers were allowed to directly purchase items that had been forfeited to the agency prior to the auction. We were unable to determine whether the items were sold at a fair market price.

**Some Officers Collect Drug Paraphernalia.** Some police officers collect drug paraphernalia and other contraband as souvenirs. The headquarters of one narcotics task force is decorated with dozens of glass "bongs" and other glassware used to consume marijuana and methamphetamine. In addition, the office walls were decorated with posters and other art from the drug culture. Another task force also had several items of paraphernalia on display in their offices and even a few pots of live marijuana plants growing in a window.

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Contraband should be destroyed, not put on display.

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Apparently, the items we observed had been seized along with other evidence in drug cases. However, the items should either have been handled as evidence or destroyed as contraband rather than being placed

on display as souvenirs. Even though it is a minor concern, this behavior exposes law enforcement officers to criticism that they use property seized from criminals for their own purposes. When we expressed concern about this practice, both agencies made a commitment to place all seized items into evidence and contraband would be destroyed.

## **Formal Procedures For Seized Assets Are Needed**

The Weber/Morgan Narcotics Strike Force was the only agency we audited that had a set of written policies and procedures regarding the seizure of assets. Several law enforcement officials told us that it is too difficult to keep a set of written procedures because the rules frequently change as new court rulings are issued.

Several agencies use internal memoranda to staff to describe the procedures that should be used when investigating a case, making an arrest, and seizing a person's property. Often these memoranda are used in court as evidence that the officers were conducting themselves according to policy. We question how a law enforcement agency can operate effectively without formal policies and procedures. Without policies and procedures, it is difficult to communicate the agency's expectations to staff and to show the public and the courts that officers are using appropriate procedures.

In view of the problems we found with the oversight of seized assets, law enforcement agencies should consider adopting a formal set of policies and procedures for the management of seized assets. Requiring officers to follow such procedures will also help the public feel confident that police are not abusing their authority when seizing the property of individuals. They should consider our list of the best practices that we observed among Utah law enforcement agencies as found in Appendix A.

### **Recommendations:**

1. We recommend law enforcement agencies consider adopting and enforcing formal procedures for the oversight of seized assets. As a minimum, these procedures should address:
  - a. Safeguarding and accounting of property seized in the field.
  - b. Placement of seized property in a secure environment.
  - c. Preservation and maintenance of seized property.
  - d. Proper disposal of seized and abandoned property.

2. We recommend law enforcement agencies consider it a conflict of interest for officers to directly or indirectly purchase items seized by the agency.
3. We recommend law enforcement agencies insure all seized items are placed in a secure environment such as an evidence room. Contraband or hazardous materials should be destroyed if not needed as evidence.
4. We recommend task forces meet with their county attorneys to explore alternatives for the accurate and secure handling of seized cash.

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## Chapter IV Forfeiture Procedures Can Be Improved

Confusion over Utah's asset forfeiture statute has made it difficult for law enforcement agencies to strictly comply with the rules regarding the distribution and use of forfeited property. Confusion about the statute has also led critics of asset forfeiture to misinterpret the statute's intent and has led them to make unfounded allegations that agencies are not complying with the law.

A primary goal of the forfeiture provisions in the **Utah Controlled Substances Act** is that forfeited assets should be used to supplement an agency's existing funds for drug enforcement. In addition, the law establishes conditions for deciding which agencies should receive forfeited property and how the proceeds from asset forfeiture can be used. If an agency can not demonstrate a need, the assets must be deposited with the Division of Finance.

We found no support for the allegations that agencies are failing to deposit all forfeited property with the Utah Division of Finance. We compared the requirements of the law with the manner in which forfeited property is distributed by the courts. We also examined how law enforcement agencies use their forfeited assets. Although the law does not require forfeited assets be deposited with the Division of Finance, we did find there has not been strict compliance with the law nor have the goals of the legislation been fully accomplished.

### Statutory Changes Needed for the Distribution of Assets

If the Legislature wants to continue placing limitations on when an agency can receive forfeited assets and how those assets can be used, some clarifications may be needed. The requirements in the statute are not broadly understood, nor does it appear effective in accomplishing its objectives.

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Legislature should  
adopt new rules for  
the distribution of  
seized assets.

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The intent of **Utah Code 58-37-13 (8)** is that forfeited assets should go to agencies that can use them in the enforcement of the state's controlled substances laws. In addition, the proceeds from asset forfeiture are supposed to supplement rather than replace an agency's existing funds for narcotics enforcement. These rules were adopted so that forfeitures could help pay the cost of enforcing the state's narcotics laws while requiring that agencies maintain a certain base level of funding. Preserving that base level funding is necessary to prevent agencies from becoming too dependent on forfeitures as a source of basic operating revenues. Otherwise, agencies might be placed in the difficult position of having to increase the number of asset seizures in order to maintain their funding.

Unfortunately, the objectives of the statute are not being accomplished because the rules are either ineffective or they are not being followed. This section of the report asks the Legislature to review the requirement in **Utah Code 58-37-13 (8)(a)** that the courts issue a "finding that the agency can use the forfeited property" before it can be awarded. We believe that the courts are not providing the level of oversight that the statute intends. As a result, some law enforcement agencies have accumulated large balances in their forfeiture accounts. Later in this chapter we describe how agencies are using these funds and how some uses are not in compliance with the statute.

### **Statutory Intent Has Been Reduced by Misinterpretation**

Critics of Utah's asset forfeiture laws have expressed concern that forfeited assets are not being deposited with Utah's Division of Finance as required by law. In fact, depositing of forfeited assets with the Division of Finance is not a requirement of the statute. Rather, this allegation is due to a misinterpretation of the statute. Utah's statute establishes a mechanism for: 1) deciding whether assets can be forfeited; 2) determining if the seizing agency has a need for those assets; and, 3) assigning those assets to either the seizing agency or the Division of Finance. The Legislature may wish to reconsider whether the division is the best agency to handle unclaimed assets.

**Misinterpretation of Utah's Asset Forfeiture Statute Has Resulted in Unfounded Allegations.** Utah's statute does not require that all forfeited assets be deposited with the Division of Finance, as some claim. Those who make this claim are misinterpreting the statute. The only

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Forfeited assets do not have to be deposited with the Utah Division of Finance

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circumstances in which forfeited property might be awarded to the Division of Finance are when: 1) the court decides that the seizing agency cannot use them; or, 2) the seizing agency does not apply for the forfeited assets.

During the 1999 legislative session, critics of asset forfeiture told legislators that local court and law enforcement officials are not complying with the statutory requirement that all forfeited property be deposited with the State Division of Finance. Information distributed at that time stated:

*The Legislature has specified that forfeited property **shall** be deposited in the custody of the Division of Finance (reference 58-37-13(8)). The Division of Finance is then empowered, upon application, to transfer the property to the seizing agency, or other applicants if the seizing agency doesn't apply. The prosecuting agency is reimbursed prior to the property transfer.*

Because the Division of Finance has not received any forfeited property, critics of Utah's asset forfeiture laws claim that state law enforcement agencies, prosecutors and courts are not complying with the statute.

**Utah's Statute Clearly Directs Forfeited Asset Distribution.** The rules for deciding the distribution of forfeited property are found in **Utah Code 58-37-13(8)**. This paragraph contains a general statement followed by subparagraphs that fully define how courts should distribute or award forfeited assets. Paragraph 8 begins with a statement that forfeiture opponents believe requires all forfeited property be deposited with the Division of Finance.

*When any property is forfeited under this chapter by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance.*

This statement is only part of the paragraph. According to court officials, prosecutors and staff from the Division of Finance, the complete statute only requires the Division of Finance receive forfeited property if the courts find no one is entitled to the property. However, the courts always award the property to the seizing agency according to the procedures described in paragraph (8) (a):

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The judge should verify that agencies have a need for seized assets.

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Assets go to the Division of Finance if agency does not apply or judge says they don't need it.

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*The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the court having jurisdiction over the case shall award the property to the seizing agency.*

This section requires, first, that the prosecuting attorney request that the seizing agency be awarded the property and, second, that the court rules the property forfeited and that the seizing agency has a need for the property. Typically, prosecutors also include language claiming that the seizing agency can use the assets for the enforcement of the state's controlled substances laws.

In the event that the seizing agency does not claim the property, or if the court decides the seizing agency can not use the property for narcotics enforcement, paragraph (b) requires the property be awarded to the Division of Finance which, in turn, awards the property to other agencies.

*The seizing agency, or if it makes no application, any state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney or, if within a prosecution district, the district attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.*

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Division of Finance  
never receives any  
forfeited assets.

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Virtually all forfeitures are awarded through the steps described in paragraph (a). Representatives from the Division of Finance told us that they could not recall ever having property awarded to them under the terms of **Utah Code** 58-37. The absence of deposits is not surprising because it is unlikely that a law enforcement agency would initiate a forfeiture if it did not intend to request that it be awarded to them.

Even if the courts were inclined to deny those funds to the seizing agencies, we found that the Division of Finance is not currently equipped to handle those assets. In fact, the division reports that they do not have policies in place to guide them if they were to receive forfeited assets. An alternative would be to have the Commission on Crime and Juvenile

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Utah courts do not always verify need before forfeiting assets to the seizing agency.

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Justice assume this responsibility. The commission already awards grants from a variety of sources to the law enforcement community.

### **Statutory Oversight Is Reduced by Failure to Identify Agency Need**

An integral part of Utah's statute is that any agency receiving forfeited assets have a need for those assets. We found the courts regularly award forfeitures without actually verifying that the agency has a need for those assets. Sometimes the forfeiture is awarded without even carrying out the specific steps required in the statute. In addition, our review of the fund balances of several law enforcement agencies suggests that some agencies may not have an immediate need for those resources. The accumulation of these reserves may indicate a need for the Legislature to place limits on the amount of forfeited assets that an agency can accumulate.

**Utah's Courts Have Not Been Verifying Agency Need for Asset Distribution.** Before the assets can be awarded to a seizing agency, **Utah Code 58-37-13 (8)** requires the courts issue

*a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws.*

A number of the forfeiture cases that we reviewed for this report lacked the elements necessary to fulfill this part of the statute. We found that judges generally comply with the requirements in the statute when they issue a forfeiture judgement. For example, most of the forfeiture judgements reviewed include a finding that the seizing agency can use the property but determine the finding without any effort to verify the claim. The judge may not have actually verified that the agency has, in fact, a need for those funds.

According to court officials and prosecutors, if a prosecutor makes a claim or statement in the petition for forfeiture, and if that statement is not challenged by the defense, the judge may not actually have to examine evidence in order to issue a finding that the statement is true. They believe that only when the statement is challenged must the prosecutor provide evidence that the agency can use the seized assets. We have concluded that even though the courts are executing the requirements of the statute by including the required finding that the agency can use the forfeited assets,

simply including that language in the forfeiture judgement does not provide the oversight intended by the statute.

In some jurisdictions it appears that the process of awarding the assets to the seizing agency has become so automatic that the county prosecutors and the courts do not fulfill all the formalities required in the statute before awarding the property to the seizing agency. In these cases property was forfeited to the seizing agency without the court or the prosecutor either naming the seizing agency in the petition or claiming that the agency could use those assets.

We believe that the objective of this statute is to prevent agencies from obtaining more property than they can use in the enforcement of controlled substances laws. It is possible for agencies to seize assets worth several times an agency's annual narcotics enforcement budget. The statute intends that the courts provide some degree of oversight. There is an expectation that the court would occasionally reject an agency's request for those assets or that agencies would recognize that they do not have a need for all of the seized assets, and would not ask the court to award the assets to them. Otherwise, the drafters of the law would not have provided the alternative of depositing those assets with the Division of Finance.

**Some Agencies Have Large Forfeiture Account Balances.** The build-up of forfeiture account balances, in some agencies, suggests that they may not have a need for additional funding and that some forfeiture funds could have gone to the Division of Finance. Figure 3 identifies the ending forfeiture fund balances of several enforcement agencies.

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Large forfeiture account balances indicate they may not have a need for forfeited assets.

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**Figure 3. Asset Forfeiture Account Balances.** The forfeiture funds that selected agencies had remaining on June 30, 1999.

Agency	Asset Forfeiture Fund Balance
Cache/Rich/Box Elder Task Force	\$ 76,482
Carbon/Emery Task Force	3,407
Davis Metro Task Force†	17,926
DEA/Metro Task Force (SLCo)	191,158
Grand/San Juan Task Force	-0-
Iron/Garfield Task Force	76,313
Kane County Task Force	860
Salt Lake Area Gang Project	13,429
SLCo Major Felony Task Force	348,739
Sanpete/Sevier/Piute/Wayne Task Force	5,023
Sandy City Police	296,597
Uintah/Duchesne Task Force*	157,930
Utah County Major Crimes Task Force	26,021
Utah County Sheriff	-0-
Wasatch County Task Force	771
Washington County Task Force	942
Weber/Morgan Task Force	195,361
Salt Lake City	198,191
West Valley City	<u>31,316</u>
<b>Total</b>	<b><u>\$1,640,466</u></b>

Note: †This year-end balance was from 3/31/99

\*This year-end balance was from 12/31/98

Figure 3 shows the year-end balances of the forfeiture funds retained by selected task force and law enforcement agencies. Several agencies do not allow forfeitures to accumulate to significant levels in their forfeiture accounts. Some agencies have relatively large forfeiture accounts, suggesting they might have difficulty proving they could use additional forfeitures if they were required to support a claim in court.

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DEA/Metro Task Force once had forfeited assets worth \$624,381.

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The balance for DEA/Metro, for example, is actually much lower than it has been in the past. The balance grew as large as \$624,381, at which time the board asked the task force to reduce its annual member assessments to draw down the forfeiture account balance. By allowing the fund to grow as large as it did, the agency demonstrated that it really did not have an immediate need for those assets.

By reducing the annual assessment charged to the cities that participate on the task force, the DEA/Metro Task Force violated the requirements in both state and federal law that forfeitures not be used to replace the base level funding for the agency. **Utah Code 58-37-13 (8)(a)** prohibits agencies from using asset forfeitures “to supplant any ordinary operating expense of the agency.” In addition, federal regulations require that forfeitures “increase and not replace”<sup>1</sup> an agency’s existing funding. By reducing the assessments to cities in order to spend down the forfeiture account, the DEA/Metro was replacing its normal operating revenues in violation of these requirements.

When asked how they intend to use the balance of their forfeiture accounts, most agencies said they did not have a specific use in mind. Several narcotics task force directors said that they were trying to build up reserves in case they lost funding from the Federal Byrne Grant program, a primary source of funding for the narcotics task forces.

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Should agencies keep the proceeds from forfeiture in a “rainy day” fund?

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We question whether law enforcement agencies can claim a need for forfeited assets if they simply allocate those funds to a reserve account and do not earmark those funds for specific purposes. To hold the money as a “rainy day” fund appears inconsistent with the rules prohibiting the use of forfeited assets to supplant normal operating budgets. If a task force were to lose its primary source of funding, such as from the Federal Byrne Grant, we question if forfeiture funds could be used as a replacement for that basic funding. Other concerns regarding the supplanting of normal operating funds are discussed in greater detail in the following section.

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Elected officials are better suited for deciding how forfeited assets should be used.

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**Courts Are Not Well Suited to the Task of Overseeing the Need for Forfeited Assets.** In our opinion, the courts are not the ideal entity to

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<sup>1</sup>Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies, U.S. Department of Justice, March 1994, page 14.

oversee the need for forfeited assets. Normally, the responsibility for overseeing the use of public funds is placed in the hands of elected government officials, such as a county commission or city council. The Legislature should consider requiring that each task force have its use of forfeited assets overseen by a body of elected officials. In contrast to task force oversight, each city and county included in the review, had forfeiture expenditures included in the city or county budgeting process. Forfeitures, as a portion of the agency's budget, were subject to some oversight by the elected officials in those jurisdictions.

## **Statutory Forfeited Asset Use Rules Are Not Consistently Followed**

Some enforcement agencies are not using forfeited assets in a manner consistent with **Utah Code** 58-37-13 (8) (a). The statute requires forfeitures only be used for narcotics enforcement and prohibits forfeiture use for certain types of expenditures. However, a few agencies are depositing the proceeds from asset forfeiture in their general operating budgets where funds are used for a variety of non-allowable expenses. Without separate accounting, agencies cannot show they are using the funds in the manner required by the statute nor can they show that proceeds are not used to supplant the normal operating budget.

### **Utah's Statute Sets Some Spending Rules**

Utah's statute places several conditions on how agencies can spend the proceeds from asset forfeiture. The purpose of these rules is to:

- Use forfeitures to pay for a portion of the cost of enforcing the state's drug laws.
- Avoid placing inappropriate incentives that would result if law enforcement agencies were funded primarily from the proceeds of asset forfeiture.

The following sections describe steps that agencies can follow to better comply with the state's statute. Requiring full compliance with the existing statute may, unfortunately, encourage some agencies to spend forfeited asset funding inefficiently in order to avoid turning those funds

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**Forfeited assets are to be used for drug enforcement.**

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**Agencies should not rely too heavily on asset forfeiture as source of revenue.**

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over to another agency. For this reason, the Legislature may want to reevaluate the guidelines for the use of forfeited assets and consider other strategies to obtain better use of the proceeds from forfeiture.

**State Statute Sets Basic Rules for the Use of Forfeited Assets.** **Utah Code 58-37-13 (8)(a)** contains the requirements for the use of forfeited assets. It states:

*Each agency shall use the forfeited property for controlled substance law enforcement purposes only. Forfeited property or proceeds from the sale of forfeited property may not be used to pay any cash incentive, award, or bonus to any peace officer or individual acting as an agent for the agency, nor may it be used to supplant any ordinary operating expense of the agency.*

This law places three restrictions on how agencies may use or not use forfeited assets:

- For the enforcement of the controlled substance laws.
- Not for cash incentives, awards, or bonuses that might be given to police officers or others such as police informants.
- Not to be used to supplant an agency's normal operating expenses.

In each of the jurisdictions audited, officials were asked to provide documentation identifying how the agency used forfeitures obtained under **Utah Code 58-37-13**. Audit staff then verified that these uses were in compliance with the above requirements. A number of questionable practices were identified.

**Statutory Controls Do Not Work Without Ability to Measure Compliance.** In order to show that they comply with the rules, agencies need to maintain a separate accounting of how those funds are used. Maintaining separate accounts is consistent with the requirements of the Governmental Accounting Standards Board (GASB). However, many of the law enforcement agencies we audited did not maintain separate accounts for the proceeds of asset forfeiture.

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Improper accounting for the use of forfeited assets makes it difficult to show compliance.

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According to GASB, government agencies are required to set up their accounting systems in a way that allows them to use different sources of revenue in accordance with the different use requirements that come with those funds. According to GASB Code 1200.106:

*An important function of governmental accounting systems is to enable administrators to assure, and report on, compliance with finance-related legal provisions. This means that the accounting system—its terminology, fund structure, and procedures—must take cognizance of and be adapted to satisfy finance-related legal requirements. For example, if a state constitution requires that proceeds of a state gasoline tax be accounted for in a state highway construction funds and used exclusively for capital outlays, on highways and public roads, the accounting system must enable the governmental unit to demonstrate compliance with the constitutional mandate.*

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**GASB requires a separate accounting for restricted funds.**

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This GASB rule requires that the accounting system demonstrate compliance with the legal mandates that come with each source of revenue. An example of such a legal requirement is the Utah statute that requires forfeited assets be used for “controlled substance law enforcement purposes only.” In order to show compliance, agencies need to maintain an accounting system that shows how those funds are used. This record could be accomplished by keeping the proceeds from asset forfeiture in a separate account. If proceeds from state and federal forfeitures are deposited into the same account, the federal or state rule, whichever is more restrictive, should be applied, or documentation must be maintained to show that the federal forfeitures were used according to federal laws and that state forfeitures were used according to state laws.

As an alternative to separate accounts, GASB allows the use of “memoranda” describing how each restricted revenue was spent. This method would be appropriate for small jurisdictions with only a few forfeitures a year. Memoranda would allow them to document the use of those funds without having to create a separate account, but would require placing a memo in budget documents describing how the proceeds from each forfeiture were spent.

Many of Utah’s law enforcement agencies do not use separate forfeiture accounts or internal memoranda as required by GASB in order to account for their use of forfeited assets. As a result, forfeiture funds are regularly

combined with other unrestricted funds and together are used for expenses that are not consistent with the three requirements in the statute.

The following sections show that the agencies, which do not have proper accounting for forfeited assets, are not able to comply with the requirements regarding the use of forfeited assets. These include that forfeitures: 1) be used for enforcement of controlled substances laws only; 2) that they not be used for bonuses or cash incentives to police officers or their representatives; and, 3) that they not supplant the agency's normal operating budget for narcotics enforcement.

### **Some Agencies Use Forfeitures for Department-wide Expenses**

Most law enforcement agencies recognize that the proceeds from asset forfeiture come with specific spending requirements and must be used to provide additional support to their drug enforcement efforts. Those agencies who are complying with the statutory requirements maintain a separate account for forfeited assets and use that account for one time expenses, such as specialized equipment, training, overtime, and miscellaneous services. Many agencies, however, do not have a separate accounting for the proceeds of asset forfeiture and use the funds for the agency's regular operating expenses and even some non-drug enforcement activities. Appendix B lists how some agencies have used their forfeiture funds. Some agencies are not included in Appendix B because they do not distinguish the use of their forfeiture funds from other operating revenues.

**Salt Lake County Uses a Separate Account to Track the Use of Forfeited Assets.** An example of a jurisdiction that properly uses a separate account for the use of its forfeited assets is the Salt Lake County Sheriff's Office. The proceeds from asset forfeiture are placed into a special account and are used only for expenses that support the operations of its narcotics unit. Figure 4 shows the expenses from this account during 1998.

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Forfeited assets must be used for "enforcement of controlled substances laws only."

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**Figure 4. Expenditures From Asset Forfeiture Account Salt Lake County Sheriff.**

Expense Item	Amount
<b>Salaries:</b>	
Salaries to Narcotics Enforcement Officers	\$161,189
<b>Services:</b>	
Wiretap by U.S. West	1,703
AT&T Wireless Service	2,012
<b>Equipment:</b>	
In-car Video System	3,263
Camcorder	625
Palm Pilots	734
Video Tapes	331
Covert Radio	705
Camper Shell	825
Ultra Low Light Camera	22,000
Panasonic Video Recorders	2,203
TV/VCR Combo	294
Surveillance Camera	595
Binoculars	594
Lens Kit	1,698
Micro-video Camera	579
<b>Fees:</b>	
Fees Paid to County Attorney	99,452
Auction Fees	187
<b>Total:</b>	<b><u>\$298,989</u></b>

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As required, the Salt Lake County Sheriff keeps separate accounts for forfeited assets.

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Salt Lake County is one of only a handful of jurisdictions that we audited that maintained a separate balance sheet for its forfeiture accounts. This separate record enables them to demonstrate that each expenditure was used only for narcotics enforcement and that their funds did not supplant the ordinary operating expenses of the Major Felony Unit.

Our only concern is in the unit's use of its forfeited asset account for salaries. We were unable to determine whether the salaries were for supplemental purposes or not. Salaries should not be paid from the proceeds of asset forfeiture unless they are used for a temporary employee or special contract work.

In contrast to the Salt Lake County Sheriff's use of forfeited assets, we found a few jurisdictions that do not have a separate account from which forfeited assets are spent. Instead, they use their forfeiture funds as an unrestricted source of revenue that is combined with their regular operating budget, which is inappropriate.

**Salt Lake City Police Uses Forfeitures for Department-wide Expenses.** The Salt Lake City Police Department has used some of the proceeds from asset forfeiture for certain narcotics expenses as required by state law. However, some of the money is also spent on department-wide expenses which are not eligible under the requirements of the Utah Controlled Substances Act. Figure 5 shows the expenditures from their narcotics forfeiture account during the 1998-99 budget year.

**Figure 5. Expenditures of Forfeited Assets Salt Lake City Police.**  
 Fiscal Year 1989-99 expenditures of the proceeds from asset forfeiture by the Salt Lake City Police Department.

<b>Directly Related to Narcotics Enforcement</b>	<b>Amount</b>
<ul style="list-style-type: none"> <li>• Vehicles Leased for Narcotics Unit</li> </ul>	\$43,000
<ul style="list-style-type: none"> <li>• Special Revenue Fund for Narcotics Enforcement (Training, equipment, supplies and overtime for Narcotics and SWAT Teams used in enforcement of narcotic related activity.)</li> </ul>	110,420
<b>Indirectly Related to Narcotics Enforcement</b>	
<ul style="list-style-type: none"> <li>• Match for COPS MORE 98 Grant (Technology Upgrade) (Grant provides dispatch and records management system, laptop computers, mug shot and fingerprint equipment)</li> </ul>	100,000
<ul style="list-style-type: none"> <li>• Match for Grant for Incident-based Reporting System (Grant provides improvements to crime reporting system)</li> </ul>	26,667
<ul style="list-style-type: none"> <li>• Match for Local Law Enforcement Block Grant (salaries for community mobilization specialist, McGruff coordinator, weed and seed coordinator, bomb suit, peer court)</li> </ul>	42,522
<b>Drug Prevention Activities</b>	
<ul style="list-style-type: none"> <li>• Urban Emphasis Boy Scout program (Materials and supplies for Boy Scout program)</li> </ul>	<u>20,250</u>
<b>Total Expenditures:</b>	<b><u>\$342,859</u></b>

Some expenditures by Salt Lake City Police are not for drug enforcement.

Figure 5 shows the Salt Lake City Police Department's forfeiture spending for fiscal year 1998-99. These expenses include Salt lake City's match for several U.S. Department of Justice block grants. These grants were for equipment and programs that benefitted the department generally and were only indirectly related to narcotics enforcement. In addition, the \$20,250 used to support the Urban Emphasis Boy Scout Program is not even an enforcement activity, although the program does play an important role in the police department's crime-prevention strategy.

It has been the policy of the Salt Lake Police Department to spend the proceeds from all state and federal forfeitures according to the guidelines established by the U.S. Department of Justice. Although each of the above expenditures comply with the U.S. Department of Justice rules, state forfeitures need to be spent according to the rules established under state law not under federal law.

It is important to note that the Salt Lake City Police Department sees asset forfeiture as a small portion of its budget (about 1 percent) and therefore choose to minimize the accounting of state and federal forfeiture monies. During the 1998-99 fiscal year the city generated about \$100,000 in federal forfeitures which were not spent. If the city used its federal forfeiture funds to pay the expenses listed in Figure 5, instead of using state forfeitures, state forfeiture funds would not have been used inappropriately.

In addition, some of the state forfeiture funds could have been used for the department wide expenses as long as they were properly allocated to narcotics enforcement. The State Auditor's Office and the Commission on Criminal and Juvenile Justice regularly audit the spending of restricted funds by local government agencies. Representatives from both agencies told us that proceeds from restricted funds, such as asset forfeiture, can only be used to pay for department-wide expenses if they are properly allocated.

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**If allocated,  
forfeitures can be  
used for  
department-wide  
expenses.**

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Salt Lake City's payment of a \$100,000 match for the COPS MORE 98 Grant is the type of expense that could be allocated to the forfeiture account. Clearly, the expenditure for new technologies indirectly benefits the enforcement of the controlled substances laws. For this reason, it is appropriate for the narcotics unit to help pay for that equipment. However, instead of paying the entire amount from the asset forfeiture account as it did, the city should have allocated that expense. For example, they might have identified the percentage of all cases attributed to the narcotics enforcement unit. The proceeds from asset forfeiture could be used to pay that percentage of the department-wide expense.

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**Statute prohibiting use of forfeited assets to pay informants is not being followed.**

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## **Forfeiture Funds Are Used to Pay Informants**

Because of improper accounting, many jurisdictions were also unable to show that they spend forfeited assets in compliance with the law requiring that:

*proceeds from the sale of forfeited property may not be used to pay any cash incentive, award, or bonus to any peace officer or individual acting as an agent for the agency... .*

Most, if not all of the agencies that are engaged in the enforcement of Utah's narcotics laws, often pay informants for information leading to an arrest or search warrant. The law prohibits the use of forfeited assets for the repayment of police officers who make seizures or to informants who may provide information leading to a seizure. Obviously, it is deemed inappropriate for police and informants to receive a direct financial benefit from a forfeiture of assets.

Unfortunately, because of the manner in which agencies account for their forfeited assets, they cannot show that forfeited assets were not used to pay informants. As mentioned, many agencies use their forfeitures as a regular source of operating revenue and combine the proceeds from asset forfeiture with their other, unrestricted revenues. When these combined revenues are used to pay for regular operating expenses, such as payments to informants, the agency cannot show that they were complying with the requirements in the statute.

The best way for agencies to prove that the proceeds from forfeiture are not used to pay informants is to maintain a separate account for those funds that shows that those funds were used for the expenses allowed by law.

## **Forfeitures Sometimes Supplant the Normal Agency Operating Budget**

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**Supplanting operating budgets with forfeiture funds is not allowed.**

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For most agencies it was very difficult to verify whether forfeiture funds supplement or supplant operating budgets because they do not have separate accounts. However, there are a few agencies who rely so heavily on asset forfeiture as a primary source of revenue that there is little doubt that the use of forfeited assets has gone beyond the point of merely being supplemental.

We reviewed accounts of several agencies that could easily show that their forfeitures were used to supplement rather than supplant their operating budgets. These include Salt Lake County Sheriff, West Valley City and the Utah County Major Crimes Task Force. These agencies place the proceeds from asset forfeiture in a separate account and use those monies primarily for major, one-time expenses associated with narcotics enforcement. Forfeitures are never placed in the regular operating budget and appear to comply with the state's statute.

In contrast, other agencies we reviewed place proceeds from asset forfeiture into their general operating budgets. These agencies could not show whether the funds supplanted the normal operating expenses. In some cases the proceeds from asset forfeiture represent such a large portion of the agency's operating budget that the agency could not have operated without those funds.

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Some agencies have used asset forfeiture as a primary source funding.

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**The Davis Metro Narcotics Task Force Uses Forfeitures to Pay for General Operating Expenses.** In the past, proceeds from forfeitures have represented such a large portion of the operating revenues for the Davis Metro Narcotics Task Force that they could not have operated without those funds. Depositing and spending seized funds raises concerns that the proceeds from asset forfeiture have reached the point of supplanting rather than supplementing the strike force's normal operating budget. Figure 6 shows the 1996-97 income and expense report for the Davis Metro Narcotics Strike Force.

**Figure 6. Davis Metro Strike Force Income and Expenses.** The income and expense report for Fiscal Year 1996 -1997.

<b>Total Income</b>		<b>Total Expenses</b>	
Assessments	\$ 25,492	Bank Charges	\$ 79
Auction - Guns	3,965	Capital Items	16,603
Auction - Vehicles	1,400	County Attorney 15%	11,402
Auction - Property	1,524	Evidence (Purchase)	8,630
Bank Credit	9	Informants Paid	3,763
Drug Diversion	100	Metro Supplies	6,304
Interest - Checking	459	Office Supplies	2,337
Interest - IMMA	5,637	Overtime	6,882
Metro Car Sold	3,690	Phones/Pagers	9,080
Restitution	5,070	Plaques/Badges	219
Seized Cash	72,572	Professional Fees	4,421
Tax Stamp Violations	7,700	Rent & Utilities	16,781
Vehicle Returns	<u>12,250</u>	Restitution Overpaid	440
		Secretarial	16,188
		Seized Funds Returned	6,113
		Share on Grant	1,577
		Training	<u>1,400</u>
<b>Total</b>	<b><u>\$139,868</u></b>	<b>Total</b>	<b><u>\$112,219</u></b>

Figure 6 shows that in fiscal year 1996-97, the Davis Task force had revenues of \$139,868 of which \$72,572 came from seized cash. The degree to which the agency has relied on seized assets to fund its operations is a concern. In addition to the seized cash, the agency generated revenues from other forfeited and abandoned property including \$3,965 from the auction of guns, \$1,400 from vehicles, and \$1,524 in other property. In all, the Davis Metro Narcotics Strike Force

used seized, forfeited, and abandoned property to generate \$79,461 in revenues or 57 percent of its total income for fiscal year 1997. The agency is now attempting to rely less on forfeitures and more on member assessments for its revenues.

The case of Davis Metro Narcotics Strike Force and the example of DEA/Metro cited previously show that some agencies are not complying with the requirement that forfeited assets not be used to replace an agency's normal operating revenues. There is a danger in agencies becoming overly reliant on the proceeds from asset forfeiture. Once member cities become accustomed to not paying an assessment, there may be pressure on the task force to continue to use forfeitures as a primary source of revenue. However, if the rate of seizures declines, there could be pressure on agencies to be more aggressive and to seize assets they might not otherwise seize.

**Enforcement of Prohibition against Supplanting is Difficult.**

Requiring agencies not to use forfeited assets to supplant the ordinary operating expenses may be unenforceable. A representative of the State Auditor's Office told us he finds it extremely difficult to determine whether new funds supplanted an agency's existing operating budget. He said the only time this can be done fairly is the first year after the new funds became available. After that, he said it is nearly impossible to determine whether an agency has continued to maintain its original source of funding.

As an alternative to the current requirement in the statute, the Legislature could consider adopting limits on the amount of forfeiture funds that can be accumulated and held by an agency. Excess funds could then be deposited with the Division of Finance or some other state agency and distributed to other law enforcement agencies that have a true need for the assets. For example, the Legislature could impose a cap on reserves of 25 percent of the agency's annual operating budget and/or require, as the U.S. Department of Justice does, that forfeitures be spent within two years.

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Preventing use of forfeiture funds for supplanting budgets may not be possible.

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## **Recommendations:**

1. We recommend law enforcement agencies maintain a separate account for all funds obtained through state forfeitures or provide other memoranda documenting how forfeited assets were used.
2. We recommend law enforcement agencies limit the use of forfeited assets to expenditures which supplement, rather than supplant, their normal operating budget.
3. We recommend law enforcement agencies limit the use of forfeited assets to expenditures directly related to the enforcement of controlled substances laws or to the share of department-wide expenses that can be allocated to the narcotics unit.
4. We recommend the Legislature consider requiring an elected body oversee each law enforcement agencies use of forfeited assets.
5. We recommend the Legislature consider placing limits on the amount of forfeited assets an agency can accumulate. The Legislature could impose a cap on reserves of 25 percent of the agency's annual operating budget and/or require forfeiture proceeds be spent within two years. Excess forfeiture funds could then be distributed to other agencies or programs.
6. We recommend the Legislature consider relocating the oversight for and distribution of excess asset forfeitures to the Commission on Criminal and Juvenile Justice.

## Appendices

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# **Appendix A**

## **Maintenance of Seized Assets**

### **Best Practices of Utah Law Enforcement Agencies**

1. Seized property must be accounted for.
  - A. All seized property is recorded by an evidence officer. If the seizure takes place during the execution of a search warrant, one police officer acts as the evidence officer and prepares a list of items seized.
  - B. When one or more individuals are apprehended by an officer on patrol and an arrest and seizure is likely, the officer calls for the assistance of another officer who can help make the arrest and verify that any cash or other seized items are correctly counted and listed on the seizure warrant.
  - C. Prior to taking the items into police custody, a copy of the seizure warrant is given to the owner of the property from whom it was seized.
  - D. Seized cash is counted by two or more officers, preferably at the site at which the cash is seized. Cash is placed into sealed containers until it can be recounted prior to being placed into a temporary secure environment.
  - E. As soon as possible, seized cash should be deposited in an interest-bearing account used solely for seized cash. A receipt of the deposit should be retained to show that the same amount seized was the amount deposited.
  - F. A “chain of custody” record is kept which identifies those who had possession of each item seized. If the property is sent to the crime lab or taken for presentation in court, a record is kept of who had custody of the property, whether the seal was broken and by whom, and for what purpose.
2. Seized Property must be maintained in a secure environment.
  - A. Seized vehicles are placed within a gated impound lot.
  - B. Shortly after smaller items are seized they are placed into sealed plastic bags or containers.
  - C. Seized cash is deposited into an interest-bearing savings account designated for seized cash.
  - D. Individual items other than cash and vehicles are placed in a secure environment such as in the evidence room. The evidence officer and the head of the agency are the only individuals with keys to the evidence room or impound lot.

3. Seized property is properly preserved and maintained.
  - A. Vehicles are kept in good operating condition and are winterized when necessary.
  - B. Items in the evidence room are maintained in a way that avoids cross contamination.
  - C. Hazardous materials such as precursor chemicals or drugs are not maintained in the evidence room where they can contaminate other evidence or present a hazard to law enforcement officers who enter the facility. Instead, they are sent out for testing and identification by the crime lab and are then destroyed.
  - D. Real estate is maintained by a responsible agency or tenant until properly disposed.
4. Seized Property is disposed of properly.
  - A. Property that has been formally forfeited to the seizing agency is either used for law enforcement purposes according to procedures established by the agency, or is properly disposed through a public sale or auction. A copy of the forfeiture judgement should be kept in the case file.
  - B. It is a conflict of interest for officers to purchase forfeited items.
  - C. Property that is not forfeited must be returned to the owner. Prior to its release, the owner must sign a transmittal sheet identifying the items that have been returned. Copies of the transmittal sheets are kept in the case file.
  - D. Items that are not forfeited and which are not claimed by the owner after proper notification has been made can be considered abandoned and sold by the seizing agency.
  - E. If items seized are no longer needed as evidence and can be considered contraband, the agency should develop rules for their proper disposal. Specifically, each jurisdiction should have a policy describing the proper disposal of seized weapons -- whether they are to be destroyed or sold.

## Appendix B

<b>Uses of Asset Forfeiture Funds Selected Agencies 1998-1999</b>		
<b>Utah County Major Crimes Task Force</b>	Returned Cash	\$3,800
	County Attorney Fees	6,039
	Salt Lake District Attorney	677
	Vehicle Repair	4,182
<b>West Valley City</b>	Byrne Grant Match	\$84,282
	Towing & Impound	3,829
	Training	10,160
	Evidence Supplies	7,129
	Office Supplies	6,322
	District Attorney Fee	23,047
	Locksmiths	771
	Petty Cash	19
	Enforcement Equipment	989
	Overtime	19,291
<b>Weber-Morgan Task Force</b>	County Attorney Fees	\$27,069
	Towing	7,070
	Agency Forfeiture Sharing	5,802
<b>DEA Metro</b>	Byrne Grant Match	\$293,259

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## **Agency Responses**

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RUBEN B. ORTEGA  
CHIEF OF POLICE

**SALT LAKE CITY CORPORATION**  
POLICE DEPARTMENT



DEEDEE CORRADINI  
MAYOR

November 10, 1999

Wayne L. Welsh, Auditor General  
Office of the Legislative Auditor General  
130 State Capitol, P.O. Box 140151  
Salt Lake City, Utah 84114-0151

Dear Mr. Welsh:

Thank you for the opportunity to review the draft audit and provide our response. We feel the audit was very professional and informative. It is clear from the audit that asset forfeiture is not being abused in Utah.

However, we do have concerns over interpretation of the uses of asset forfeiture by Salt Lake City Police Department and the application of the State law. Conservative estimates are that over 50% of all the departments' activities are in response to the drug problem. Criminal activity ranging from homicides to family fights and drug houses to nuisance complaints are largely fueled by the drug problem. Some examples are 60% of armed robberies and 50% of burglaries are related to drugs to meet the needs of drug addicts. The effect is that every part of the department is responsible to deal with the results of the drug problem. These efforts are not isolated to the narcotics unit alone, but must include Community Action Teams, Crime Prevention Specialists, beat officers, detectives, etc. Narcotics enforcement is a duty of every part of the department. The monies derived from asset forfeiture are properly used to enhance our drug enforcement and prevention efforts.

We welcome an opportunity to continue discussions on these important subjects, as we look to meet the ever growing challenge of illegal drugs and their impact on our community and State.

Sincerely,

*Ruben B Ortega*  
RUBEN B. ORTEGA  
Chief of Police



OFFICE OF  
**DISTRICT ATTORNEY**

FOR SALT LAKE COUNTY

November 10, 1999

**DAVID E. YOCOM**  
DISTRICT ATTORNEY



JUSTICE DIVISION

**RICHARD S. SHEPHERD**  
Division Director

**JERRY G. CAMPBELL**  
CHIEF DEPUTY

**Response of Salt Lake County District Attorney's Office to**

SPECIAL INVESTIGATIONS UNIT

**MICHAEL P. GEORGE**  
Chief Investigator

**Leg**

**islative Auditor General's Asset Forfeiture Audit**

This office is committed to the appropriate divestiture of criminal proceeds and the instrumentalities of crime from those who perpetrate crime and those who seek to profit from crime, through the proper use of forfeiture laws as promulgated by the Utah Legislature. We are gratified that the Auditor General's current legislative audit of asset forfeiture in Utah has debunked many of the wild myths surrounding asset forfeiture that have been promulgated by anti-forfeiture fear mongers in the last few years.

This office is in the process of developing guidelines for law enforcement agencies in Salt Lake County regarding asset forfeiture similar to those which have been established by the Department of Justice for federal agencies and federal adoption cases. This office further seeks to be, has been and will continue to be actively involved in drafting and proposing appropriate legislative responses to the concerns raised by the current audit, which although important, are such that we believe they can be easily remedied. In this regard, an understanding of our outlook on the forfeiture of criminal assets may be helpful.

**Why Asset Forfeiture?**

Whether cloaked in the gold chains of a drug dealer or the white collar of a banker, persons who transact in dirty money, or use their property to commit crime, or allow their property to be used to facilitate the crimes of others, contribute to the corruption of the economy and enhance the capability of organized criminals to continue their illegal ways. Those who possess property which represents the profit of criminal activity need not have direct contact with the underlying criminal activity that generates illicit proceeds. In fact, the more the criminal assets can be insulated from the underlying crime, the more attractive it is to the criminal, those involved in the criminal enterprise, knowing, unknowing or unwitting accomplices and the more difficult the ill-gotten gain is to detect.

By facilitating drug traffickers, extortion, fraud, illegal gambling, loan sharking and other organized criminal activity, the acquisition, concealment, use and eventual laundering or reinvestment of criminal assets and crime proceeds inflicts many harms on society. It enables criminal organizations to meet payroll; acquire or control the property needed to continue and

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***Salt Lake County District Attorney's Office Response  
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expand operations, such as real property, vehicles, communications equipment and guns; pay off witnesses; and otherwise grow rich off the victimization of others and the corruption of society.

The acquisition, accumulation and use of criminal proceeds also distorts the economy. Honest businesses lose out to those bankrolled by organized crime. As a member of the Italian parliament and former prosecutor observed, "How would you like to be a company competing against [businesses taking dirty money] when you have to carry a debt load of 25 percent and your competition has zero?"<sup>1</sup> With such a competitive advantage, it is no wonder that dirty money quickly penetrates and dominates entire industries. According to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), the fishing industry in Washington state<sup>2</sup> and the Diamond District in New York<sup>3</sup> are overwhelmed with dirty money. Recent press reports note that the same is true for the wholesale jewelry industry in Los Angeles<sup>4</sup> and that dirty money was assertedly behind the scenes in the savings and loan crisis as well.<sup>5</sup>

Equally troubling, the acquisition, accumulation and use of criminal proceeds tears at the social fabric of our communities by promoting negative role models, drug trafficking and criminality. It enables even small-time drug pushers to parade themselves as success stories, thereby posing as industrious examples of the "American dream", when, in fact, they are nefarious examples of the ancient art of committing crime to get gain.

Money is the motive for economic and many other types of crime. If there were no financial reward for such crime, these types of crimes would not occur. Money is also the medium for all ongoing criminal industries. Without money to pay for necessary goods and services, no industry could continue, criminal or otherwise. The "blood money" which represents the enslavement of the addict and the profits of the drug dealer motivates individual participants of crime, and is the "life blood" of criminal enterprises and organizational structures.

Attacking crime, not only through enhanced protective and enforcement measures, but also through proactive measures to remove the profit and tools of criminal activity, will together ensure the success of the effort to rid ourselves of crime, and keep our society safe for our citizens. Among the useful tools in this effort is asset forfeiture, which is the confiscation (seizure) and awarding to government (forfeiture) of the profits and instrumentalities of crime.

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<sup>1</sup> WASHINGTON POST, Oct. 5, 1992, at A12. *Of course, in another scenario, organized crime may impose extortionate interest rates on hard pressed borrowers.*

<sup>2</sup> LAUNDERING THREAT ASSESSMENT - WASHINGTON STATE, 80-8 1 (FinCEN 1992)

<sup>3</sup> LAUNDERING THREAT ASSESSMENT - NEW YORK CITY METROPOLITAN AREA, 12(FinCEN 1992)

<sup>4</sup> Los Angeles Times, Aug. 22, 1991, at B1.

<sup>5</sup> Wall Street Journal, Apr. 18, 1991 at B6(E).

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"Since the earliest years of this Nation, Congress has authorized the Government to seek parallel in rem civil forfeiture actions and criminal prosecutions based upon the same underlying events. See e.g., Act of July 31, 1789"<sup>6</sup> The use of asset forfeiture to remove the motive and profits of crime is as old as this Nation. Asset forfeiture can proceed, generally, as a civil legal proceeding against the tainted property or criminal proceeds, (called an in rem proceeding), or as a part of a criminal prosecution (called in personam forfeiture). However, if the forfeiture proceeds as part of the criminal prosecution, it only affects the rights of the accused, and separate, in rem proceedings are necessary against all other persons who may have claim to the property.

I believe all rational people agree with Justice Leonard H. Russon of the Utah Supreme Court, when he wrote "Clearly, one does not have, nor is one entitled to, a property interest in illegal drugs that have been confiscated by the police. Such constitutes contraband per se. It is equally clear that one who normally has a right to property loses that right where that property is sufficiently involved in illegal drug activities. Therefore, where money, which is normally legal to possess, is clearly a product of a drug transaction, it is subject to seizure, and forfeiture cannot be considered punishment. Taking away that to which one has no right is not punishment."<sup>7</sup> Criminal activity turns drugs, contraband or illegal acts into money. The forfeiture of the proceeds of crime is no different than the confiscation of the underlying contraband. Drug dealers have no right to have their drugs returned to them, why then should they have the criminal proceeds obtained from the sale of their drugs returned to them? The means by which this illegal property and criminal proceeds are removed from criminals, criminal enterprises and criminal associates and "straw men" is asset forfeiture.

As stated by our Utah Supreme Court in 1955, "In the administration of justice, a court cannot be rendered helpless and impotent by the devious and cunning ways adopted by the defendant in this case. The great weight of authority sustains this proposition. To hold to the contrary would permit a mischievously inclined defendant to profit by his own wrongdoing."<sup>8</sup> Repealing or rendering ineffective the current asset forfeiture laws in Utah will render Courts, prosecutors and law enforcement officers impotent in removing the profits of crime, merely by criminals placing criminal assets in the name and nominal ownership of other persons.

### **Permissible Asset Forfeiture In Utah**

Property is forfeitable to the government only if forfeiture is specifically authorized by a statute.<sup>9</sup> In Utah, asset forfeiture is limited to the following types of property and contraband:

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<sup>6</sup> United States v. Ursery, 116 S.Ct. 2135, 2140 (1996).

<sup>7</sup> State v. \$175,800.00, 942 P.2d 343, 349-50 (Utah 1997).

<sup>8</sup> State v. Myers, 508 P.2d 41, 42-43 (Utah 1955)

<sup>9</sup> United States v. Lane Motor Co., 199 F.2d 495, 497 (10<sup>th</sup> Cir. 1952), aff'd, 344 U.S. 630 (1953).

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alcohol; drugs; imitation controlled substances; drug precursors; drug paraphernalia; drug ingredients; drug manufacturing materials, recipe books; "pay/owe" sheets; pornography; gambling devices and illegal weapons, explosives, etc. In addition, the proceeds or cash or other property which represents the profit of certain, limited criminal activities is forfeitable, including the proceeds of drug trafficking; racketeering and money laundering. Finally, in some limited circumstances, property which is used to commit crimes is subject to forfeiture, including:

conveyances, warehouses, storage facilities, firearms, weapons, ammunition, equipment, tools, etc. used in drug crimes, racketeering, money laundering. In addition, all weapons used to commit felonies are forfeitable, and vehicles used to flee from the police or used to commit a firearm offense, or an offense involving a firearm are subject to forfeiture.

Responding to concerns and the legitimate needs of our society, the 1996 Utah Legislature, with the assistance of prosecutors and law enforcement statewide, amended the Controlled Substances forfeiture laws to, among other changes, provide that all property sought to be forfeited as an instrumentality or facilitator of criminal drug activity must be forfeited as part of the criminal prosecution. Consequently, the only types of forfeitures to which civil proceedings apply are those in which it is alleged by the State that the property seized and to be forfeited is the direct proceeds of drug trafficking or other crimes, or is property derived from or purchased with money which is the proceeds of criminal activities. Because of this change, all non-proceeds cases, those cases in which it is alleged that the property should be forfeit because it was used to commit a drug crime, must proceed as part of a criminal prosecution, and no such facilitation or instrumentality forfeiture can occur unless there is a conviction and finding of forfeiture by the Court in the criminal case.

**Why Civil Forfeiture in addition to Criminal, *In Personam* Proceedings?**

Civil, *in rem* forfeiture is important, and is a useful anti-crime tool for the following reasons:

- Civil asset forfeiture removes the profits and the profit motive, from specified illegal activities, thereby forcing criminals and their associates to disgorge criminal profits, and preventing the reinvestment of criminal proceeds into criminal activities, enterprises and organizations, thus weakening criminal enterprises by removing the capital infrastructure of crime.
- Civil asset forfeiture protects legitimate commerce, and prevents or discourages black market or underground economies.
- Civil asset forfeiture deters crime by raising the economic risks associated with criminal activities.

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- Civil asset forfeiture, as opposed to criminal, *in personam* forfeiture, allows innocent owners, lien holders, and other claimants to present their claims, and have their day in court without waiting for the outcome of criminal cases in which they are not defendants. Civil asset forfeiture also allows forfeiture proceedings to be initiated against the allegedly tainted property, without the State filing criminal charges against those who may be tangentially or marginally involved, or filing criminal charges against someone only because they are somehow involved in a minimal measure with property alleged to be the proceeds of crime.
- Civil asset forfeiture allows constitutional challenges to seizures to be heard quickly, without waiting for the outcome of criminal cases. It also allows for reciprocal discovery, under the Utah Rules of Civil Procedure, which is broader and more extensive for Claimants than would be criminal discovery, especially in cases where it is believed that property is tainted, but a claimant has not been criminally charged, and is therefore not privy to the information contained in the case against the criminal defendant. It also allows for the speedy examination of the merits of a case for forfeiture, and of any defenses or claims raised, such as discovery motions, motions to dismiss, motions for summary judgment, none of which are available in criminal forfeiture proceedings.
- Civil asset forfeiture allows forfeiture cases to proceed with all possible claimants, thereby avoiding multiple *in personam*, criminal forfeiture proceedings, wherein each of multiple defendants would have a separate criminal trial, and thereafter the State would still be forced to sue non-criminal defendant claimants for the forfeiture of the tainted property.
- Civil asset forfeiture allows forfeiture of criminal proceeds even when the criminal has fled the jurisdiction to avoid prosecution, a circumstance which occurs in Salt Lake County frequently, because of jail overcrowding and an inability to hold all felons until trial or other disposition of their cases.
- Civil asset forfeiture allows for the efficient forfeiture of criminal proceeds which have been abandoned, and to which no claim is made.
- Civil asset forfeiture prevents Utah from becoming a money laundering haven, where criminals who conduct their criminal activities outside of our State move here and keep their criminal proceeds here.
- Civil asset forfeiture allows actions against criminal proceeds where criminal charges may not be warranted against nominal owners, such as siblings, parents, children, neighbors, etc. ("straw- men")

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- Civil asset forfeiture is governed by one hundred and two years of Utah civil procedure rules, statutes and jurisprudence, and two hundred and nine years of federal civil procedure rules, statutes and jurisprudence.
- Civil asset forfeiture proceedings may proceed in District Court *only*. Thereby assuring that state judges, which are Courts of record, who are appointed by the Governor, and confirmed by the Senate preside over asset forfeitures.

**Debunking the Myths surrounding Asset Forfeiture**

*Myth 1. Only those convicted of a crime should forfeit their ill-gotten gain.*

Any proposal to limit asset forfeiture to those instances where the property owner is convicted of a crime "ignores the economic windfall that is available to persons who permit their property to be used in a criminal enterprise." And ignores the propensity of criminals to hide assets in the names of others, who may or may not know of the source of the assets, and who may or may not even know the asset is in their name.

As noted above, civil asset forfeiture exists as a tool which can be used to "deter individuals from using their property to facilitate criminal activity."<sup>10</sup> Civil asset forfeiture removes profits and the profit motive from specified illegal activities, thereby forcing criminals and their associates to disgorge their criminal profits. Civil asset forfeiture also prevents the reinvestment of criminal proceeds into criminal activities, enterprises and organizations, thereby weakening criminal enterprises by removing the capital infrastructure of crime.

In this era of multi-national criminal syndicates, including several controlled substance importation cells, the investigation of which I have personally been involved in, citizens of other countries import drugs into Salt Lake County, use the money from the distribution of those drugs to move into Salt Lake County, and then acquire assets, using the proceeds of drug sales, all of which are kept in the names of uninvolved siblings or children. These relatively unsophisticated criminals have easily already determined how to avoid disgorging their drug proceeds, as the "straw-men" nominal holders would likely not be prosecuted, and may not even know that criminal proceeds are being kept in their names.

Recently, a clandestine methamphetamine laboratory was discovered in Salt Lake County, the operator of which allegedly conducted his activities as a means of supporting himself. Subsequent investigation led investigators to believe that this person used the proceeds of his criminal activities to purchase a 1998 ATV, which he titled and registered in the name of his four year old child. Because the registered owner of the ATV which represents the alleged proceeds of criminal activity is not the alleged criminal, criminal asset forfeiture would be unable to force the defendant to disgorge the profits of his crime. Only a civil *in rem* proceeding

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<sup>10</sup> National District Attorneys Association, Resolution (Adopted March 6, 1993).

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against the actual property alleged to be criminal proceeds can attack this clear effort to hide and protect criminal assets.

Criminals are undeterred when resources such as money, vehicles, real property, and illicit operations are readily available to fund, operate or hide their criminal enterprises, and are not subject to asset forfeiture.

*Myth 2 : Civil Asset Forfeiture Allows No Due Process, and Affords Innocent Owners and Claimants No Rights*

This argument is an outright fabrication, and ignores the plain meaning of all Utah forfeiture statutes, and all state and federal forfeiture jurisprudence. Those opposed to all asset forfeiture assert that their "purpose" is to "restore" due process to asset forfeiture, as if no process is currently in effect to protect the property owner. Any cursory reading of the asset forfeiture laws in Utah demonstrates that this is not the case. In every instance where asset forfeiture is permitted, procedural protections (due process of law) exist to protect owners of property who were unaware that their property was involved in criminal activity.<sup>11</sup>

When property is seized by a law enforcement officer, a receipt is required by Utah law to be given to the person from whom the property is seized. In every civil, *in rem* asset forfeiture proceeding, the State is required, as in any other civil lawsuit filed by any other litigant in the State of Utah, to begin the forfeiture proceeding by filing a Complaint, which is filed within ninety days or one year<sup>12</sup>, of the seizure of the property. This Complaint must be verified by the police officer, and signed by the prosecutor. After filing the Complaint, the State must then give the person from whom the property was seized, any registered owner and any other possible claimant known to the State notice of the proceeding, by filing with the Court, and serving upon all known claimants or interest holders a Notice of Seizure, and Notice of Intent to Forfeit.

Thereafter, any claimant desirous of doing so may file an Answer or claim, asserting or setting forth the person's claim to the seized property, and the reasons why the forfeiture is not appropriate. The respective forfeiture statutes prohibit the forfeiture of any property or interest of legitimate owners or interest holders of property who were unaware of the criminal activity.<sup>13</sup>

<sup>11</sup> See Utah Code Ann. §58-37-13 (permitting forfeiture property used in violation of controlled substance act); Utah Code Ann. §41-6-13.7 (permitting forfeiture of vehicles and conveyances used to flee police officers); Utah Code Ann. §76-3-501 (permitting forfeiture of vehicles used to commit felony offenses in which a firearm is used); Utah Code Ann. §76-10-525, (permitting the forfeiture of weapons unlawfully used or possessed), Utah Code Ann. 76-10-1107-08, (Permitting forfeiture of all devices, equipment, and proceeds of gambling offenses); Utah Code Aim. 76-10-1601, (permitting the forfeiture of all proceeds of and any interest in all continuing criminal enterprises (racketeering)); and Utah Code Ann. 76-10-1901, (permitting the forfeiture of all proceeds and interests in illicit operations used for money laundering).

<sup>12</sup> Depending on the type of forfeiture action.

<sup>13</sup> See Utah Code Aim. 41-6-13.7(1) (protecting rights of vehicle owner who does not know or consent to vehicle being used to flee officers, and rights of persons having security interests in such vehicles); Utah Code Ann. 58-37-

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Thereafter, reciprocal discovery is available to all parties who have asserted a claim, in order to determine the basis for the allegations of forfeiture, and to substantiate or disprove any defense and claims. If the claims are substantiated, or the claimant is an innocent party, the forfeiture is then settled or dismissed by the prosecutor, based upon evidence produced by additional investigation or by the interested parties.

If no answer or claim is filed, then the State may apply to the court for a default judgment, at which time the court examines the record, and if sufficient proof is shown supporting the forfeiture, the court may enter a Judgment, forfeiting the property to the State.

If an answer or claim is filed, and discovery does not resolve the case, then the claimant, like any other party to a civil suit, is entitled to a trial before the court to determine whether or not forfeiture is warranted and is constitutionally permissible. In this trial, the State has the burden of proof. Like any defendant or claimant in any lawsuit, all evidence supporting forfeiture must be adduced and presented by the State, and all claims and defenses must be sustained by the claimant, *after a prima facie showing* sufficient to support forfeiture is made by the State.

Forfeiture opponents either misunderstand, misapprehend or misuse the term "due process of law", or seek to use our cherished notions of due process as a screen behind which they mask their true intent of abolishing all asset forfeiture. Due process is the term the founders used to express the uniquely American ideal that legitimate governmental action, and the fair and just exercise of governmental powers requires notice to, and the affording of an opportunity to be heard by, all persons affected by the proposed governmental exercise of power.

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13(2)(e) (forfeiture of vehicle used in violation of controlled substance act not permitted if owner did not know or consent to violation); Utah Code Ann. 58-37-1 3(2)(I) (forfeiture of warehousing, housing, and storage facilities used in violation of controlled substance act not permitted if interest holder did not know or have reason to know of unlawful conduct); Utah Code Ann. 58-37-1 3(2)(I) (iii) (forfeiture of real property used in violation of controlled substance act not permitted unless cumulative sales of unlawful substances on the property in two month period exceeds \$1,000); Utah Code Ann. 76-3-501 (permitting seizure of vehicle used in commission of felony in which a firearm is used only if owner "was a knowing participant in the offense or voluntarily allowed the vehicle to be used, knowing that it would probably be used to commit the offense"); Utah Code Ann. 76-10-525 (firearm used as evidence shall be returned to owner unless the "true owner is the person committing the crime for which the weapon was used as evidence"), all devices, equipment, and proceeds of gambling offenses, Utah Code Ann. 76-10-1107 (requiring prior to forfeiture a magistrate's determination that the device or equipment is used or kept for the express purpose of gambling); Utah Code Ann. 76-10-1 108 (only a person convicted of a gambling offense shall be required to "forfeit any seized" gambling bets or proceeds); Utah Code Ann. 76-10-1603.5 (requiring conviction of racketeering prior to forfeiture of proceeds of continuing criminal enterprise); Utah Code Ann. 76-10-1908 (civil forfeiture of vehicles, property, or funds used in violation of money laundering statute requires filing of complaint, issuance of seizure warrant, service upon all claimants known to prosecutor, all of whom may petition court for release).

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The myth that there is no due process in asset forfeiture proceedings propounds the false notion that asset forfeiture as currently allowed by Utah law allows forfeitable property to be confiscated without due process. Forfeiture and seizure are not the same. Seizure is governed by the respective forfeiture statutes, and the case law arising from the Fourth Amendment's enunciation of our right to be secure in our persons, houses, papers and effects against unreasonable searches and seizures. Seizure of property which may eventually be subject to forfeiture is allowed under the same strict standards applicable to searches and evidence seizures. Forfeiture, or the awarding of property to the government, and the cessation of all other's rights in the property, is governed by detailed court procedures found in statute, raised against the background of the Constitution, and subject to not only the statutory forfeiture procedures, but also to all of the provisions of the Utah Constitution, the United States Constitution and the Utah Rules of Civil Procedure.

In every case where asset forfeiture is permitted, there is a process of law by which assets are seized, the claims of persons asserting an interest in the property may be heard and the rights of innocent owners protected. The unsupported position that asset forfeiture is consistently used by Utah law enforcement agencies against innocent owners to obtain money, slanders and denigrates the integrity and reputation of every County Sheriff, Deputy Sheriff, Police Chief, Police Officer and prosecutor in this State.

*Myth 3: Civil Asset Forfeiture Threatens Legitimate Property Rights.*

These myths are "supported" by argument and reasoning devoid of any factual research. This assertion libels and impugns the integrity of every law enforcement officer, prosecutor and judge who has been involved in the prosecution and resolution of asset forfeiture cases, as well as every legislator who ever voted in favor of an asset forfeiture law. Further, such wild, unsubstantiated claims debase the public discourse, and demean those whose sworn duty is to protect, to serve and to uphold the United States and Utah Constitutions. This statement, as evidenced by the results of the current audit, bears no relationship to reality.

Forfeiture opponents conclusively assert that asset forfeiture is "one of the most threatening" ways in which individual property rights are violated. However, the only property threatened by asset forfeiture is that property which is the proceeds of, was acquired with the proceeds of, or is used to commit or facilitate crime. In Utah, many if not most thefts are drug-related. Stolen property is routinely exchanged for illegal drugs. Allowing criminals to keep their criminal proceeds and property, and doing away with asset forfeiture places property rights in greater jeopardy.

As only criminal proceeds and criminally tainted property is subject to forfeiture, only criminals and their associates, and those who knowingly economically benefit from crime need worry about losing their property. Surely most citizens would not advocate that bank robbers keep their ill-gotten gain, or that if somehow they were able to escape a criminal conviction, they could keep the bank's money. Yet the reasoning of current asset forfeiture opponents, if carried

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to its logical conclusion, would prohibit the seizure of bank robbery proceeds until a criminal conviction could be obtained, and would mandate the return of such money if no conviction occurred, even if it could be proven that the money is, in fact, the money taken from the bank during the robbery.

In calendar year 1997, the Salt Lake County District Attorney's Office screened 354 cases of seized property for possible asset forfeiture proceedings. Of these, 343 were eventually filed as civil or criminal asset forfeiture cases. This represents approximately one forfeiture case for every ten drug felony criminal cases filed by Salt Lake County prosecutors during the same period.

Of the 343 forfeiture cases filed in Salt Lake County in 1997, in only 46 cases was any claim or answer filed by any person. In 297 cases, judgments of forfeiture were entered because no one, not the person from whom the property was seized, nor any other person, ever filed a claim, filed an answer, or mailed any type of claim to either the police agency, the District Attorney's Office, or the Court. Of the 46 cases in which claims were made: 17 of the cases were dismissed, and the property returned, after a claim was filed and further investigation revealed the legitimacy of the claims by innocent persons, interest holders or owners; 10 of the cases resulted in the property owner stipulating and agreeing to forfeiture after they saw the evidence supporting forfeiture; 16 of the cases resulted in judgments of forfeiture being entered by Courts after hearing the State's evidence and the evidence put forth by the claimants, and 3 cases remain pending before the Courts. No cases which went before a Court for determination after a claim was filed resulted in the return of property or other finding in favor of claimants.

In calendar year 1998, the Salt Lake County District Attorney's Office screened 464 cases of seized property for possible asset forfeiture proceedings. Of these, 456 were eventually filed as civil or criminal asset forfeiture cases. Again, this represents approximately one forfeiture case for every ten felony drug criminal case filed by Salt Lake County prosecutors during the same period. The percentages of claims and answers filed, and the percentages of cases in which no claim is filed appear to have remained about the same. However, many of these 1998 forfeiture cases remain pending before the Courts.

*Myth 4                      Civil Asset Forfeiture Creates a Conflict of Interest By Allowing Police Agencies To Use  
Forfeited Assets To Combat The Criminal Activity From Whence The Forfeiture Arose.*

As the plaintiff in every criminal case filed in state court, the State of Utah conceivably has the same "conflict of interest" in acquiring forfeiture proceeds as a police agency. Further, because the forfeiture must be screened by, and prosecuted by a state or county prosecutor, and because forfeitures must be ordered by District Judges, any conflict of interest in asset forfeiture is the same as any other civil or criminal action brought by the State.

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This myth is premised on the flawed and unsupported notion that an inherently evil and insurmountable "conflict of interest" is created by the police being able to retain assets which are subject to forfeiture. As noted, forfeiture opponents fail to explain why the State of Utah would not have a similar conflict in the event forfeited proceeds were deposited in the general fund. Forfeiture opponents have relied in the past on a few, anecdotal, sensationalized or well publicized cases, arising in jurisdictions outside of Utah, where abuses occurred and were corrected. Utah has been a leader in guarding against the possibility of these types of abuses.

The National Code for Professional Conduct for Asset Forfeiture, attached for your information, protects asset forfeiture from the taint of conflict. Adherence to this Code requires that forfeiture proceeds "shall be maintained in a separate fund or account subject to appropriate accounting controls" and that seizing agencies are required to protect and preserve the value of seized property. Most importantly, seizing entities "shall avoid any appearance of impropriety in the sale or acquisition of forfeited property."

*Myth 5: Civil Asset Forfeiture Allows Law Enforcement To Confiscate Private Property Without Due Process, Upon Mere Allegations Of Criminal Conduct.*

Again, this argument is an outright fabrication, and ignores the plain meaning of all Utah forfeiture statutes, and forfeiture jurisprudence, as well as the facts as borne out by the current audit. Before any property is subject to forfeiture, a specified criminal activity and crime must occur. Property involved in, or the proceeds of the crime must then be seized. Seizure of forfeitable property must proceed as, and is subject to all constitutional safeguards applicable to all searches, seizures of any kind, and arrests<sup>14</sup>, namely:

Allegedly forfeitable property must be seized by peace officer, *with probable cause* to believe property is the proceeds of, or is intimately involved in facilitating the specified criminal activity. The seizure must be made with a seizure warrant or a search warrant, which has been approved by a magistrate.

Certain limited exceptions to the seizure warrant requirement exist, and they are the same as the exceptions to the requirement for warrants for police searches and for arrests. These are situations in which the law enforcement official has procured an administrative inspection warrant, or obtains the consent of the person in possession of the seized property, or where the property to be seized is subject to a prior judgment of forfeiture, or if the seizure is incident to arrest, *and* the property is dangerous to health or safety; or the property, if not immediately seized, will vanish, dissipate, be concealed, destroyed or removed from jurisdiction of the Court.

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<sup>14</sup> See Utah Code Ann. §58-37-13(3)(a); Utah Code Ann. §41-6-13.7(2); Utah Code Ann. §76-3-501(3); Utah Code Ann. §76-10-525, Utah Code Ann. 76-10-1107(1); Utah Code Ann. 76-10-1603.5; and Utah Code Ann. 76-10-1908(2).

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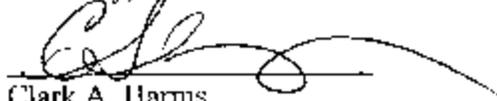
All seizures are subject to federal and state search and seizure constitutional provisions and restrictions. Search warrants and administrative warrants must seek and have magistrate's approval for seizure of proceeds. If seizure occurs without a warrant, a seizure warrant must still be obtained from the Court to hold property seized pending forfeiture proceeding outcome.

**Conclusion**

The divestiture of the proceeds of crime, through state legal action (Asset forfeiture) currently exists as a viable weapon against crime in Utah. Forfeiture opponents seek to eviscerate this tool. This office supports appropriate forfeitures of criminal proceeds, and seeks to lawfully prevent criminals from keeping their ill-gotten gain, to protect local control over the funds obtained through asset forfeiture, and to promote and assure the accountability of those involved.

As prosecutors, the last thing we would ever want to do is deprive innocent persons of life, liberty or property. However, almost equally galling and revolting is the thought of allowing criminals to get and keep gain or profit from their crimes.

Sincerely,

  
\_\_\_\_\_  
Clark A. Harms  
Deputy District Attorney



UTAH COUNTY SHERIFF'S OFFICE  
PROVO POLICE DEPT.  
OREM POLICE DEPT.  
SPRINGVILLE POLICE DEPT.  
AMERICAN FORK POLICE DEPT.  
SPANISH FORK POLICE DEPT.

PLEASANT GROVE POLICE DEPT.  
LEHI POLICE DEPT.  
FAYSON POLICE DEPT.  
NAPLTON POLICE DEPT.  
SANTAQUIN POLICE DEPT.  
SALEM POLICE DEPT.

ALMIRAH/HIGHLAND POLICE DEPT.  
UTAH DIVISION OF INVESTIGATIONS  
LIVSC POLICE  
BYU POLICE  
ADULT PROBATION AND PAROLE  
FOURTH DISTRICT JUVENILE COURT

**State of Utah**  
**Office of the Legislative Auditor General**  
**130 State Capitol**  
**Salt Lake City, Utah 84114-0151**

**Nov 8<sup>th</sup> 1999**

**Attn: James P. Behunin**

Please find enclosed my comments in reference to the recent Performance Audit of Asset Forfeiture Procedures (Report #99-09) completed by your office. These comments are not intended as argumentative, or rebuttal, but only as an explanation and defense of the Utah County Major Crimes Task Force.

Under Chapter III, the section titled **Isolated Problems at Two Agencies** starting on page 30, it states that "the Utah County Major Crimes Task Force has a history of problems with the management of its seized assets." The report goes on to explain that several years ago, the agency took custody of some items without going through the forfeiture process. The example of this that you then cite, is something that was done by the Utah County Narcotics Enforcement Team (NET) which was prior to the organization of the Utah County Major Crimes Task Force. Mistakes or decisions made by personnel during those years, should not be transferred to the officers and administrative staff that are assigned to the current task force. Personnel assigned to the Utah County Major Crimes Task Force currently, from Administrative personnel, evidence intake and custodian, Officers, even the City that administers the grant from a financial standpoint are all different from the days of the Narcotic Enforcement Team (NET). Perceptions can easily become reality in peoples mind, and the perception that the Utah County Major Crimes Task Force has "a history of problems with the management of its seized assets" can taint or slant opinions from the public and/or from Police administrators both within and outside of Utah County about how well the task force is being run. As the director of the Utah County Major Crimes Task Force my concern is that the current task force (Utah County Major Crimes Task Force) is not strongly separated from the old task force (The Utah County Narcotics Enforcement Team) or NET.

On page 33, under the subtitle **Evidence Missing from the Evidence Room**, it states that "In early 1998, the Utah County Major Crimes Task Force discovered items missing from its evidence room at their headquarters at the Pleasant Grove Police Department." Again, this problem refers to the Major Crimes Task Force and our evidence room. The Major Crimes Task Force has never used the evidence room at the Pleasant Grove Police Department for our evidence. From the very first day of our organization in July 1997, we determined that we did not want to be in the evidence business, and the Provo City Police Department and its evidence custodian and evidence procedures is what we subscribed to, and where we processed our

evidence. The Utah County Major Crimes Task Force never used or had anything to do with the evidence room at the Pleasant Grove Police Department, other than taking over what evidence was still in custody from the days of the Utah County Narcotics Enforcement Team (NET). To say that the Utah County Major Crimes Task Force discovered missing items from j~ evidence room is incorrect, and leads the reader to believe that the current task force used the same room and evidence procedures that were in place in the days of the NET team. Again, it is my opinion as the project director of the Utah County Major Crimes Task Force, that procedures and mistakes from the days of NET have nothing to do with the way the current task force is operated and administered. I take offense to the perception that is being portrayed that NET and the Utah County Major Crimes Task Force is all one and the same. It is not now, and never has been, the same organization.

In the spring of 1999, the amount of seized cash had grown to about \$140,000 and it was decided that the cash needed to be deposited into an interest bearing savings account.” This is another statement that is not true, and leads the reader to believe that those running the Utah County Major Crimes Task Force are either stupid, or extremely trusting to keep \$ 140,00 in cash in a safe at their office in the basement of a local police department. That money has never been kept at the offices of the task force, but has always been in the custody of either the Provo City Police Department evidence custodian, in a safe at that location, or in the custody of the Utah County Sheriffs Office in a safe in their locked, alarmed, evidence room. The task force never has and never would keep that kind of cash in our office, locked in a safe or not. Statements to that effect make this organization appear to be administered by incompetent, non-thinking individuals. While our administrative personnel may not be accountants, or be business management experts, it is my feeling that we excel in the area of common sense, and good practical police related skills.

The statement is true that \$1000 in seized cash was inadvertently dropped, misplaced, or left at the seizure scene. Officers made every effort to recover that missing money, however it was not found. There is no excuse to be made for that lost money, only that officers are human, mistakes are made, and \$1000 was lost. The other case involved a substantial amount of cash that was seized, and the mistake was made in the counting phase of the seizure. It was incorrectly counted and documented at the scene, and later when re-counted and placed in the custody of the City of Orem for deposit in the state interest pool account, the mistake was found. However at that time, paperwork (property sheets) and documentation at the scene showed more money seized than was actually seized. New property sheets and documentation could have been drawn up, that negated the mis-count, however we did not want to appear to be covering a simple counting mistake up, so it was documented that this mistake was made, and the count at the scene was done incorrectly. This was probably due to the exact conditions that are described in the report. That being, the time of day, at a search warrant, in a location not suitable to good lighting and accurate accounting. Again, there is no excuse for this mis-count other than our characteristic of being human. Money was counted multiple times by multiple individuals, however the mistake was still made.

On page 35, under the subtitle **Property Has Not Been Returned to Owners** the report states, “In one case a forfeiture action was filed a year after the seizure had been made. In another case, task force officials thought the case had been sent to the County attorney. However, when we visited with the County attorney’s office they did not have the case on file. As a result, this second case also was not filed within the required 90-days of the date the items were seized. Because of the mis-communication between the task force and the County attorney’s office, the task force has seized property in its custody that they will probably not be able to forfeit.”

Cases not filed by the County attorneys office are mistakes made by the County attorneys office, not the Major Crimes Task Force. While it is probably true of any law enforcement unit, that communication

between law enforcement and prosecutors could be improved, we certainly cannot and should not be holding the hands of prosecutors to insure that they are doing their job. When a case is filed with the County attorneys office, it leaves the hands of the officer, and presumably is taken over (from a prosecution standpoint) by the prosecuting attorney. It is our presumption that short of testimony in court, the case is completed unless the prosecuting attorney requires additional investigation, in which case he/she contacts the officer and requests additional investigation prior to the actual court filing of the case. In this particular case, the officer filed the case with the County attorneys office and did not hear any additional information regarding the case.

It is my understanding as it relates to the second case, that it was a seizure involving a small amount of cash that was taken from a juvenile that was arrested and drug charges were filed with juvenile court. Due to the fact that the defendant was a juvenile, those charges and forfeiture actions would have been handled through juvenile court and not the County attorneys office. Again, filing of this forfeiture proceeding was apparently not done by the juvenile court prosecuting attorney.

On page 36, under the subtitle **Three Instances of Officer Abuse of Seized Property**, the report states “In the third case of reported missing evidence in Utah County Major Crimes Task Force, officials found the evidence missing but could not verify, due to poor controls over the evidence room, which officer, if any, had taken the missing items.” My contention again is that this was not the Utah County Major Crimes Task Force evidence that was missing due to poor controls over the evidence room, but the Utah County Narcotics Enforcement Team (NET) case of missing evidence or items from it's property/evidence room. I realize that the Major Crimes Task Force took over NET after re-organizing the task force, however the Major Crimes Task Force is under new leadership, and has new procedures that are different than the way things were done at the time that NET was functioning as the task force in Utah County.

On page 37, under the subtitle **Below Market Deals are Rare**, the report states “Officials with the Utah County Major Crimes Task Force told us that several years ago officers were allowed to directly purchase items that had been forfeited to the agency prior to the auction.” This is another statement that misleads the reader to believe that the Utah County Major Crimes Task

Force is one and the same with the Utah County Narcotics Enforcement Team (NET). The report refers to “the agency” after just speaking of the Utah County Major Crimes Task Force. The Major Crimes Unit has never sold any item of evidence, forfeited property, or any other piece of equipment to any officer for any reason. We do not handle our evidence the same way, we do not sell property or forfeited items to officers for a reduced price, or for any price for that matter, and control and accountability measures are in place that make these kinds of problems non-existent. I would prefer a complete separation between the Utah County Major Crimes Task Force and the Utah County Narcotics Enforcement Team (NET).

I realize that given the time, resources, and access to the records of a task force or County attorneys office for this audit, lends itself to a nightmare in trying to piece together information that may be many months or years old. However, I contend that the space and time devoted to the Utah County Major Crimes Task Force is unfair to us, and should more directly be pointed to the Utah County Narcotics Enforcement Team (NET). I feel that the report should be made very clear to the reader, that mistakes made in Utah County did not happen under the command of the current leadership of the task force. Every effort has been made since the organization of the Major Crimes Task Force to keep us out of the evidence business. Common sense tells one, that the personnel that seize evidence should not also be in control of processing, storing and releasing that evidence for court or other purposes. That process lends itself to many possible ways to corrupt a case, or corrupt an officer. That has not happened in Utah County since the inception of the Major Crimes Task

Force. We have had the good fortune to be able to use the City of Provo, and now the Utah County Sheriffs office evidence facilities for processing and storage of the evidence that is seized by the Utah County Major Crimes Task Force.

Please accept these comments / rebuttal in the way they are intended, that being defense of a very fine law enforcement unit. Granted, the Utah County Major Crimes Task Force has made mistakes and will probably make mistakes again in the future. However, the officers and administrators of the task force are 1top notch, high quality officers that desire a reputation within the law enforcement community of the State of Utah that is as top notch as the officers are. I believe this report will somewhat taint that reputation, and subsequently this defense has been written to attempt to correct those items that I could see that may be incorrect. Thank you for your consideration to these comments.

Respectfully,

*Stephen H. Clark*

Lt. Steve Clark

Orem, Department of Public Safety

Director, Utah County Major Crimes Task Force



OFFICE OF  
**Utah County Attorney**

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Sherry Ragan, Criminal Division Chief  
B. Kent Sundberg, Civil Division Chief  
Doug Waney, Chief Investigator

Criminal Division  
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November 9, 1999

Wayne L. Welsh  
Auditor General  
130 State Capitol  
P.O. Box 140151  
Salt Lake City, Utah 84114-0151

Dear Mr. Welsh:

I appreciate having provided to me a copy of the exposure draft of report number 99-09 dealing with asset forfeiture procedures. The general findings and conclusions of your audit indicating that police agencies and prosecutors are not violating individual rights by unjustified seizure and forfeiture of personal property comes as no surprise to me. I have worked in law enforcement for more than twelve years and know the caliber of individuals who serve this state as police officers and prosecutors. They are generally individuals dedicated to making the communities in which they work safer, more pleasant places to live and raise families. And while they may perform their duties aggressively they are also very attuned to the need to be fair and respect individual rights.

I believe that knowledgeable members of the Utah County law enforcement community would accept the audit's criticism of NET. As you know, the irregularities noted in your audit report were being investigated by the Utah County Sheriff's Office prior to the commencement of the audit and the MCTF Board of Directors had been considering changes necessary to prevent future problems of a similar nature,

There are several conclusions or recommendations included in your report with which I disagree and would like to note them for the record. They are as follows:

1. The report recommends the legislature consider a cap on reserves which agencies may maintain with monies derived from asset forfeitures. It suggests that reserves or "rainy day finds" are an indication agencies are using forfeiture funds to supplant rather than supplement normal operating budgets,

In my opinion, the very opposite is true. The accumulation of unexpended funds derived from forfeitures very clearly indicates agencies are operating within budgets established with assessments to member agencies and using forfeiture funds only for those extraordinary expenses which everyone experiences from time to time and which may not be included in one's budget.

To require law enforcement agencies to cap their reserves, or worse yet, to spend forfeiture funds within a specific length of time after the court grants forfeiture, can only lead to waste, excess, and the unnecessary expenditure of funds which might be more beneficially spent in the future. Contrary to the indication in your report, no law enforcement agency ever has more money than it *can* prudently use in the enforcement of controlled substance laws

The State of Utah maintains a "rainy day fund" for the very same purpose drug task forces do, to meet unexpected and unbudgeted needs. Maintaining a savings account is just good financial practice whether you are an individual, a drug task force, or the State of Utah. The recommendations made in your report with respect to reserve accounts, I believe are unwise.

2. Your report recommends having one attorney in each prosecutor's office assigned to do all forfeitures. The basis for that recommendation seems to be a belief that the attorney will acquire a high level of experience and expertise in the area of asset forfeiture and thus reduce the possibility of "inappropriate seizures."

In my office we have, pursued asset forfeitures both ways, with one attorney assigned to do all forfeitures arid with each attorney doing those forfeitures arising out of criminal prosecutions assigned to them. Before the law in Utah changed and prosecutors filed forfeitures in rem, I assigned one attorney to do all forfeitures. I did so because I believed good practice dictated a separation~ between the criminal case and the forfeiture in order to preclude a defendant who owned seized property from using it to lessen his accountability in the criminal case.

While I prefer having one attorney do all forfeitures, because the current state of forfeiture law in Utah requires a forfeiture be part of the criminal proceeding, it would be an unjustifiable waste of resources to assign two attorneys to one drug prosecution. It would require a degree of specialization which is difficult to achieve in all but the largest jurisdictions.

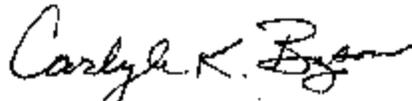
It is my experience that in those offices where one attorney is assigned to do all forfeitures, that assignment is usually given to one of the least experienced attorneys, to individuals not sufficiently experienced to be assigned more complicated cases such as homicides, sexual offenses, and fraud. Your report completely ignores the probability that if alt prosecutors to whom drug prosecutions are assigned also pursue the forfeiture aspect of those cases, they will all acquire the level of experience your report indicates you believe attorneys handling forfeiture cases should have.

3. Your report recommends that items of property seized, but not forfeited and not claimed by the proper owner, be considered abandoned and sold by the seizing agency. I'm not certain that simplistic recommendation conforms with the complicated provisions of section 67, chapter 4a of the Utah Code which deals with the disposition of abandoned property.

While I agree with the general conclusions of your report, I wish to reiterate my concern for the methods used by Mr. Behunin in gathering the information necessary to the audit process. I have expressed those concerns in a prior communication and will not repeat them here. However, I believe *you* should know that in September I received a telephone call from Fourth District Court Judge James Taylor. He informed me that Mr. Behunin had arranged an appointment with him on what he believed was the pretext of conducting a survey of judges on forfeiture issues. When Judge Taylor informed Mr. Behunin that he would not discuss active cases nor answer questions about how he might rule in a particular circumstance, Mr. Behunin's line of questioning changed to questions on specific cases handled by Mr. Taylor when he was a deputy in this office, I believe it a fair representation of Judge Taylor's comments to me to say he felt Mr. Behunin was deceptive and dishonest in his approach.

I look forward to seeing your audit report in final form and would appreciate receiving a copy of that document. If I can be of any further assistance please feel free to contact me.

Sincerely,



Carlyle K. Bryson  
Utah County Attorney

CKB:am