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STATE OF NEBRASKA
OFFICIAL
APR 2 1993
DEPT. OF JUSTICE

DATE: March 24, 1993

SUBJECT: Application of Political Subdivision Budget Limitations to Public Power and Irrigation Districts.

REQUESTED BY: Senator Jerry Schmitt
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the application of the statutory provisions imposing budget limitations on political subdivisions (other than school districts) contained in Neb. Rev. Stat. §§ 77-3437 to 77-3441 (Cum. Supp. 1992) to public power and irrigation districts. In addition, you have asked us to address certain other questions pertaining to the powers of public power and irrigation districts. As you indicate that, depending upon our responses to your questions, you are considering introducing clarifying legislation, we will respond to your request.

Initially, you ask whether "the lid restrictions in the Nebraska Budget Act apply to public power and irrigation districts?" The budget limitations on political subdivisions referred to in your request are not actually a part of the "Nebraska Budget Act." The provisions of the Nebraska Budget Act are contained at Neb. Rev. Stat. §§ 13-501 to 13-513 (1991 and Cum. Supp. 1992), while the limitations on budgets of political subdivisions are contained at Neb. Rev. Stat. §§ 77-3437 to 77-3441

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(Cum. Supp. 1992). The provisions outlining these budget limitations, however, make reference to various provisions of the Nebraska Budget Act. Section 77-3438 provides, in pertinent part: "(1) Except as provided in sections 77-3438.01, 77-3439, and 77-3440, no governing body shall adopt a budget statement pursuant to section 13-506. . . in which the anticipated aggregate receipts from property taxes for any fiscal year exceed the anticipated aggregate receipts from property taxes for the prior fiscal year. . . ." Section 77-3437(3) provides the definition of "[g]overning body" shall be that found in § 13-503, with the exception of school boards or boards of education of school districts. "Adopted budget statement" is defined in § 77-3437(1) to have the same meaning as in § 13-503, in which the term is defined to mean a "proposed budget statement which has been adopted or amended and adopted as provided in section 13-506."

Recently, questions have arisen regarding the scope and application of both the provisions of the Nebraska Budget Act and the limitations on political subdivision budgets imposed under §§ 77-3437 to 77-3441. In a recent opinion, this office concluded that "the Budget Act and budget limit provisions apply to all political subdivisions including public building commissions." Op. Att'y Gen. I92-087 (December 29, 1992). As a result of our issuance of this opinion, a legal challenge to the applicability of the Budget Act and the limits on political subdivision budgets was instituted. ***Lincoln-Lancaster County Public Building Comm'n v. Breslow***, Doc. 492, Page 212 (Lancaster County District Court). As we stated previously: "The question whether the budget requirements are applicable to political subdivisions whose governing bodies are not included in Section 13-503 is recurring. . . . Legislative clarification of provisions of the Budget Act, and in particular, the definitional section regarding governing bodies would serve to facilitate implementation of and compliance with the requirements of the Act." While recognizing these difficulties, we will nevertheless endeavor to respond to your initial question regarding the application of these statutory provisions to public power and irrigation districts.

Public power and irrigation districts are not among the entities whose "governing body" is specifically mentioned in § 13-503. However, based on our recent opinion, this does not necessarily mean that these entities are therefore excluded from compliance with the Budget Act. Public power districts are public corporations and political subdivisions of the state. ***York County Rural Public Power Dist. v. O'Connor***, 172 Neb. 602, 111 N.W.2d 376 (1961); ***Consumers Public Power Dist. v. Eldred***, 146 Neb. 926, 22 N.W.2d 188 (1946). Consistent with our prior opinion, then, it appears that public power and irrigation districts are not exempt from the provisions of the Budget Act.

It does not necessarily follow, however, that such entities are also subject to the budget limitations on political subdivisions imposed under §§ 77-3437 to 77-3441. As noted previously, § 77-3438 (1) prohibits a governing body from adopting

a budget statement "in which the anticipated aggregate receipts from property taxes for any fiscal year exceed the anticipated aggregate receipts from property taxes for the prior fiscal year. . . ." (Emphasis added). Neb. Rev. Stat. § 70-629 provides: "Except for the authority to make assessments granted by section 70-677 to districts organized under or subject to Chapter 70, article 6, the district shall have no power of taxation, and no governmental authority shall have the power to levy or collect taxes for the purpose or paying, in whole or in part, any indebtedness or obligation of or incurred by the district or upon which the district may be or become in any manner liable." As the limits imposed under §§ 77-3437 to 77-3441 apply to revenues raised by "property taxes" as defined in § 77-3437(5), and public power and irrigation districts are generally precluded from exercising taxing power under § 70-629, the limitations in §§ 77-3437 to 77-3441 would not be applicable to public power and irrigation districts organized and operating under Chapter 70, article 6, to the extent revenues for the district are not generated from property taxes.

Section 70-667 provides, in part:

> All power plants and systems, all ethanol production or distribution systems, and all irrigation works constructed, acquired, used, or operated by any district organized under or subject to Chapter 70, article 6, or proposed by such district to be so constructed, acquired, owned, used, or operated are hereby declared to be works of internal improvement. All laws applicable to works of internal improvement and all provisions of law applicable to electric light and power corporations, irrigation districts, or privately owned irrigation corporations, the use and occupation of state and other public lands and highways, the appropriation, acquisition, or use of water, water power, water rights, or water diversion or storage rights, for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of power plants, systems, transmission lines, and irrigation works, as herein contemplated, shall be applicable, as nearly as may be, to all districts organized under or subject to Chapter 70, article 6, and in the performance of the duties conferred or imposed upon them under such statutory provisions. Such laws, provisions of law, or statutory provisions are hereby made applicable to all irrigation works and facilities operated by irrigation divisions of public power and irrigation districts organized under Chapter 70, article 6, and shall include, but not be limited to, the right of such district to exercise the powers conferred upon districts by Chapters 31 and 46, relating to operation, maintenance, rehabilitation, construction, reconstruction, repairs, extension, recharge of ground water, and surface and subsurface drainage projects and the assessment of the

cost thereof to the lands benefited thereby.

Pursuant to § 70-667, public power and irrigation districts are authorized to exercise powers conferred upon drainage districts (Chapter 31) and irrigation districts (Chapter 41) "relating to operation, maintenance, rehabilitation, construction, reconstruction, repairs, extension, recharge for ground water, and surface and subsurface drainage projects and the assessment of the cost thereof to the lands benefited thereby." Thus, for example, irrigation districts are empowered to make annual assessments on real property within the district, *see* Neb. Rev. Stat. §§ 46-131 to 46-141 (1988); to call a special election to seek approval of an additional assessment, *see* Neb. Rev. Stat. § 46-144; or to make an assessment to defray certain costs of the district, *see* Neb. Rev. Stat. § 46-152. Assessments of this nature, however, may or may not be characterized as "property taxes" within the meaning of § 77-3437(5). While it is unlikely that exactions in the nature of special assessments (which are excluded form the definition of "tax" under § 13-503(4) of the Budget Act) should be classified in this manner, all taxes imposed under these provisions may not be deemed to fall in this category. Further, while irrigation districts formerly were exempted from the Budget Act, that exemption was recently removed. Neb. Rev. Stat. § 13-514 (1991) (*repealed* 1992 Neb. Laws LB 1063, § 214; 1992 Neb. Laws, 2nd Special Sess. LB 1, § 182). To the extent this situation interjects an area of unclarity, amendatory legislation would certainly be appropriate.

You next ask whether it is permissible for a public power and irrigation district to borrow funds in excess of fifty cents per acre of land in the district under the provisions of Neb. Rev. Stat. § 46-152. Section 46-152 provides, in part, as follows:

> If, after the annual assessment for the current year, the funds provided are for some unusual or unforeseen cause insufficient for the proper maintenance and operation of the district, the board of directors shall have the power to borrow additional funds needed, to an amount not to exceed fifty cents per acre for the land embraced in the district, pledging credit of the district for the payment of the same, and shall include in the estimate for the levy for the ensuing year for the general fund the amount so borrowed, and provide for the payment of the same.

The question presented is whether the provisions of § 70-667, making laws relating to irrigation districts applicable to public power and irrigation districts "as nearly as may be," requires that public power and irrigation districts acting under § 46-152 comply with the limit on borrowing contained in the statute.

"A statute is not to be read as if open to construction as a matter of course." ***County of Douglas v. Board of Regents,*** 210 Neb. 573, 577, 316 N.W.2d 62, 65 (1982). "Where words of a statute are plain and unambiguous, no interpretation is necessary to

ascertain their meaning, and in the absence of anything to indicate to the contrary, words will be given their ordinary meaning." ***Hill v. City of Lincoln***, 213 Neb. 517, 521, 330 N.W.2d 471, 474 (1983).

Construing the provisions of §§ 70-667 and 46-152, it appears plain that, to the extent a public power and irrigation district invokes the powers contained in § 46-152, the district is subject to the requirements and limitations imposed under this statute applicable to irrigation districts. ***See Wright v. Loup River Public Power Dist.***, 133 Neb. 715, 277 N.W.2d 53 (1938) (public power district governed by statutes relating to irrigation districts as to their appropriation, crossing, and use of highways). Thus, the limitation on borrowing in § 46-152 would be applicable to public power and irrigation districts acting pursuant to this provision.

Finally, you ask what consequences exist if a public power and irrigation district exceeds the borrowing limitation contained in § 46-152. While this is a rather broad and open-ended question, it appears that one possible consequence could be that a property owner in the district with standing to challenge such action could institute a lawsuit to have the district's act declared invalid as in excess of the authority granted by statute. While it may be likely that such action by the district could be deemed invalid only as to amounts borrowed in excess of the fifty cent per acre limit provided by statute, the lawsuit could seek to have any amount borrowed in excess of the limit declared invalid. Also, an affected property owner could seek to have all or part of any ensuing levy for payment of the amount borrowed declared invalid or illegal in whole or in part. Beyond such potential actions, we decline to speculate as to any further possible consequences which may flow from a determination that a district has acted contrary to § 46-152.

Very truly yours,

DON STENBERG
Attorney General

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Assistant Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

7-619-7.19

APPROVED BY:

DON STENBERG, Attorney General