Linda Willard

STATE OF NEBRASKA
Department of Justice

LINCOLN, NEBRASKA 68509 • TEL (402) 471-2682
ROBERT M. SPIRE
Attorney General

#90002

NO.
STATE OF NEBRASKA
OFFICIAL
JAN 18 1990
DEPT. OF JUSTICE

DATE: January 18, 1990

SUBJECT: The Constitutionality of LB 272A (which would appropriate funds to reimburse depositors of insolvent Nebraska industrial loan and investment companies)

REQUESTED BY: Senator David M. Landis
District No. 46

WRITTEN BY: Robert M. Spire
Attorney General

You ask if LB 272A is constitutional when it appropriates funds to reimburse depositors of State Securities Company, American Savings Company and Commonwealth Savings Company. In my judgment LB 272A is constitutional as to these depositors.

On May 18, 1989, I issued Opinion #89051 on the constitutionality of LB 356. I concluded that LB 356 was constitutional. For reference I attach a copy of this Opinion #89051.

LB 272A is substantially the same as LB 356. The modifications of LB 356 which are reflected in LB 272A do not alter my conclusions with regard to this depositors reimbursement legislation. I conclude that both LB 356 (as described in my May 18, 1989 Opinion #89051) and LB 272A are constitutional.

My reasoning with regard to the constitutionality of LB 272A is the same as my reasoning with regard to LB 356. In short, LB 272A is constitutional for these reasons:

(1) LB 272A represents an appropriation of funds to reimburse depositors of insolvent institutions for an appropriate public purpose as described in LB 272A. This appropriate public purpose is specifically identified in LB 272A in this manner:

(a) LB 272A summarizes the history of (a) insolvency of these failed industrial loan and investment companies, (b) the Nebraska Depository Institution Guaranty Corporation (NDIGC) and (c) the enactment of Neb.Rev.Stat. §21-17,144 (which required depository institutions to advertise the NDIGC protection of depositor accounts). LB 272A then makes a legislative finding and declaration that the history it summarizes has "seriously impaired the confidence of the people of this state in the Legislature and in the enactments of the Legislature such as §21-17,144."

(b) In addition, there are the further legislative declarations that "the confidence of the people of this state in its financial institutions has been seriously impaired, the welfare and stability of this state and its financial institutions require that the people have confidence in the Legislature and in the financial institutions that are organized pursuant to the enactments of the Legislature, and the redemption of the guaranty to depositors by the Nebraska Depository Institution Guaranty Corporation will serve a necessary public purpose and will effect a sound and necessary public policy."

(2) The declaration of public purpose in LB 272A is abundantly clear. LB 272A states without ambiguity that the circumstances surrounding these failed institutions present a unique and deeply disturbing situation which urgently calls for a legislative remedy. As cogently stated in LB 272A, the very integrity and credibility of actions by the State are involved. Restoring this credibility requires at a minimum the action of the Legislature provided for in LB 272A. The circumstances the Legislature describes are not normal or customary. They are unique and thus call for unique responses. The unique legislative response in LB 272A, based upon a clearly described statement of public purpose, would not, in my opinion, be second-guessed by the courts.

(3) I conclude that the courts would (a) examine the history and circumstances surrounding these failed institutions, (b) consider thoughtfully the public purpose set forth in LB 272A, and (c) determine that the LB 272A public purpose is an appropriate legislative response on behalf of the State of Nebraska to the circumstances surrounding these failed institutions. I believe the courts would

agree with the Legislature that there can be no more important public purpose than public confidence in government. And public confidence in government is directly involved here.

Through LB 272A the Nebraska Legislature is making a good faith effort to address a situation which has seriously eroded confidence in State government. In LB 272A the Legislature clearly describes the circumstances and public purpose it is addressing based upon those circumstances. In my judgment, the courts would uphold the action of the Legislature here as the fulfillment of an appropriate public purpose as identified and described by the elected representatives of the citizens of Nebraska.

Very truly yours,

Robert M Spire

ROBERT M. SPIRE
Attorney General

RMS/hmt

Attachment

cc: Patrick J. O'Donnell
Clerk of the Legislature

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

#89051
NO.
STATE OF NEBRASKA
OFFICIAL
MAY 18 1989
DEPT. OF JUSTICE

DATE: May 18, 1989

SUBJECT: The Constitutionality of LB 356 (which would appropriate funds to reimburse depositors of insolvent Nebraska industrial loan and investment companies)

REQUESTED BY: Senator John L. Weihing
District No. 48

WRITTEN BY: Robert M. Spire
Attorney General

You ask if LB 356 is constitutional when it appropriates funds to reimburse depositors of State Securities Company and American Savings Company. You also ask if LB 356 would be constitutional if depositors of Commonwealth Savings Company were added to it. In my judgment LB 356 is constitutional as to the depositors of State Securities Company and American Savings Company and also would be constitutional as to the depositors of Commonwealth Savings Company. Therefore, my answer is yes with regard to depositors of all three of these insolvent industrial loan and investment companies.

I

What is the legal basis for the constitutionality of LB 356? There are many constitutional, statutory and common law legal principles which relate to this issue. Discussion of them all would easily provide subject material for a year-long law school seminar and several law review articles. All of which would be worthwhile. However, the essential legal basis for determining the constitutionality of LB 356 is the question of whether or not appropriation of funds to reimburse the depositors of these

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insolvent institutions is for an appropriate public purpose. If LB 356 is for such a public purpose, it is constitutional. If not, it is unconstitutional and subject to legal attack on a number of grounds.

LB 356 summarizes the history of (a) insolvency of these failed industrial loan and investment companies, (b) the Nebraska Depository Institution Guaranty Corporation (NDIGC) and (c) the enactment of Neb.Rev.Stat. §21-17,144 (which required depository institutions to advertise the NDIGC protection of depositor accounts). LB 356 then makes a legislative finding and declaration that the history it summarizes has "seriously impaired the confidence of the people of this state in the Legislature and in enactments of the Legislature such as §21-17,144." In addition, there are the further legislative declarations that "the confidence of the people of this state in its financial institutions has been seriously impaired, the welfare and stability of this state and its financial institutions require that the people have confidence in the Legislature and in the financial institutions that are organized pursuant to the enactments of the Legislature, and the redemption of the guaranty to depositors by the Nebraska Depository Institution Guaranty Corporation will serve a necessary public purpose and will effect a sound and necessary public policy."

There are several Nebraska Supreme Court cases addressing the question of what is or is not a proper public purpose which will support the constitutionality of a legislative appropriation. A study of these cases is instructive. See State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962); Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 334 (1976); Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981); State ex rel. Creighton Univ. v. Smith, 217 Neb. 682 353 N.W.2d 267 (1984). There are other similar decisions.

Several common themes which bear upon the constitutionality of LB 356 run through these cases. These themes are:

1) The Nebraska Constitution does not grant power to the Legislature but rather restricts the Legislature. The Legislature may legislate on any subject not prohibited by the Constitution.

2) Unless either the United States or Nebraska Constitution provides otherwise, the Legislature may enact laws and appropriate funds in order to accomplish any proper public purpose.

3) It is for the Legislature to determine what is and what is not a proper public purpose. A legislative determination of a public purpose may be reviewed by the courts. But in making this

review, the courts may not declare a statute invalid unless it clearly does not serve a public purpose.

4) In examining the propriety of a legislative statement of public purpose, the courts defer to the judgment of the Legislature. In order to invalidate the Legislature's judgment, the courts must find that the specific public purpose identified and described by the Legislature either does not exist or is inescapably improper. In other words, the essential responsibility for determining what is or is not a public purpose is that of the peoples' elected representatives, the Legislators. The courts will not disturb such a legislative determination unless the courts conclude that it is clearly opposed to established public policy. Stated another way, courts will not substitute their judgment of a proper public purpose for that of the Legislature without a strong showing of legislative error in determining the specific public purpose.

5) With regard to both statements of public purpose and other matters, a statute enacted by the Legislature is presumed to be Constitutional. The courts will not set aside a statute as unconstitutional unless the courts find the statute to be clearly contrary to basic constitutional law and general public policy.

The declaration of public purpose in LB 356 is abundantly clear. LB 356 states without ambiguity that the circumstances surrounding these failed institutions present a unique and deeply disturbing situation which urgently calls for a legislative remedy. As cogently stated in LB 356, the very integrity and credibility of actions by the State are involved. Restoring this credibility requires at a minimum the action of the Legislature provided for in LB 356. The circumstances the Legislature describes are not normal or customary. They are unique and thus call for unique responses. The unique legislative response in LB 356, based upon a clearly described statement of public purpose, would not, in my opinion, be second-guessed by the courts.

To summarize, I conclude that the courts would (a) examine the history and circumstances surrounding these failed institutions, (b) consider thoughtfully the public purpose set forth in LB 356, and (c) determine that the LB 356 public purpose is an appropriate legislative response on behalf of the State of Nebraska to the circumstances surrounding these failed institutions. I believe the courts would agree with the Legislature that there can be no more important public purpose than public confidence in government. And public confidence in government is directly involved here.

II

There are several legal premises upon which the constitutionality of LB 356 may be attacked. Chief among these are:

1) Premise for legal attack: LB 356 is unconstitutional special legislation because it circumvents the procedures established in the State Tort Claims Act for responding to claims of alleged wrongs to a fixed class of persons. Answer to premise for legal attack: The public purpose of LB 356 is to restore confidence in the credibility of government. The fact that it provides benefits to the depositors does not override the authority of the Legislature to address this public purpose. The issue here is not how and when the State of Nebraska may be sued or by whom. The issue here is the legislative response to the public purpose as described and supported by the legislative declarations in LB 356.

2) Premise for legal attack: LB 356 violates the separation of powers between Executive and the Legislative governmental entities because only the Executive (through the Attorney General) may settle a tort claim. Answer to premise for legal attack: This separation of powers assertion would apply if we were addressing this matter simply as the resolution of a lawsuit. However, the constitutional authority of the Legislature to identify and respond to an appropriate public purpose (in this case the integrity of actions of the State and enactments of the Legislature) supports this appropriation. This is not a question of the Legislature rather than the Attorney General settling a lawsuit.

3) Premise for legal attack: With regard to the depositors of Commonwealth, a settlement was made through an $8.5 million appropriation by the Legislature. Thus, Commonwealth's depositors should not be reimbursed further. Answer to premise for legal attack: This argument fails because the purpose of LB 356 is to restore governmental credibility and the Legislature may do this without regard to past or present lawsuits. The prior settlement of the Commonwealth depositors' tort claims through the $8.5 million payment does not prevent the Legislature from addressing the public purpose it has described in LB 356.

4) Premise for legal attack: LB 356 appropriates funds to reimburse depositors for payments which the depositors could have received from the NDIGC if the NDIGC had held sufficient assets to make such payments. Thus, the appropriation of the funds under LB 356 for these depositors violates Article XIII, Section 3 of the Nebraska Constitution, which restricts the authority of government to provide financial aid to corporations (the aid here in effect

being to NDIGC, a private corporation, because the payments to depositors may satisfy obligations of NDIGC). Answer to premise for legal attack: Here again, we must look at the public purpose so clearly stated by the Legislature in LB 356. The purpose is the restoration of confidence in government through an accounting to the depositors of at least some of the losses those depositors suffered as a result of the circumstances surrounding these failed institutions. Any possible indirect benefit to NDIGC does not invalidate this public purpose. The legal constitutional test here is whether or not this purpose (that is, the appropriation of these funds to restore credibility in government) is proper.

III

Through LB 356 the Nebraska Legislature is making a good faith effort to address a situation which has seriously eroded confidence in State government. In LB 356 the Legislature clearly describes the circumstances and public purpose it is addressing based upon those circumstances. In my judgment, the courts would uphold the action of the Legislature here as the fulfillment of an appropriate public purpose as identified and described by the elected representatives of the citizens of Nebraska.

Very truly yours,

ROBERT M. SPIRE
Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature