

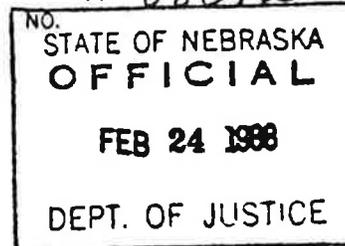
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
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88012



DATE: February 23, 1988

SUBJECT: Identification and Election Relative to Low-Level Radioactive Waste Facility Site

REQUESTED BY: Senator Gerald A. Conway, Senator Stan Schellpeper, Senator Sandra K. Scofield, and Senator David Bernard-Stevens

WRITTEN BY: Robert M. Spire, Attorney General; Linda L. Willard, Assistant Attorney General

You have inquired whether the provisions of LB 882 of the 1988 Session are inconsistent with or in conflict with any provisions of the Central Interstate Low-Level Radioactive Waste Compact, the Nebraska state statutes, the Nebraska Constitution, or existing federal laws or regulations. The proposal for identification of the facility site and submission of said facility site to a vote of local electors is not in conflict, at least in theory, with any of the authorities you have identified. However, if the procedure results in a delay in construction of the facility, it may be seen as an attempt to delay construction of the facility by the Federal government and Central Interstate Commission and could result in fines and/or other sanctions against the state for unreasonable delay. The amount of any fines and type of sanctions would be up to the Federal government and the Commission--within the limits of Public Law 99-240 and the Central Interstate Compact. Final determination of whether the state's actions were arbitrary and capricious and if any penalty imposed is appropriate could be appealed to the federal courts.

We do have two areas of concern with LB 882. The first concern is with the determination of the "affected area" which in turn determines the scope of the electorate. Our second concern is with the definition provided for approval of a site.

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The Statement submitted by Nebraska's Governor and approved by the Central Interstate Compact Commission calls for the "community's consent." Both the Governor's Statement as well as the minutes of the December 8, 1987, Commission meeting used the term "community" in the context of community consent or compensation to the host community.

Since neither the Governor's Statement nor the Commission amendment provide for a definition of "community," it should be given its ordinary meaning. Black's Law Dictionary, Fifth Edition, defines "community" in part as: "Neighborhood; vicinity; synonymous with locality. People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests." (Citations omitted). In Lukens Steel Company v. Perkins, 107 F.2d 627, 631 (D.C. Cir. 1939) the federal court defined "community" as follows:

The word community connotes a congeries of common interests arising from associations--social, business, religious, governmental, scholastic, recreational--involving considerations of public health, fire protection, water, sewage, transportation, and other services, which bind together the people of such a community or set them quarreling with each other.

LB 882 not only uses a different term for defining the scope of the area involved in a consent vote it provides a definition for that term that is well beyond the reasonable limitations of the ordinary meaning of the term "community." LB 882 calls for a consent vote by the electorate in the "affected county." "Affected county" is defined in LB 882 as: "The county in which a proposed site is located and any county the boundary of which is within a radius of 20 miles of the proposed site." In almost all cases within Nebraska this would involve more than one county and in some instances may involve as many as six or seven counties.

In the case of In Re Arrigo, 98 Neb. 134, 137, 152 N.W. 319 (1915), the Nebraska Supreme Court held: "The concept which a word conveys is that which custom has accorded it. There is no reason why a legislature may not expand the definition of a word to a reasonable degree and include within the circle of its definition for the purpose of an act, ideas which are related to that concept but not ordinarily included therein." (Emphasis added.) LB 882 uses an entirely different term to define the area eligible to vote on consent than the term presented to and adopted by the Commission. Further, it provides a definition for that term which is well beyond the ordinary definition for "community" or "host community."

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Expansion of the community's consent to a multi-county consent could be viewed by the Central Interstate Compact Commission as contrary to the intent of the Commission and their passage of the proposal. Should the expansion of the community to multi-county result in delay in construction of the facility, it could well subject the State to sanctions by both the Federal government and the Central Interstate Compact Commission under federal law and the terms of the Compact.

We also have a concern with Section 2(4) of LB 882 which provides in part: "If at least forty percent of such electors voting on the question for a given site vote no, the facility shall not be built at such site." In such a case, it is still possible that 60 percent of the electors would be in favor of the proposal. This would result in rule by the will of the minority.

"It is a fundamental principle of popular government that in elections the will of the majority, expressed in the manner authorized by law, must prevail unless the constitution provides otherwise." 29 C.J.S. §242, p. 674. A determination of the will of the people whereby a clear minority could prevail is not only contrary to the democratic form of government but would surely be viewed by the Federal authorities as well as the Commission as being arbitrary and capricious actions on the part of the State of Nebraska to needlessly delay the selection of a facility site and the subsequent construction of said facility. This in turn could subject the state to Federal and Compact penalties.

Sincerely,

ROBERT M. SPIRE
Attorney General

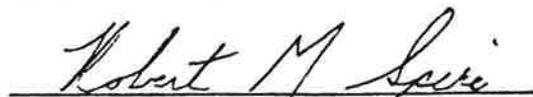


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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:


Attorney General