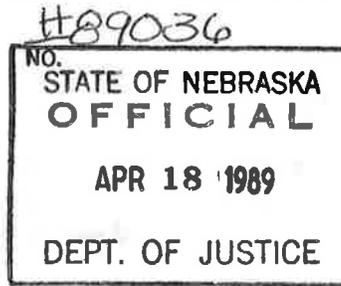


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



ROBERT M. SPIRE
 Attorney General
 A. EUGENE CRUMP
 Deputy Attorney General

DATE: April 17, 1989

SUBJECT: Construction and Validity of Legislative Bill 311
 Providing for Amendment of the Nebraska Investment
 Finance Authority Act and the Wastewater Treatment
 Facilities Construction Act

REQUESTED BY: Sandra K. Scofield, State Senator
 Legislative District No. 49

WRITTEN BY: Robert M. Spire, Attorney General
 Fredrick F. Neid, Assistant Attorney General

This is in response to your questions concerning proposed
 Legislative Bill 311 which provides for funding of projects from
 the Wastewater Treatment Facilities Construction Loan Fund.

The first question you have asked is whether the State would
 be "contracting a debt" by the State's obligation to repay loans
 with interest provided for in Section 6 of the proposed bill. This
 question is factual in nature and concerns the contracting of debt
 within the meaning of Article XIII, Section 1, of the Nebraska
 Constitution.

Article XIII, Section 1, of the Nebraska Constitution, in
 pertinent part, states:

The state may, to meet casual deficits, or failures
 in the revenue, contract debts never to exceed in the
 aggregate one hundred thousand dollars, and no greater
 indebtedness shall be incurred except for the purpose of
 repelling invasion, suppressing insurrection, or
 defending the state in war, and provision shall be made
 for the payment of the interest annually, as it shall
 accrue, by a tax levied for the purpose, or from other
 sources of revenue, which law providing for the payment
 of such interest by such tax shall be irrepalable until
 such debt is paid;...

(Emphasis supplied.)

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Section 6 of LB 311 would empower and authorize the Nebraska Investment Finance Authority to "make and undertake commitments to make loans to the Wastewater Treatment Facilities Construction Loan Fund to be used to make loans for wastewater treatment projects." It is our conclusion that the State would be contracting a debt by pledging resources of the Fund to secure the repayments of loans to or deposits to the Fund.

The ancillary question you have raised is whether "the debt to NIFA would exceed in the aggregate \$100,000.00?" We, of course, have no information or knowledge as to future contemplated commitments of the Fund. It does appear that the Nebraska Investment Finance Authority would be authorized by the Act to pledge resources which would in the aggregate exceed \$100,000. Your related inquiry is that if the debt exceeded \$100,000, would this violate the constitutional prohibition that the State may not contract debts to exceed in the aggregate \$100,000.

In analyzing this question, it is important to note that the "Special Fund Doctrine" has been recognized by the Nebraska Supreme Court. This Doctrine generally sets out the principle that constitutional prohibitions regarding debt do not apply to indebtedness which would be payable from revenues derived from a "special fund" and not from general funds.

In State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 283 N.W.2d 12 (1979), the court held that the Fund which provided for financing of low cost housing did not violate the prohibitions found within Article XIII of the Nebraska Constitution. In this case, the court recognized the "Special Fund Doctrine" and upheld the constitutionality of the Nebraska Mortgage Finance Fund. The rationale of the court was that the issuance of bonds provided under the Act did not constitute an extension of credit by the State in that no state funds were involved in the repayment of debt contemplated by the Act. The Nebraska Mortgage Finance Fund Act was construed as providing that the bonds were to be repaid out of revenue derived from the Fund and that no State appropriation, revenue, or tax would be used to repay the bonds.

In an earlier case, State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968), the court considered the constitutionality of the Nebraska Clean Waters Commission Act which created the Nebraska Clean Waters Commission. This Act authorized issuance of bonds and making of loans to municipalities for water treatment projects and facilities. The court held specifically that the bonds and notes issued by the Commission were general obligations of the Commission, payable solely from funds of the Commission, and not a liability of the State. However, the court did note that the Act provided that other funds were available to make payment on the Commission's bonds. The other funds consisted

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of fees, charges, and appropriations, and to this extent, the court held that the Act violated the constitutional limitation on indebtedness.

Your inquiry presents very close questions in that plausible arguments may be advanced for upholding the validity of the proposed bill relating to the funding of projects from the Wastewater Treatment Facilities Construction Loan Fund. It may be contended that the Act does not violate the constitutional debt limitation because funds which may be used for loan security or bond repayment purposes have already been appropriated. The general rule is that an obligation for which an appropriation is made at the time of its creation from funds already in existence, or for which definite provision has been made, is not within the operation of a limitation of indebtedness provision. State ex rel. Douglas v. Thone, supra.

In State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N.W.2d 164 (1968), a legislative act which authorized the construction of a state office building to be financed by revenue bonds, payable in part from the general revenue of the State, violated the constitutional limitation upon indebtedness as well as the constitutional provision against continuing appropriations. The court rejected the argument that the debt limitation provision of the Constitution was not applicable because the bonds and notes authorized were payable only from the State Game Fund and not from general taxation. The court considered this arrangement to be a form of financing which the constitutional provision was intended and stated:

One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision.

Id. at 300, 160 N.W.2d at 167.

It may not be concluded with certainty that the sources of state funds would be from existing appropriations. In reviewing the proposed bill, it is noted that the amounts of prospective obligations are not known; and for this reason, it is not known what amounts may be called upon or demands made upon the Fund. Accordingly, it may be concluded that the state funds which would be appropriated to the Fund would not be appropriations from funds or revenues currently in existence which would violate the constitutional prohibitions limiting debt.

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The cases very briefly summarized in this Opinion do not uphold the validity of fund mechanisms which provide or authorize the use of state funds to secure loan obligations or pledges of "special funds" derived from state funds. Rather, to the extent the proposed acts would authorize this use of state funds, the acts have been held to violate the constitutional limitations regarding debt.

You also inquire whether pledging all or any part of the Fund and its assets to secure, directly or indirectly the loans, is the State pledging its credit and does this violate Article XIII, Section 3, of the Constitution of the State of Nebraska. Article XIII, Section 3, has generally been construed to be a prohibition to protect the State and its political subdivisions against financial involvement in private enterprise supposed to serve the "public good" but which are in fact dominated by private interest.

This constitutional provision prohibits public funds from being expended for a private as opposed to a public purpose. If the purposes served are public purposes, Article XIII, Section 3, is not violated. Authorities clearly settle that the vital point in all such appropriation is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not the means. Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 234 (1976); United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956). Since you have indicated that ". . . it is clear that the funding would serve a public purpose," there is no reason to further consider your question concerning whether Article XIII, Section 3, would be violated.

You further inquire whether the provisions of Neb.Rev.Stat. § 81-15,158 (1988 Cum.Supp.), as further amended by proposed Legislative Bill 623, would constitute a guarantee by the State of payment on the loan in the event a municipality defaults on a loan. It is noted that LB 623 has been passed by the Legislature and signed by the Governor. Thus, the provisions of the bill have become operative law. This office has not and cannot determine the constitutionality of operative law; accordingly, we do not respond to this question.

Your last inquiry is "If state general funds are contributed to the Wastewater Treatment Fund (which is pledged to repay bonds issued by NIFA) does this change NIFA's legal status as a quasi-public entity as defined by State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445 (1979)?" We have reviewed this case and do not find that the precise legal status was defined. The court generally declined to define the status of the Nebraska Mortgage Finance Fund (NIFA's predecessor) as an individual,

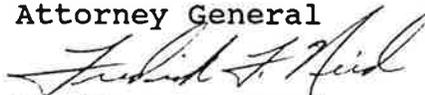
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association, or corporation but characterized the Fund as a governmental body related to state government over which the Legislature had some control.

In summary, it is our conclusion that Section 10 of the proposed bill which would authorize use of "All or any part of the fund or assets thereof" to pay or secure the repayment of loans or deposits to the Fund would be violative of the constitutional limitations concerning indebtedness of the State. This conclusion is reached because the Fund would consist of more than loan, loan interest, and related payments. Sources of revenue to the Fund would also consist of state funds from legislative appropriations derived from state general revenues. Accordingly, it is the opinion of this office that to the limited extent proposed LB 311 authorizes use of state funds for payment or to secure indebtedness or obligations of the Fund, it is offensive to Article XIII, Section 1, of the Constitution of the State of Nebraska.

Sincerely,

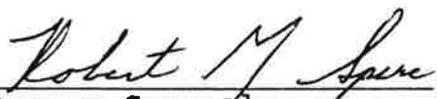
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Attorney General



Fredrick F. Neid
Assistant Attorney General

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

APPROVED:


Robert M. Spire
Attorney General