

Linda Willard

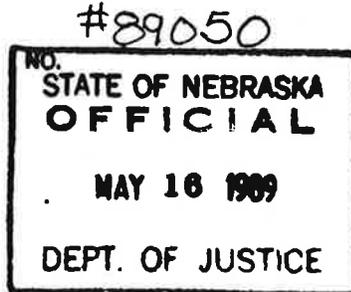
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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
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DATE: May 12, 1989

SUBJECT: Constitutionality of Legislature Bill 311 as amended and Legislative Power to Grant Authority To Issue Bonds.

REQUESTED BY: Senator 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 request for an opinion of this Office concerning proposed Legislative Bill 311, as amended. LB 311, in part, provides for funding mechanisms for construction of wastewater treatment facilities.

The first inquiry is whether Article I, Section 26, and Article XIII, Section 2 of the Nebraska Constitution delegate to the Legislature the power to authorize the Nebraska Investment Finance Authority (NIFA) to issue Wastewater Treatment Facility Bonds. In reviewing these provisions, issuance of bonds to finance wastewater treatment facilities is not expressly provided for.

Your related inquiry is, if not expressly provided for in Articles I and XIII, from what source does the Legislature derive the power "to authorize NIFA to issue these bonds?" It is the conclusion of this Office that the Legislature has the inherent power to enact legislation which would authorize the issuance of bonds if not constitutionally prohibited or inhibited. This conclusion is reached because an express grant of authority for specific purposes is not required under the Nebraska Constitution.

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The Legislative grant of power is not derived solely from the Constitution but also, from the people of the State of Nebraska. Initially, the people have all legislative power. Generally, the widely accepted view is that a state legislature may generally pass any act because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised by representatives of the people. Our Supreme Court in State, ex rel. Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984), has accepted this view and recognized that the Constitution is not a grant of power but a limitation of power.

Further, this question was partially answered by the Court in State, ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968). In this case, the Court considered the question whether authority for issuance of revenue bonds by the Nebraska Clean Waters Commission was a valid delegation of legislative power. The Court noted that while the delegation of authority to the Commission was under generalized standards, the field of operation of the Commission is quite narrow. It was observed that the powers of the Commission are limited to assisting municipalities in the planning and financing of waste water collecting systems and treatment. The Court specifically held that the issuance of bonds was not an invalid delegation of legislative power to the Commission.

Accordingly, it is our opinion that while the Constitutional provisions you have referred to do not constitute a specific grant of power, these provisions do not expressly prohibit or limit the power of the Legislature to authorize issuance of bonds contemplated in LB 311.

The second question you have raised is whether Amendment 1620 is sufficient "to overcome the constitutional limitations on the indebtedness of the State?" In an earlier opinion of this Office, it was concluded that to the extent proposed LB 311 would authorize 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. Opinion of the Attorney General #89036, April 18, 1989.

AM 1620, in pertinent part, provides:

The fund and assets thereof may be used, to the extent permitted by the Clean Water Act, as amended, and the regulations adopted and promulgated pursuant to such act, to pay or to secure the payment of bonds and the interest thereon, except that amounts deposited into the fund from state appropriations and the earnings on such appropriations may not be used to pay or to secure the payment of bonds or the interest thereon.

(emphasis added.)

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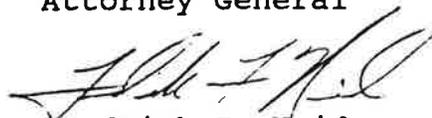
Concern has been indicated that the State will use funds other than proceeds from the issuance of NIFA Bonds to guarantee repayment. Concern has also been expressed that the State will be "inserted" in place of the local financial institution in the financing mechanism contemplated by LB 311. While there may be other sources, financing mechanisms which derive funds from sources other than state general funds derived from state revenues are not constitutionally prohibited. In the earlier opinion of this Office, it was our conclusion that the Special Fund Doctrine is recognized in this State.

In reviewing LB 311 as amended, we are unable to determine whether financial institutions would be circumvented from participation in financial transactions which maybe undertaken. The role local financial institutions would play would depend on the structuring of any bond underwriting undertaken by NIFA. There is not sufficient information before us to conclude whether traditional roles of financial institutions would be supplanted by the State under the provisions of proposed LB 311. In any event, the role financial institutions would undertake under the auspices of a legislative enactment providing for a bond underwriting is a policy question to be decided by the legislature.

In conclusion, it is our opinion that the provisions of AM 1620 remove objection because of the Constitutional prohibition regarding debt since state funds are expressly prohibited from securing or paying debt obligations of the Wastewater Treatment Facilities Construction Loan Fund.

Sincerely yours,

ROBERT M. SPIRE  
Attorney General



Fredrick F. Neid  
Assistant Attorney General

APPROVED:

  
Attorney General

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

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