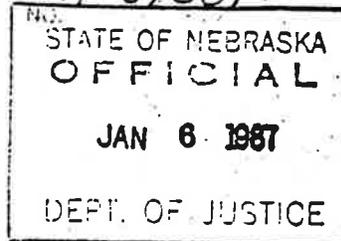


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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#87001



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DATE: January 6, 1987

SUBJECT: Energy Overcharge Funds

REQUESTED BY: Senator Jerome Warner/Senator Lowell Johnson
Nebraska State Legislature - Appropriations Committee

WRITTEN BY: Robert M. Spire, Attorney General
A. Eugene Crump, Deputy Attorney General

You have requested our legal opinion on issues dealing with the receipt and use of monies received as the result of court awards in various energy overcharge cases. Specifically, you have asked about the Exxon, Stripper Well, and Diamond Shamrock cases.

These cases involve suits which were brought on behalf of consumers of petroleum products against various petroleum producers for overcharges to the consumers in the 1970s. The federal courts awarded refunds and ordered distribution to the various states on behalf of individual consumers. Amounts paid to each state were based upon the apparent number of consumers within the state.

We respond to each of your questions individually.

I. Legislative Appropriations of the Overcharge Funds.

A. What is the status of these overcharge funds? Are they state funds or public funds? Are they trust funds?

Nebraska case law and the Nebraska statutes do not define either "state funds" or "public funds." In addition, these overcharge funds do not fit within commonly accepted statutory definitions of trust funds involving trust accounts, trust certificates or trust companies. As a result, the exact status of these overcharge funds is not clear.

However, the weight of authority from other jurisdictions indicates that the fact that monies are deposited within a state treasury does not in itself make them state funds. There also is authority which indicates that only monies raised by operation of some general state law become state funds. The Navajo Tribe v.

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Arizona Department of Administration, 111 Ariz. 279, 528 P.2d 623 (1975); 81A CJS States §224. There also is authority that federal money deposited in a state treasury pursuant to a federal grant program is held in trust for a specific purpose and retains its original legal character. Application of State ex rel. Department of Transportation, 646 P.2d 605 (Oklahoma 1982). Such custodial funds are not state monies. MacManus v. Love, 499 P.2d 609 (Colo. 1972).

On the basis of this general authority, we conclude that these overcharge funds did not become "state funds" simply because they were placed in the state treasury. Rather, these funds should be characterized as custodial funds held for a specific purpose. As such, these overcharge funds are not state monies.

These overcharge funds were labeled as the "Energy Overcharge Trust Fund" in the 1986 Appropriations Bill. (LB 1251, §87, 1986 Session). The labeling of these funds as a trust fund was apparently done as a matter of accounting procedure based upon practices of the legislative fiscal office. This does not make the overcharge funds trust funds within the definitions previously discussed.

B. What is the criteria for or definition of a "trust" fund held by the state?

The definitions of "trust" appear in the sections of the state statutes relating to trust accounts in general, trust certificates, or trust companies. There are no definitions of "trust" fund in the Nebraska statutes in relation to "state trust funds." The only reference to trust funds in relation to the funds held by the state appears to be in the procedures and definitions in use by the legislative appropriations committee for purposes of labeling appropriated funds.

C. Is a legislative appropriation necessary for the expenditure or granting of these overcharge funds (or for any "trust" fund)? Yes, for the following reasons:

Article III, Section 25, of the Constitution of the State of Nebraska provides, in part, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued as the Legislature may direct. . . ."

Also, Neb. Rev. Stat. §77-2406 (Reissue 1981) provides: ". . . No warrants shall be drawn for any claim until an appropriation shall have been made therefore. . . . It is our opinion that a legislative appropriation is necessary for the expenditure or granting of the overcharge funds. LB 1251 of the

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1986 legislative session indicates that the energy overcharge funds were appropriated to the Governor's Office as the "Energy Overcharge Trust Fund."

If a legislative appropriation is not necessary, may the Legislature still direct the use of these funds (consistent with the terms of the court order) by way of either appropriations or statutory directive?

As indicated above, it is our opinion that legislative appropriations are necessary before the funds may be expended. The terms of the court orders involved in this case do call for public input. If public input has been received on prior energy overcharge cases, it is not necessary that the state hold additional hearings. A series of public meetings was held across the state in the spring of 1986 requesting input from the public as to use of the energy funds. This would meet the requirements of the various court orders that require public input.

The Legislature may direct the use of these funds (consistent with the court order) to the same extent and in the same manner that it directs use of any other appropriated funds received from sources outside of general tax revenues and other fees associated with the general operation of state government.

The Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within constitutional limits. There is one thing, however, which it cannot do, and this is inherent in Article II, section 1, Constitution of Nebraska. It cannot through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of government. It cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed.

State v. State Board of Equalization and Assessment, 185 Neb. 490, 499-500, 176 N.W.2d 920, 926 (1970).

II. State Energy Office Administration of Overcharge Funds.

The Exxon decree ordered that the Exxon funds not be used for administrative costs. When these funds are accepted by the state and distributed by the Energy Office, the Legislature then obligated to appropriate out of state tax funds the necessary funds to pay any

administrative costs the Energy Office may incur? No, for the following reasons.

The Legislature shall make all appropriations for the expenses of the government. The Constitution of the State of Nebraska, Article III, Section 22. Additional appropriations may be implied only from constitutional provisions. Additionally, Neb.Rev.Stat. §81-1601 provides in part: "The director [of the state Energy Office] may employ such assistance, professional staff, and other employees as may be deemed necessary to effectively carry out the provisions of sections 81-1601 to 81-1605 within such appropriations as the Legislature may provide."

The Energy Office does not have the power to commit the funds of the State of Nebraska beyond the amount already appropriated for salaries to hire additional staff in order to carry out the provisions of the Exxon energy overcharge funds. It would be within the power and discretion of the Legislature whether or not to appropriate additional funds to pay for any administrative costs which the Energy Office may incur in supervising these funds. Otherwise, the Energy Office would have to allocate those funds already appropriated to it or to be appropriated, in such a way as to absorb the administrative costs which may be incurred.

III. "Nebraska Energy Fund, Inc.".

A. What is the status of this corporation? Is it merely a private guarantee or could it be construed to be functioning as a part of state government?

The Nebraska Energy Fund, Inc., is incorporated under the Nebraska laws of incorporation as a private corporation. It will be seeking nonprofit status. As a private corporation, the Nebraska Energy Fund, Inc., would not be functioning as any part of the Nebraska state government but as a separate and distinct entity.

B. Once the overcharge money has been granted to this corporation, may a state agency, using either state tax funds or part of the Stripper Well funds retained by the state, use state resources to assist the corporation (such as by providing administrative or clerical support)?

Article XIII, Section 3 of the Nebraska Constitution, states, in pertinent part, "the credit of the state shall never be given or loaned in aid of any individual, association or corporation, . . ." In essence, this constitutional provision states the fundamental principle that public monies may not be used for essentially private purposes. State ex rel. Beck v.

City of York, 164 Neb. 223, 82 N.W.2d 269 (1957). Therefore, in the instance which you have described in this question, the legitimacy of the use of state resources to assist the private corporation would turn on whether the activities of the Nebraska Energy Fund, Inc. involve a public or a private purpose.

Before engaging in an analysis of the nature of the activities referenced in this question, we would note that we have previously indicated that Stripper Well settlement funds which were received by the state do not appear to be state funds or state monies since they were received in a custodial capacity by the state and not generated as a part of general state tax revenues. As a result, Stripper Well funds could be used for administrative costs of the Nebraska Energy Fund, Inc. to the extent that the federal court order awarding those funds to the State of Nebraska makes allowance for such administrative costs. Our opinion in this regard is supported by the case of Application of State ex rel. Department of Transportation, supra, where the Supreme Court of Oklahoma rejected the notion that federal funds deposited in the Oklahoma State Treasury became state funds subject to a provision of the Oklahoma Constitution which provided "the credit of the state shall not be given, pledged, or loaned to any individual, company, corporation, or association . . ."

The issue of whether state tax funds may be used to assist the Nebraska Energy Fund, Inc. presents a separate question. Recent cases from our Supreme Court have evidenced a somewhat more flexible interpretation of the public purpose doctrine in relation to the expenditure of state monies, and have indicated that the purpose involved in the use of state funds controls over the entities selected for the receipt of those funds. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 283 N.W.2d 12 (1979); State ex rel. Douglas v. Thone, 204 Neb. 836, 286 N.W.2d 249 (1979). In particular, in the Nebraska Mortgage Finance Fund case, the court stated,

What is a public purpose is primarily for the Legislature to determine. . . . Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. . . . It is the province of the Legislature to determine matters of policy and appropriate the public funds.

204 Neb. at 457-458, 283 N.W.2d at 21. We conclude that use of state monies to assist in the administrative costs of the Nebraska Energy Fund, Inc. could constitute a proper public purpose. However, while these energy overcharge funds were appropriated to the Governor's Office as the "energy overcharge trust fund," there is no statement in the appropriation or in its

legislative history as to the purpose of the funds, and no direction provided to the authorizing agency for the use of the funds. Consequently, since there was no statement of public purpose in connection with the appropriation of the overcharge monies, we conclude that use of state tax revenues to assist the Nebraska Energy Fund, Inc. in the distribution of overcharge monies would violate Article XIII, Section 3 of the Nebraska Constitution. Should the Legislature at some point choose to make a more complete statement of the public purpose in connection with the distribution of the oil overcharge monies, this constitutional concern could be removed.

C. If there is a certain amount of state involvement (such as administrative or clerical support) with the functioning of this corporation, is there any possibility of state liability for the corporation's actions? Or state liability to restore to the federal court or federal government any money which may be found to be used by the corporation contrary to the terms of the court order? The answer to both of these questions is yes.

State liability for actions of the corporation would be defined by Nebraska's Tort Liability Act, Neb.Rev.Stat. §81-8,209 et seq. (Reissue 1981). Therefore, the state's liability would be to the extent that an injury or loss was caused by the negligence of a state employee.

The federal court in each energy overcharge case has distributed the overcharge funds to the state for the benefit of the consumers within the state. The state is accountable to the court for any use or misuse of these funds. If the corporation were to misuse the energy overcharge funds, the court could still hold the state liable for the misuse and could demand repayment, stop further payments, or provide other appropriate sanctions against the state. However, if the corporation were involved with or responsible for the misuse of funds, the state would have a case against the corporation and possibly the members of its board for reimbursement of those funds lost or ordered to be repaid to the court.

IV. Article XIII, Section 3 of the Nebraska Constitution.

A. Are these overcharge funds subject to the restrictions on the expenditure of funds contained in the Nebraska Constitution, particularly Article XIII, Section 3?

As discussed above, Article XIII, Section 3 of the Nebraska Constitution prohibits extending the credit of the state to any private individual or corporation, or, in essence, prohibits the use of state funds for essentially private purposes. As is also discussed above, we have concluded that the oil overcharge monies

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in the present case are not state funds in the general sense that they were accumulated by taxation for the general purposes of state government. Rather, the oil overcharge monies are more closely akin to federal funds or custodial funds which the state holds for consumers who were initially damaged by the overcharge. Since these oil overcharge monies do not appear to be state funds, it is our view that they are not subject to the restrictions on expenditure of funds contained in the Nebraska Constitution, particularly those contained in Article XIII, Section 3. However, because they have been placed in our state treasury, they are subject to those constitutional provisions dealing with appropriations and the issuance of warrants as were previously discussed.

B. If so, could the state's disbursement of these funds to the "Nebraska Energy Fund, Inc.," for the purpose of making loans to individuals be construed as violating Article XIII, Section 3?

As indicated above, it is our view that the oil overcharge monies are not subject to Article XIII, Section 3 of our state constitution.

C. If Article XIII, Section 3, is relevant, could there be possible constitutional problems if the state contracts with or otherwise is involved in a significant way with the "Nebraska Energy Fund, Inc." in its use of these overcharge funds to make loans to individuals--such as, if a state or state agency contracts with the corporation to approve a disbursement of funds by a corporation?

As noted above, we do not believe that Article XIII, Section 3 of our state constitution is relevant to the expenditure of the oil overcharge monies.

Sincerely,

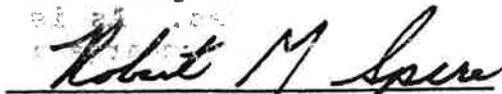
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AEC:DAC:jem
cc: Patrick J. O'Donnell
Clerk of the Legislature

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APPROVED:


Attorney General

Oil Overcharge Monies Explanatory Statement

Background Information

Nebraska has received approximately \$21 million from several lawsuits for overcharges illegally made to Nebraska customers over 10 years ago. A federal court ordered these payments to Nebraska along with similar payments to other states. Because of the practical impossibility of identifying individual users who were overcharged the court did not reimburse users. Rather, it distributed the money to the states with the requirement that the states use the restitutionary money for energy purposes.

The money received by Nebraska is subject to the federal court requirement that the Governor use it for energy programs which meet detailed guidelines. These monies are being held in a separate state trust fund until used for the purposes ordered by the court.

The Governor has proposed programs for the use of these funds. One of these programs is a grant of \$5 million to the Nebraska Energy Fund, Inc., a nonprofit private corporation which intends to contract with the Nebraska Department of Energy to provide energy conservation loans to individuals and other services.

Summary of Attorney General's Opinion on Legal Issues

The legal questions asked by the Governor, Senator Warner and others about these funds deal with the Nebraska Constitutional and statutory requirements for their use. In short, what are the legal procedures which must be followed in the actual expenditure of these funds?

Today my office has issued a detailed legal opinion answering certain specific legal questions asked by Senator Warner. These questions are most appropriate for the obvious reason that use and expenditure of these funds must be accomplished as provided by law. This means that there must be precise legal accountability for their use. In summary, here is what our legal opinion says:

1. The Nebraska Constitution prohibits the giving or lending of the credit of the state to aid private persons or associations. We conclude that these overcharge monies are not state funds subject to this constitutional prohibition. And so there is no constitutional barrier to the granting of these funds to the Nebraska Energy Fund, Inc.

2. No regular state funds (tax monies, for example) could be used for the Nebraska Energy Fund, Inc. unless the Legislature specifically determines that the Nebraska Energy Fund, Inc. serves a public purpose. The Legislature has not done this.

3. Although these are not normal state funds, they are held by the state and so are subject to appropriation by legislative action. The Legislature has made the necessary appropriation to a separate fund which can be distributed pursuant to the federal court order guidelines.

Related Legal Aspects

The federal court order requires prior court approval before overcharge monies actually are expended. This federal court approval is based upon approval by the federal Department of Energy. The federal Department of Energy has not yet given a final approval to the Nebraska Energy Fund, Inc.'s proposal. Thus, no funds should actually be transferred from the separate state fund to the Nebraska Energy Fund, Inc. until this approval is obtained (and the authenticity of such federal Department of Energy and court approval is approved by my office).

The legal questions here are complex. There are no easy answers. Reasonable people may differ with the legal conclusions reached in our opinion. The underlying factor is simply that of public accountability. This means (a) accountability of the State of Nebraska (through the office of the Governor) to expend the funds constructively in keeping with the federal court agreement, and (b) accountability of the State Constitutional Officers and Legislature to assure that the Nebraska Constitution and laws are followed precisely in administering the funds.

The Legislature may wish to review and consider the effectiveness of Nebraska laws concerning monies of this nature and related issues. If so, my office is available to assist the Legislature in any way the Legislature may request.

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