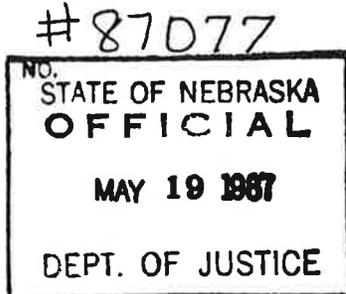


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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May 19, 1987

SUBJECT:            Constitutionality of LB 658, with reference  
                      to Section 13

REQUESTED BY:    Rex Haberman  
                      State Senator

WRITTEN BY:       Robert M. Spire  
                      Attorney General

                      Bernard L. Packett  
                      Assistant Attorney General

You have asked our opinion as to the constitutionality of Section 13(2) of LB 658 which provides that after January 1, 1990, wholesale gasoline distributors may not possess or sell gasoline containing less than 10% ethanol. We have examined the provision in light of the commerce clause of the United States Constitution.

The decisions of the United States Supreme Court involving laws or regulations affecting interstate commerce provide guidance in determining the validity of legislation attempting to establish standards for various products. The decisions make clear that the court will carefully scrutinize local legislation which may reduce the flow of commerce into a state in order to determine whether such legislation is intended to achieve a legitimate constitutional purpose, or whether the purpose is merely to advance the economic interests of a

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particular group within the state.

The test currently being used in determining a statute's interference under the commerce clause is presented in Pike v. Bruce Church, 397 U.S. 137 (1970):

The general rule for determining the validity of state statutes affecting interstate commerce is that where the statute regulates even-handedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit; since the question is one of degree, the extent of the burden that will be tolerated will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In other words, the test encompasses the requirements that (a) a legitimate local public interest must be served, and (b) the burden on interstate commerce must be only incidental in relation to the proposed benefits.

The public interest served by §13(2) of LB 658 is clear. It is to foster the ethanol producing industry and corn growers of the state.

The public interest here is legitimate. And so we must ask whether or not §13(2) places a burden upon commerce which legally would be excessive in relation to the proposed benefits.

What burdens upon commerce would a court consider in examining §13(2)? Three that would be relevant are these: (1) an in-state wholesale distributor of gasoline would be unable to possess non-ethanol gasoline for sale in another state; (2) an out of state wholesaler would have to have two facilities for storage of gasoline, one for gasoline containing 10% ethanol for sale in Nebraska and one for gasoline without ethanol for sale in other states; (3) travelers who would normally pass through the state would have to go around Nebraska if they were unable to make it through the state without refueling and they did not wish to burn ethanol gasoline in their vehicles.

The inconvenience of having to go around the state was raised recently in Consolidated Freightways v. Kassel, 612 F.2d 1064 (8 Cir. 1979). In that case, one of the grounds raised challenging an Iowa law limiting the length of trucks to 65 ft. twins was that it unconstitutionally burdened interstate

commerce by making it necessary for trucks exceeding 65 ft. to divert around the state. In holding the Iowa law in violation of the commerce clause, the court said:

When a state regulation directly pursues a valid safety objective, some burdening of interstate commerce will be tolerated. How much is a matter of balance. When the regulations objective accrues not directly, by prohibiting a vehicle with which there is some inherent safety problem, but indirectly, by the deflection of interstate commerce away from the state, the balancing is automatic; national interest must prevail.

As the court has pointed out in the Consolidated Freightways case, some consideration will be given to the purpose of the legislation (highway safety) but it also considers the facts of how and to what extent the legislation affects interstate commerce. If, on balance, the effect on interstate commerce outweighs the benefit, the benefit must yield.

Whether or not an act violates the commerce clause of the United States Constitution depends upon the facts of each case. We have considered the guidelines the courts have expressed in the many cases challenging legislation on the grounds of violation of the commerce clause. These are not easy cases for Courts to determine. From our study, we conclude that in a legal test, a Court would find §13(2) to be unconstitutional as an improper burden on interstate commerce.

Very truly yours,

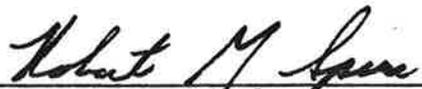
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APPROVED:

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Attorney General

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