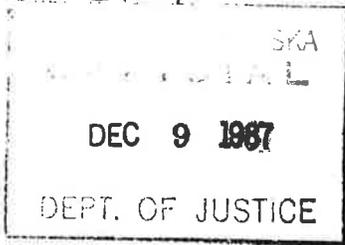


STATE OF NEBRASKA
Department of Justice
87114



LINCOLN, NEBRASKA 68509 • TEL (402) 471-2682

ROBERT M. SPIRE
Attorney General

DATE: December 9, 1987

SUBJECT: Separation of Powers Between the Executive and
Legislative Branches of Government in Relation to
LB 683 (Nebraska Energy Settlement Fund)

REQUESTED BY: Governor Kay A. Orr

WRITTEN BY: Robert M. Spire, Attorney General

You have asked if LB 683 (Nebraska Energy Settlement Fund Legislation) violates the separation of powers provisions contained in Art. II of the Nebraska State Constitution. Our conclusion is that yes it does violate the separation of powers provisions, for the reasons I will explain below.

Perhaps some background information would be helpful here. Nebraska has received approximately 21 million dollars from several lawsuits for oil overcharges illegally made to Nebraska customers over ten 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 specific users. Rather, the court 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 specific guidelines. These monies are being held in a separate state trust fund until used for the purposes ordered by the court. Some of these monies already have been disbursed pursuant to the court guidelines and other monies remain to be distributed in the future.

On January 16, 1987, our office issued an opinion regarding these funds in which we stated our conclusion that (1) overcharge funds are held by the state in a custodial manner (they are not "state" funds; they are held by the state for the specific purposes described in the federal court order); and (2) legislative appropriation is necessary for actual payment of these funds out of the state from the State Treasurer. For reference I attach a copy of this earlier opinion.

Governor Kay A. Orr
December 9, 1987
Page -2-

It is important to distinguish here between state and nonstate funds. State funds are those monies which are generated by state fees or state taxes. Nonstate funds are those which the state receives from outside sources. Examples of nonstate funds are the various federal grants which the state receives for specific purposes (such as grants to the state for the Department of Social Services to use to carry out the goals of certain designated federal programs).

The oil overcharge funds also are an example of nonstate funds. They are received by the state, not from a governmental agency, but through a federal court proceeding in which the funds have been awarded to the state to be used for the specific purposes set out in the federal court proceeding.

The Legislature must appropriate all funds (both state and non-state) before actual payment can be disbursed from the state. In other words, the State Treasurer cannot actually issue checks until there has been an appropriation authorizing the issuance of a warrant which in turn gives the State Treasurer the authority to write a check.

However, nonstate funds must be appropriated for purposes defined by the sources of the funds. For example, when the State of Nebraska receives a federal grant for a specific purpose this grant money must be appropriated by the Legislature for that specific purpose. And so it is with the oil overcharge funds. These must be appropriated by the Legislature pursuant to the specific purposes set out in the court order defining the use of the funds by the states. This means it is appropriate for the Governor to administer these funds within the court order guidelines.

In short, the federal court order grants these nonstate funds to the Governor to administer pursuant to the guidelines in the court order. These funds cannot actually be disbursed pursuant to the Governor's administration of them until the Legislature has appropriated them. The Legislature can only make this appropriation pursuant to the conditions set out in the federal court order. When it does so it is then the task of the Governor to administer the funds pursuant to those court order guidelines.

Let us now address LB 683:

LB 683 creates the Nebraska Energy Settlement Fund (Fund). The Fund consists of money received from awards or allocations to the State of Nebraska on behalf of consumers of petroleum products, as well as any investment interest earned on the Fund. The awards are a result of judgments or settlements in legal

actions brought on behalf of consumers of petroleum products who were overcharged for products sold during the period of time in which federal price controls on such products were in effect.

LB 683 further provides that the Governor shall develop a plan for the disbursement of money in the Fund. The Governor's plan must be in accordance with the court order awarding the funds, any applicable federal guidelines, and legislative guidelines contained within the bill. The bill then provides that the Governor must submit the plan to the Legislature. The Appropriations Committee of the Legislature shall then conduct a public hearing on the plan and the Legislature pass any appropriations therefor within 30 days. The State Energy Office is to be the administrative agency for selection of the projects, allocation of funds, and monitoring of the administration of the funds. No money is to be disbursed or expended from the Fund unless it is pursuant to an appropriation by the Legislature and in compliance with the guidelines set out in the bill. The bill further provides that the Governor is to submit a yearly report to the Legislature regarding projects receiving money.

Our concern with this bill relates to the requirement that the Governor submit a plan for expenditure of the funds to the Legislature and the Legislature's appropriation of funds based on its review of the plan. This appears to be an attempt by the Legislature to exercise executive functions, specifically, the executive function of administration of expenditures.

LB 683 at §3 provides that the Governor shall submit a plan to the Legislature to include certain specifics set out in the bill. The bill then provides for Legislative review of the executive plan and passage of any appropriations therefor. The Legislature is, in essence, requiring legislative approval before expenditure of the funds. The fact that the bill is written in terms of legislative approval for the appropriation does not alter the clear intent of the act requiring legislative approval for the expenditure. The Legislature is in effect attempting to both make the law and administer it; appropriate money, and spend it. This is a violation of the separation of powers article of the Constitution of the State of Nebraska.

In short, LB 683 is unconstitutional because it impinges on the executive power of the Governor to administer the funds involved. It is important to note here that the Legislature cannot do indirectly what it cannot do directly. Our Nebraska State Supreme Court so ruled to this effect in the 1974 case of State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974). The Court held that, "[T]he legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly." 219 N.W.2d at 730. The

policy and let the CEO figure out the details of the administration.

However, with outside funds (such as federal grant funds and these oil overcharge funds) the purposes and the lines of demarcation are clear. When federal guidelines are set out that earmark how federal outside funds should be spent, then the Legislature must appropriate pursuant to those guidelines and the Governor in turn must administer in keeping with the purposes set out in those guidelines. Likewise, with this oil overcharge money (a) the Legislature must appropriate pursuant to the guidelines set out in the federal court order, and (b) the Governor in turn must administer the funds in a manner consistent with the parameters described in those guidelines.

Where does this leave us? In short, I have said that LB 683 violates the constitutional separation of powers by impinging upon the constitutional right and duty of the Governor to administer. Thus, if the Governor and the Legislature cannot agree at this time (through some modification in LB 683, for example) then a court test is appropriate.

And so with these oil overcharge funds (as indeed with any outside nonstate funds which the state receives) what can the Legislature do?

1. Accept the funds with the restrictions indicated and appropriate the funds with these restrictions.
2. Refuse to appropriate the funds.
3. Work out with the Governor on a volunteer basis how the funds will be spent within the restrictions on the funds as received. In so doing, both the Legislature and the Governor would recognize that the Governor actually has the sole authority to make the administrative determinations.

What can the Governor do?

1. Voluntarily accept legislative restrictions. In so doing, both the Legislature and the Governor would recognize that the Governor actually has the sole authority to make the administrative determinations.
2. Ignore the Legislature. If the Legislature refuses to appropriate the funds, then seek a court order requiring appropriation.

This entire matter is not an easy one. It is, as lawyers would say, a "close case." Nonetheless, in reviewing in detail

Governor Kay A. Orr
December 9, 1987
Page -7-

the law and the nature of these funds; it is our conclusion that LB 683 does violate our constitutional separation of powers provisions.

Sincerely,



ROBERT M. SPIRE
Attorney General

1-04-2

APPROVED BY:



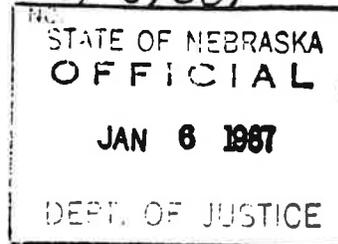
Deputy Attorney General

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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

#87001



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

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.

L. Jay Bartel
Mantel J. Bundy
Janie C. Castaneda
Dele A. Comer
Laura L. Freppel

Lynne R. Fritz
Yvonne E. Gates
Jill Gradwohl
Royce N. Harper
William L. Howland

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Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Steven J. Mosler

Harold I. Mosher
Fredrick F. Neid
Bernard L. Packett
Lisa D. Martin-Price
LeRoy W. Sievers

James H. Speers
Mark D. Starr
John R. Thompson
Susan M. Ugal
Linda L. Willard

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

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

D. 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.

A. 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, is 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

Senator Jerome Warner
Senator Lowell Johnson
Page -7-
January 6, 1987

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.

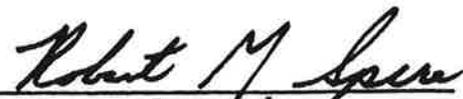
Sincerely,

ROBERT M. SPIRE
Attorney General


A. Eugene Crump
Deputy Attorney General

AEC:DAC:jem
cc: Patrick J. O'Donnell
Clerk of the Legislature
1/01

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.

January 6, 1987



ROBERT M. SPIRE
Attorney General

QUESTION:

2. Is the Division of Nebraska Resources authorized to provide planning assistance to county planning commissions?

CONCLUSION: 2. Yes.

The establishment of a county planning commission is provided by Section 23-166, R. R. S. 1943, which provides in part as follows:

" * * * such county board shall appoint a commission, to be known as the planning commission, to fix the boundaries of the various original districts and appropriate regulations to be enforced therein; and such commission may employ technical personnel to assist them in their work. * * * "

The section following provides that the county board shall provide for the enforcement of zoning regulations by requiring permits before the erection, construction, alteration, et cetera, of any structure within a zoned area and providing for the hiring of a county building inspector and fixing of permit fees. It has previously been determined by a report of this office, Report of Attorney General, 1959-1960, page 313, that the fees from these permits should go into the general fund and that the "county board may appropriate money from the general fund for the compensation of the building inspector, and the administration of the zoning resolution and regulations."

It was previously well established in the case of Speer v. Kratzstein, 143 Neb. 310, that the county board has authority not only to carry out its express powers but to exercise such powers as arise by necessary implication. There can therefore be no question but that the county board would have authority to appropriate the necessary funds for the hiring of technical staff and administration staff for the carrying out of the duties of the county planning commission.

In answer to your second question, Section 2-1904, R. R. S. 1943, regarding the purposes to be accomplished by the Division of Nebraska Resources, provides in part as follows:

" * * * : (2) to energize and to establish continuing contacts with local or regional planning agencies, planning agencies in the United States Government, and similar bodies in the fields of agriculture, commerce, industry and labor, for the purpose of exchanging information and assistance, harmonizing proposed plans, policies and programs, and securing proper timing in their execution; (3) to encourage community self-appraisal programs so that the problems peculiar to each community may be recognized and effectively met through planning at either the local or state level; * * * "

The assistance of a county planning commission would certainly fall within the meaning of these sections. In addition to the foregoing, Section 2-1905, R. R. S. 1943, makes it your duty to carry out the following:

" * * * * * "

"(6) To require and direct the cooperation and assistance of state and local governmental agencies and officials; and
"(7) To do all acts and things, not inconsistent with the law, for the further development of Nebraska's agricultural and industrial resources."

In view of the foregoing language it would certainly be within your power, if not a mandatory duty for your division to assist the county planning commissions in carrying out their responsibilities in the absence of any statute precluding you from doing so.

Section 2-1909, R. R. S. 1943, specifically authorizes your division to provide planning assistance to cities and villages in the state and in metropolitan or regional areas; whether or not a county would come within a "regional area" within the meaning of the last section, said section certainly would not preclude you from rendering such assistance under the powers and duties previously enumerated.

It is therefore our opinion that the answer to both questions submitted by you should be in the affirmative.

No. 22

February 26, 1963

Re: L. B. 324 and L. B. 325

Dear Senator:

L. B. 325 provides that no new building may be constructed nor buildings or lands bought by the state or any state agency without the prior approval of the Legislature, and no expenditure from the State Institutional and Military Department Building Fund may be made without prior authorization of the Legislature. L. B. 324 provides that the Legislature rather than the Governor must consent to the acquiring of title to real property by the Game, Forestation and Parks Commission.

You ask (1) whether or not L. B. 324 and L. B. 325 encroach upon the executive power so as to be in violation of the constitutional provision as to separation of powers, and (2) whether or not an amendment giving to the Legislative Council or a committee of the Legislature power to give such approval or authorization when the Legislature is not in session would be in violation of that same constitutional provision.

Article II of the Nebraska Constitution provides:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

It is elemental that the Legislature has the power to appropriate money of the state, and, except as it is restricted by constitution, the legislature has exclusive power to decide how, when and for what purposes public funds shall be applied in carrying on state government. So, too, the Legislature may grant or withhold authority of an executive body to acquire estate for the State of Nebraska. See, Fischer v. March, 113 Neb. 153, 202 N. W. 422; State ex rel. Anderson v. Fadelly, (Kansas) 308 P. 2d 537; People v. Tremaine, 252 N. Y. 27, 168 N. E. 817; 29 C. J. S. Eminent Domain, Section 211, p. 1131; 81 C. J. S., States, Section 104, p. 1076. This

the Legislature does by passing bills which grant that authority or make that appropriation.

But by these bills we are confronted with an appropriation made, and an authority granted which are conditioned on the subsequent approval and authorization of the Legislature of any proposed expenditure or use of that power. How is the Legislature to exercise this retained authority? By passing another law, or by simple motion, or resolution?

If another law is necessary, what purpose is served by the original appropriation or grant of authority? It would appear that the reservation of approval power effectively nullifies any attempted appropriation or grant of power. If the Legislature attempts to grant approval or authorization by motion or resolution, then it is either attempting to legislate without passing a law, or it is usurping the authority of the executive by substituting its discretion for that of the executive in deciding which contract to enter into, and its terms and conditions, whether it be for constructing a building or for acquisition of land.

If the Legislature may do this, it can also, by similar provisions in other law, require the State Auditor to seek its permission to audit a state department or a county, or require the Attorney General to first ask the Legislature before he could defend the state against legal attack. Reduced to an absurdity, such provisions could be carried to such an extent that no executive activity could proceed without prior consent for each individual act.

While the Legislature has the power and authority to decide all of these matters before making any appropriation, or before granting any authority, yet if it seeks to retain control by inserting in its laws and bills the requirement that no action be taken or money spent until subsequent approval of the Legislature be granted, then it is in effect, both making the law and administering it, appropriating the money and spending it, and the constitutional system of separation of powers would be destroyed.

What would be the situation if amendment to the bills were made to allow the Legislative Council or a committee of the Legislature to exercise this power of approval when the Legislature is not in session? Such bodies would not have any authority to pass laws or to make resolutions as does the Legislature. Any exercise of this attempted delegated authority would clearly be executive in its nature, substituting the discretion of the council or a committee for that of the executive. That this may not be done is self-evident. If the Legislature may not do it, certainly any group or committee of the Legislature may not do it. As Judge Pound said in *People v. Tremaine*, supra:

“ * * * The legislative power appropriates money, and, except as to legislative and judicial appropriations, the administrative or executive power spends the money appropriated. Members of the legislature may not be appointed to spend the money. * * * ”

And the Supreme Court of the United States, in *Springer v. Philippine Islands*, 277 U. S. 189, said:

“ * * * Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or

appoint the agents charged with the duty of such enforcement. The latter are executive functions. * * * ”

See, also, *State ex rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N. W. 2d 625.

Herbert Brownell, Jr., while Attorney General of the United States, and writing for the *Dickinson Law Review*, No. 60, pgs. 1-5, discussed the provisions of the *Defense Appropriation Act of 1956*, and its effect on the separation of powers. That act reserved to the Appropriations Committee of the Congress the right to disapprove and forbid action by the Secretary of Defense in disposing of or transferring work performed for a period of three years or more by civilian personnel of the Department of Defense. Mr. Brownell said that the provision was an attempted delegation of power to a committee or its members to make contracts, by conferring on them power to disapprove a contract which an officer of the executive branch wishes to make, and concluded:

“ * * * The present proviso cannot be sustained on the theory that it is a proper condition attached to an appropriation. It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of government would be placed in the gravest jeopardy. * * * ”

It is our conclusion that, while the Legislature has exclusive control over appropriations and the granting of the power to take title to real estate, it must exercise this control when it passes the bills in which it limits or restricts, or permits the action of the executive agency involved. It may not retain control over the expenditure or use of the power by requiring approval of the Legislature or any committee of the Legislature subsequent to the passage of the law in which the appropriation or power is given. To do so is to invade the executive functions in such a manner as to violate Article II of the Nebraska Constitution requiring the separation of powers of government. *State ex rel. Johnson v. Hagemeister*, supra; *People v. Tremaine*, supra; *Dean v. Timmerman*, 106 S. E. 2d 665; *Bramlett v. Stringer*, 186 S. Car. 134, 195 S. E. 264; 42 Am. Jur., *Public Funds*, Section 50, p. 752.

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February 26, 1963

GOVERNOR

Authority of to Require Information Concerning Capital Improvements of Agencies.

REQUESTED BY: Honorable Frank B. Morrison, Governor of the State of Nebraska, State Capitol, Lincoln, Nebraska.