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STATE OF NEBRASKA
OFFICIAL
JAN 11 1994
DEPT. OF JUSTICE

DATE: January 10, 1994

SUBJECT: Constitutionality of Proposed Change to the Nebraska Waste Reduction and Recycling Act.

REQUESTED BY: Senator C.N. (Bud) Robinson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have inquired as to the constitutionality of a proposed amendment to the Nebraska Waste Reduction and Recycling Act to allow the State to make low-interest loans to both public and private entities for use in developing, constructing or purchasing equipment used for tire recycling. Specifically, you have inquired as to whether such an amendment would violate Neb. Const. Art. XIII, § 3, which prohibits the lending of the "credit of the state."

Discussion

A. The Waste Reduction and Recycling Act

The Nebraska Waste Reduction and Recycling Act ("the Act") is found at Neb. Rev. Stat. §§ 81-15,159 to 81-15,165 (Cum.Supp. 1992) (Supp. 1993). Currently, the Act establishes a Waste Reduction and Recycling Incentive Fund to be administered by the Department of Environmental Quality. The fund may be used for a variety of specified purposes such as assistance in creating recycling systems, recycling and waste reduction projects, capital assistance for establishing private and public intermediate processing facilities using recyclable materials in new products, and capital

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assistance for establishing private and public facilities to manufacture combustible waste products and to incinerate waste to generate and recover energy resources. Neb. Rev. Stat. § 81-15,160(2) (Supp. 1993). The Act currently provides for grants from the fund to a political subdivision or other entity or organization, public or private, which meets certain criteria when it is found that the proposed reduction or recycling program or project appears to benefit the general public. Neb. Rev. Stat. § 81-15,161 (Supp. 1993).

The proposed amendment would involve making low-interest loans to public and private entities for use in developing, constructing or purchasing equipment for tire recycling.

B. The Credit of the State

The Nebraska Constitution prohibits the unlawful pledge of the credit of the State: "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation. . . ." Neb. Const. Art. XIII, §3.

The Nebraska Supreme Court has stated "the purpose of article XIII, §3, of Nebraska's Constitution is to prevent the State or any of its governmental subdivisions from extending the state's credit to private enterprise. (Citation omitted). It is designed to prohibit the state from acting as a surety or guarantor of the debt of another." ***Haman v. Marsh***, 237 Neb. 699, 718, 467 N.W.2d 836 (1991) (emphasis added). *See also* ***Haman***, 237 Neb. at 722.

Haman is the most recent Nebraska Supreme Court decision to interpret Article XIII, Section 3, of the Nebraska Constitution. ***Haman*** involved legislation which appropriated $33.8 million of state tax money to compensate depositors who had suffered losses due to the failure of industrial loan and investment companies in Nebraska. In ***Haman***, the Court established a three-prong test, and stated that to establish a law was unconstitutional under Article XIII, Section 3, a plaintiff had to prove each of the following elements: 1) The credit of the state 2) was given or loaned; 3) in aid of any individual, association, or corporation. ***Haman***, 237 Neb. at 719.

Thus, the threshold question which must be analyzed is whether the proposed amendment to the Nebraska Waste Reduction and Recycling Act involves the "credit of the state."

In ***Haman***, the Court noted that the state's credit was inherently the power to levy taxes and involved the obligation of its general fund. The Court stated as follows: "There is a distinction between the loaning of state funds and the loaning of

the state's credit. When a state loans funds, it is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit." *Id.* at 719-720. (Emphasis added). Thus, when the State's credit is given or loaned, the State is in the position of a surety or guarantor of the debt of another. *Id.* at 718. *Accord* ***Utah Technology Finance Corp. v. Wilkinson***, 723 P.2d 406, 411 (Utah 1986) (loaning the credit of the State is "liability for the debt of another . . . suretyship.").[1]

The court concluded in ***Haman*** that under the legislation in question "the State would be forever liable for the losses of industrial company depositors . . . the stated purpose of the act is redemption of the guarantees of a private corporation to depositors by obligating present and future taxes from the State's general fund." *Id.* at 720. In contrast, the proposed amendment to the Act would provide low-interest loans for certain tire recycling projects. As stated above, the Nebraska Supreme Court has expressly distinguished between loaning the State's credit and the loaning of state funds. ***Haman***, 237 Neb. at 719-720. If the proposed amendment provides for the loaning of state funds whereby the State is in the position of a creditor rather than debtor, there is no violation of Article XIII, § 3 as the State's credit is not given or loaned.

C. Public Purpose

In Op. Att'y Gen. No. 93004 (Febr. 2, 1993), we examined another proposed amendment to the Act under Neb. Const. Act XIII, § 3 and also under the Public Purpose Doctrine. Our analysis under the Public Purpose Doctrine remains the same with respect to the proposed amendment regarding low-interest loans.

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[1]The Nebraska Supreme Court's analysis of the prohibition against the lending of the state's credit is consistent with that of other jurisdictions. In ***Utah Technology Finance Corp. v. Wilkinson***, 723 P.2d 406 (Utah 1986), the court analyzed the Utah Technology and Innovation Act. The Act authorized equity investment and loans to assist and encourage emerging and developing small businesses. *Id.* at 408. The court concluded, "We find nothing in the Act which would authorize a lending of credit as we defined it . . . and as defined by other courts . . . viz., the state is not empowered to become a surety or guarantor of another's debts." *Id.* at 412.