DEPARTMENT OF JUSTICE
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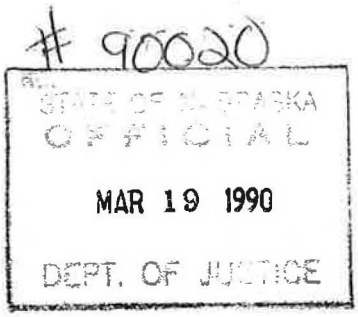

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DATE: March 16, 1990

SUBJECT: Constitutionality of LB 897 - Pipeline Company Personal Property Tax Refund Reimbursement Fund

REQUESTED BY: Senator Howard Lamb
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the constitutionality of LB 897. Generally, LB 897 proposes to create a fund to provide reimbursement to taxing subdivisions in the state for losses sustained by the granting of refunds to pipeline companies of personal property taxes paid for 1988 by virtue of the Nebraska Supreme Court's decisions in Northern Natural Gas Co. v. State Board of Equalization and Assessment, 232 Neb. 806, 443 N.W.2d 249 (1989), cert. denied, 58 U.S.L.W. 3527 (U.S. Feb. 20, 1990), ["Northern"] and Trailblazer Pipeline Co. v. State Board of Equalization and Assessment, 232 Neb. 823, 442 N.W.2d 386 (1989), cert. denied, 58 U.S.L.W. 3527 (U.S. Feb. 20, 1990), ["Trailblazer"]. Your question concerns whether the establishment of a fund of this nature violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, or any provision of the State Constitution.

With regard to your question as to the possible implications of the Equal Protection Clause in this context, it is well established that the Equal Protection Clause of the Fourteenth Amendment has no application to the acts of a state against its political subdivisions. City of Trenton v. New Jersey, 262 U.S. 182 (1923); Triplett v. Tiemann, 302 F.Supp. 1239 (D.Neb. 1969). Thus, while LB 897 does impact taxing subdivisions of the state, the subdivisions themselves possess no right which may be legally subject to injury under the Equal Protection Clause. It is conceivable that taxpayers affected by the bill could attempt to assert a claim of injury cognizable under the Equal Protection Clause. See Triplett v. Tiemann, supra. As the subject matter of

LB 897 does not implicate a fundamental right or suspect class, however, any Equal Protection Clause challenge would be limited to an inquiry as to whether the classification established bears a rational relationship to a legitimate state interest. Botsch v. Reisdorff, 493 Neb. 165, 226 N.W.2d 121 (1975); Porter v. Jensen, 223 Neb. 438, 390 N.W.2d 511 (1986).

As to the existence of a rational basis underlying the establishment of the fund created under LB 897, we believe the classification created under the bill could withstand scrutiny if challenged on equal protection grounds. While, as you note, the bill provides for distribution of state funds only to subdivisions facing revenue losses as a result of property tax refunds for 1988 arising out of the decisions in Northern and Trailblazer, and not for a distribution of state funds to all subdivisions in the state, the classification so established is reasonable and rationally based, as it furthers the purpose of reimbursing subdivisions faced with such revenue losses. The classification drawn by LB 897 in this manner thus appears to bear a rational relationship to a legitimate state purpose.

With regard to your question as to whether LB 897 would violate any portion of the Nebraska Constitution, the primary question which arises is whether the bill would violate the prohibition against special or local legislation in Article III, Section 18. In City of Scottsbluff v. Tiemann, 185 Neb. 256, 266, 175 N.W.2d 74, 81 (1970), the Nebraska Supreme Court stated the following regarding the Legislature's power to classify in light of this constitutional provision:

> 'It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. (Citation omitted.) The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. (Citations omitted.) The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. (Citation omitted.) A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be

> classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. (Citations omitted.)' (Emphasis in original.)

Furthermore, in Campbell v. City of Lincoln, 195 Neb. 703, 709, 240 N.W.2d 339, 342 (1976), the court stated:

> Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

Applying these principles, we believe that, to the extent LB 897 is construed as creating separate classifications of subdivisions by providing for the distribution of state funds only to subdivisions facing revenue losses as a result of refunds ordered in light of Northern and Trailblazer, the classifications established are reasonable and related to the legitimate goal of reimbursing subdivisions faced with refunding property taxes for 1988 as a result of these court decisions. Indeed, in order for the bill to achieve the objective of reimbursement under these circumstances, it must necessarily distinguish between subdivisions which have suffered property tax losses by virtue of refunds of this nature, and subdivisions which were not affected in this manner.

We note that a number of Nebraska cases construing the limitation contained in Article III, Section 18, have struck down legislation on the ground that the classifications created unreasonable closed or frozen classes which precluded the opportunity for an increase in the members of the class by future growth or development. See, e.g., State ex rel. Douglas v. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980); City of Scottsbluff v. Tiemann, supra; Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942); State v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912). This principle would likely be viewed as inapplicable in this instance, however, as LB 897 is not intended to have future application in that it is limited to establishing a means to reimburse subdivisions facing revenue losses by refunds for 1988 arising from Northern and Trailblazer.

In conclusion, it is our opinion that LB 897, if enacted, would not violate any of the above-referenced constitutional provisions.

Very truly yours,

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7-387-2

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

APPROVED BY:

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