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NO.
STATE OF NEBRASKA
OFFICIAL
NOV 16 1993
DEPT. OF JUSTICE

DATE: November 10, 1993

SUBJECT: Dollar and Energy Saving Loan Program

REQUESTED BY: Robert Harris, Director
Nebraska Energy Office

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired whether the state's publicly and municipally owned electric and natural gas utilities can invest money with the State of Nebraska for use in the Dollar and Energy Saving Loan Program. Specifically, you ask whether Article XIII, § 3, of the Constitution of the State of Nebraska would prohibit publicly and municipally owned electric and natural gas utilities from investing money with the State of Nebraska for use in loan programs such as the Dollar and Energy Saving Loan Program. This program, in conjunction with the state's lending institutions, provides low cost financing for energy conservation improvements to the residential, small business, agricultural, local government, and rural nursing home sectors throughout the state. The state has already invested oil overcharge funds in the program.

We note that Neb. Rev. Stat. §§ 66-1001 to 66-1011 (1990) provide authority for publicly owned electrical utilities to provide loans to customers for energy conservation measures. Loan is defined at § 66-1005 to "mean an extension of credit by a utility from its own capital or from capital raised by the Nebraska Investment Finance Authority pursuant to sections 58-201 to 58-272 to or for the benefit of a customer solely for the purchase or installation of energy conservation measures with repayment to be made through the utility's periodic billing system."

Section 66-1007 permits these utilities to also contract with banks, financial experts, and such other advisors as may be necessary in its judgment to initiate and administer the loans.

Article XIII, § 3, of the Constitution of the State of Nebraska provides in pertinent part:

> The credit of the state shall never be given or loaned in aid of any individual, association, or corporation. . . .

The Nebraska Supreme Court has held that to establish a statute as unconstitutional under Article XIII, § 3, three elements must be proved: (1) the credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation. ***Haman v. Marsh***, 237 Neb. 699, 719, 467 N.W.2d 836 (1991).

The first determination to be made, then, is whether grants to private entities under these statutes would involve the credit of the State. "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." ***Haman v. Marsh***, 237 Neb. at 719-729 (emphasis added). In short, the "credit of the state" provision in article XIII, § 3 was "designed to prohibit the state from acting as a surety or guarantor of the debt of another." ***Id.*** at 718; ***id.*** at 722.

In ***Haman***, the Court found that under the legislation in question "the state would be forever liable for the losses of industrial company depositors. . . ." ***Id.*** at 720. "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.*** The funds available pursuant to Neb. Rev. Stat. §§ 66-1001 through 66-1011 (1990) are a temporary investment of available public funds. The public utility is not in the position of a debtor nor in the position of a surety or guarantor of the debt of another. Consequently, the "credit of the state" is not being given or loaned under these statutes.

The constitutional analysis does not end here, however. "Closely related to the prohibition against the giving or lending of the state's credit . . . is the principle of law that public funds cannot be expended for private purposes." ***Haman v. Marsh***, 237 Neb. 699 at 721-22. This constitutional principal involves the expenditure of state funds in contrast to the extension of credit. ***Id.*** at 722.

It is a longstanding principle of constitutional law in Nebraska that public funds cannot be expended for private purposes. ***Haman v. Marsh***, 237 Neb. 699, 722 (1991); ***State ex rel. Douglas v. Nebraska Mortgage Finance Fund***, 204 Neb. 445 (1979); ***State ex rel. Douglas v. Thone***, 204 Neb. 836 (1979); ***State ex rel. Beck v. City of York***, 164 Neb. 223 (1957); ***Oxnard Beet Sugar Co. v. State***, 73 Neb. 66 (1905). The Constitution of Nebraska contains no express provision against expending funds for essentially private purposes. This principal "is grounded on the `fundamental concepts of our constitutional system.'" ***Douglas v. Thone***, 204 Neb. at 842 (quoting ***Beck v. City of York***, 164 Neb. 223). The Nebraska Supreme Court has said this principal "emanates" from Article XIII, § 3. ***Haman v. Marsh***, 237 Neb. at 722.

What constitutes a public purpose is primarily for the Legislature to determine.

> It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature.

Haman, 237 Neb. at 721 (quoting ***Thone***, 204 Neb. 843). There is no hard and fast rule for determining whether a proposed expenditure of public funds is for a public purpose. Each case must be decided according to the object sought to be accomplished and the degree and manner in which that object affects public welfare. ***Id.***

In determining whether an expenditure serves a public purpose, "the test is in the end result, not in the means." ***Douglas v. Mortgage Finance Fund***, 204 Neb. at 460. "A law may serve the public interest although it benefits certain individuals or classes more than others." ***Id.*** Before a court will declare a statute invalid for lack of a public purpose, "the absence of public purpose must be so clear and plausible as to be immediately perceptible to the reasonable mind." ***Douglas v. Thone***, 204 Neb. at 843 (quoting ***Chase v. County of Douglas***, 195 Neb. 838 (1976)).

Since the determination of a public purpose is primarily for the Legislature, it is appropriate to look to the legislative findings or statement of purpose in analyzing a particular statute. Section 66-1001 clearly sets out the Legislature's public purposes for allowing public funds to finance energy conservation measures undertaken by customers of public electric utilities. Use of these funds for conservation measures as set out in these statutes, in our determination, is clearly a valid public purpose.

Thus, an energy conservation loan made directly to a customer of a publicly owned electrical utility as defined in § 66-1003 or one administered through a bank, or financial institution would not violate Article XIII, § 3, of the Constitution on the State of Nebraska. The question then becomes whether these utilities may contract with the Energy Office to place funds in the Dollar and Energy Savings Loan Program for use by banks to finance energy conservation measures with the original capitol to be returned at the end of the Loan Program instead of contracting directly with a bank or with the customer.

Section 66-1007 allows the utilities to contract with banks, financial experts or such other advisors as may be necessary in its judgment to initiate and administer the loans. The Dollar and Energy Savings Loan Program, as you have described it to this office, would function as an advisor in coordinating with banks to initiate and administer these loans. Therefore, it is our determination that publicly owned electrical utilities may contract with the Nebraska Energy Office to initiate and administer loans for the purchase or installation of energy conservation measures through the Dollar and Energy Savings Loan Program pursuant to the authority granted to utilities in Neb. Rev. Stat. §§ 66-1001 through 66-1011 and the guidelines contained therein.

We find no authority for publicly owned natural gas utilities to use funds to help finance conservation efforts. Therefore, such an action would be beyond the statutory authority granted to such an entity. Privately owned utilities would not be under the same restrictions as public utilities and, as long as it would not violate their charter or bylaws, could contribute funds to the Dollar and Energy Saving Loan Program.

Sincerely,

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28-10-14.op

APPROVED:

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