DEPARTMENT OF JUSTICE
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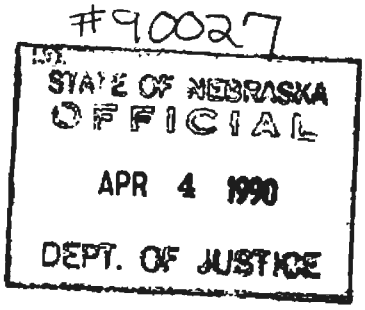

DATE: April 4, 1990

SUBJECT: LB 1124 - Issuance of Transferrable Motor Fuel Tax Credit Certificates to Entities Which Produce Ethanol

REQUESTED BY: Senator LaVon Crosby
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Bernard L. Packett, Assistant Attorney General

This is in reply to your inquiry concerning the constitutionality of that provision of LB 1124 which would entitle a producer of ethanol to obtain from the Department of Revenue a transferrable motor fuel tax credit certificate in the amount of 20¢ for each gallon of ethanol produced in Nebraska.

Your inquiry makes specific reference to Article XIII, Section 3 of the Nebraska Constitution which provides in part: "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation, ***."

It would seem quite clear that the purpose of Section 1 of LB 1124 is to subsidize the ethanol producers of Nebraska in order to increase the market of grain used in the production of ethanol. The purpose is not unlike that addressed by our Supreme Court in Oxnard Beet Sugar Company v. State, 73 Neb. 57, 102 N.W. 80; 73 Neb. 66, 105 N.W. 716.

In that case, to encourage the manufacture of sugar from plants grown in Nebraska, a law was enacted which provided for a "bounty" of a specified sum, to any person, firm or corporation engaged in the manufacture of sugar in the State, for each pound of sugar manufactured. The manifest object of the Legislature in encouraging the manufacture of sugar was to build up manufacturing

industries in the State which would help to develop the market of those crops used in the manufacture of sugar.

The question presented to the court was the power of the Legislature to appropriate the public money for such purposes.

In holding the act unconstitutional, our Supreme Court noted that it was aided by the discussions of other courts on the precise question and said:

> "In Michigan,under a constitutional provision similar to ours, the Legislature attempted to appropriate the public money to encourage the production of sugar, and the Supreme Court of that state upon thorough investigation and careful reasoning determined that the purpose of the appropriation was not a public one, and held the legislation unconstitutional. (Cases Cited) Following this decision the Supreme Court of Minnesota, held similar legislation unconstitutional for the same reason. The Circuit Court of Appeals of the United States for the Eighth Circuit has announced the same conclusion, giving strong reasons for concluding that the encouragement of the manufacture of sugar is not a public purpose for which the Legislature may appropriate the public money."

In conclusion, our court said:

> "The Legislature cannot appropriate the public moneys of the state to encourage private enterprises. The manufacturing of sugar and chicory is a private enterprise and the public money or credit cannot be given or loaned in aid of any individual, association, or corporation carrying on such enterprises."

In the present matter, we see no difference between the payment for "tax credit certificates" issued to producers of ethanol produced in the State and the payment of claims by producers of sugar in Nebraska for each pound of sugar produced.

It has been suggested that, aside from the legal question, there is still a moral and equitable duty to pay a producer of ethanol which uses the agricultural products of Nebraska farmers. The same argument was made in the Oxnard Beet Sugar case and our court said:

> This contention seems to receive some support in the language used by Peckham J., in the case of U.S. v. Realty Co., 163 U.S. 427, 167 up. Ct. 1120, 41 L.Ed.215. While recognizing the high standard of the tribunal from which the decision comes, as well as the great learning

> of the author of the opinion, we are still unable to give our assent to this doctrine. We are unable to understand any principle either of equity or good conscience that should estop the people of the state of Nebraska by an unauthorized act of the Legislative department of their government, especially when such act is attempted to be enforced in the face of a direct prohibition in the Constitution or basic law adopted by the people. An unconstitutional statute is a legal stillbirth, which neither moves, nor breathes, nor holds out any sign of life. It is a form without one vital spark. It is wholly dead from the moment of its conception, and no right, either legal or equitable, arises from such an inanimate thing.

The rule stated in the Oxnard Beet Sugar case has been reaffirmed in many subsequent cases, See State ex. rel. Douglas v. Thone, 204 Neb. 836, 286 N.W.2d 249; State ex. rel. Rodgers v. Swanson, 198 Neb. 125, 219 N.W.2d 726; Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189; Summerville v. North Platte Valley Weather Control District, 170 Neb. 46, 101 N.W.2d 748; and United Communities Services v. Omaha National Bank, 162 Neb. 786, 77 N.W. 2d 576.

From the above, it is our conclusion that the provision of LB 1124 which would authorize the issuance of transferrable motor vehicle tax credit certificates for each gallon of ethanol produced in the State could not be successfully defended in a test before our courts.

Very truly yours,

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22-1-7

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

APPROVED:

Attorney General