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91034

DATE: May 1, 1991

SUBJECT: LB 72--New "Community Consent" Requirement for Licensing Low-Level Radioactive Waste Regional Facility

REQUESTED BY: Senator Chris Beutler, Nebraska State Legislature

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

You have inquired regarding the legality of LB 72 which would impose a new form of community consent as a prerequisite for licensing of a low-level radioactive waste facility. You ask whether the new form of community consent is consistent with the State's obligations under the statutes of the State of Nebraska, the Constitutions of the State and United States, and the Central Interstate Low-Level Radioactive Waste Compact. You have also inquired whether any legal liability would be created for the State if LB 72 is passed and results in a negative vote by the "local community."

Your letter indicates no specific statutes which you wish this office to address directly. Therefore, we have limited our statutory review to the Nebraska Low-Level Radioactive Waste Act, Neb.Rev.Stat. §§ 81-1578 et seq. (Reissue 1987 and 1990 Cum.Supp.). Section 81-1759(3) (1990 Cum.Supp.) states in relevant part:

> It is the intent of the Legislature that potential host communities be actively and voluntarily involved in the siting process. To the extent possible, consistent with the highest level of protection for the health and safety of the citizens of the state and protection of the environment, the developer shall make every effort to locate the facility where community support is evident.

This part of the statute was enacted in 1988 as part of LB 1092. LB 1092 originally contained a provision requiring community consent prior to construction of a facility. After considerable debate, the requirement for community consent was amended as reflected above. We find no conflict between the requirement for community consent in LB 72 and the State's obligations under the Low-Level Radioactive Waste Act.

The Central Interstate Low-Level Radioactive Waste Compact was passed by the Legislature in 1983 and was subsequently ratified by the United States Congress. As indicated in the attachments to your question, the members of the Compact Commission passed a resolution in December, 1987, adopting ten conditions, including community consent, as generic conditions that would apply in the event of any state selection as a host state. Dr. Norm Thorson, on behalf of the State of Nebraska, presented the ten conditions to the Commission. In discussing the concept of community consent, Dr. Thorson stated:

> We feel that the precise mechanism that would be used to determine when you had community consent is a matter which is properly left to the host state, whichever state that might be.
>
> I think it is necessary that there be some finality in the process; that a point in time be set when a community must indicate whether they're willing to be considered or not, and that then becomes their decision. You obviously can't have a situation where people are opting in and opting out of the process.

(Minutes of December 8, 1987, Compact Commission meeting, p. 64).

At the beginning of the siting process US Ecology sought letters of interest from communities and counties throughout the state who were interested in hosting the facility. In line with Neb.Rev.Stat. § 81-1579(3), a letter of interest would "not constitute a commitment to host the facility" but merely focus the developer's efforts on those regions of the state "willing to objectively consider the project" (US Ecology Press Release, March 15, 1988).

As a result of this request, US Ecology received letters of interest from numerous cities and counties throughout the state, including letters from the Boyd County Board of Supervisors and the communities of Butte and Lynch. Approximately eight days prior to selection of a preferred site, the Boyd County Supervisors withdrew their "invitation" to US Ecology.

We have reviewed the Compact and the above history and find no conflict between LB 72 and the Central Interstate Low-Level Radioactive Waste Compact. Additionally, since the Compact Commission passed a resolution requiring community consent, it would appear that the Commission supported the concept of community consent.

In Lenstrom v. Thone, 209 Neb. 783, 789, 311 N.W.2d 884, 888 (1981), the Nebraska Supreme Court stated:

> Certain fundamental constitutional principles must guide, and always have guided, us when the constitutional bounds of legislative power are questioned. The first principle is the Legislature has plenary legislative authority limited only by the state and federal Constitutions. . . . The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. . . . Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. (Citations omitted.)

With this principle in mind, we have reviewed LB 72 as it relates to the restrictions set out in the state and federal Constitutions. As stated previously, the Compact Commission passed a resolution in December, 1988 calling for community consent prior to siting of a facility and leaving the definition of community consent to the host state. In January, 1988, when the developer entered into his contract with the Compact Commission, the resolution regarding community consent had already been passed by the Compact Commission. The developer was well aware that the Compact Commission required community consent and that the host state could determine how community consent would be defined. Arguably, LB 72 does not alter the contract but merely provides the host state's definition of community consent pursuant to the resolution passed by the Compact Commission.

Additionally, in City of El Paso v. Simmons, 379 U.S. 497, 506 (1965), the United States Supreme Court stated:

> For it is not every modification of a contractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause. (Citations omitted.) * * *
>
> The decisions "put it beyond question that the prohibition is not an absolute one and is not to be read

> with literal exactness like a mathematical formula," as Chief Justice Hughes said in Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 428, 54 S.Ct. 231, 236. The Blaisdell opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "[n]ot only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end `has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U.S., at 434-435, 54 S.Ct., at 238-239. Moreover, the "economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." Id., at 437, 54 S.Ct., at 239. The State has the "sovereign right * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of a State we must respect the `wide discretion on the part of the legislature in determining what is and what is not necessary.`" East New York Savings Bank v. Hahn, 326 U.S. 230, 232-233, 66 S.Ct. 69,71. As Mr. Justice Johnson said in Ogden v. Saunders, "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." 12 Wheat 213, 291, 6 L.Ed. 606.

The passage of LB 72 may well have no affect on the contract between the Compact Commission and the developers since it provides for a timely vote to determine community consent. If the vote reflects that there is no community consent, the current contract contains clauses that provide for amendment of the work plan to carry out the intent of the parties if future events demand changes. The contract also contains a termination clause that should the Compact states, local government of the host state, or federal government prevent or make it impossible for the developer or the Compact to perform its duties or obligations under the contract that the contract can be terminated.

While we are concerned with the timeliness of LB 72 in relation to the contract, it is our determination that community consent was in the contemplation of the parties at the time they entered into the contract and that the state's inherent powers to protect the general welfare of the people justify the requirement of community consent. Therefore, we determine that LB 72 does not violate the Constitution of the United States or the State of Nebraska.

In response to your question regarding the affect of failure to obtain community consent under LB 72, we refer you to our earlier Opinion No. 89045, a copy of which is attached hereto.

Sincerely,

DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

28-03-14.91

cc: Patrick J. O'Donnell
Clerk of the Legislature
Senator Rod Johnson
Senator Cap Dierks

APPROVED:

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#89045

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

DATE: May 4, 1989

SUBJECT: Proposed Amendment AM 1397 to the Low-Level Radioactive Waste Act

REQUESTED BY: Senator M. L. Dierks, District No. 40
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired whether AM 1397's proposed system of seeking local approval while limiting the number of elections conflicts with provisions of the Central Interstate Low-Level Radioactive Waste Compact. It is our determination that this method of requiring a vote for approval but limiting the number of elections does not conflict with the provisions of the Compact. However, we feel compelled to note that what you have proposed may affect the state's relationship with the Compact and the developer in other ways.

Federal regulations, 42 U.S.C.A. 2021e(d)(2)(B)(iii), require that the Compact regions certify to the Nuclear Regulatory Commission by January 1, 1990, that the Compact region will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within the Compact after December 31, 1982. Subsection (C) of the same regulation sets a deadline of January 1, 1993, for a Compact region to be able to provide for the disposal of low-level waste generated within the Compact region. If all three sites currently identified as potential sites reject the facility, there is no assurance that an additional two sites will even be identified by January 1, 1990. Federal regulations are clear that the states will lose access to existing sites for the disposal of low-level radioactive waste on January 1, 1993.

If voters in all three of the counties with currently identified sites veto placement within their county, a delay would result while additional testing and negotiations are conducted by the developer to identify two additional sites to satisfy AM 1397. If the siting and voting process involves such additional time that federally mandated deadlines are not met, the Compact Commission or the federal government may view the delay as unreasonable and seek to impose penalties against Nebraska for the delay. Penalties imposed would undoubtedly include the cost incurred by other Compact states for disposal of their low-level waste until such time as a facility is ready to accept the waste within the Compact region.

Placing additional conditions on the developer at this time may also affect the contract between the developer and the Compact Commission. Currently the contract provides that the developer must indemnify the Compact if a deadline is not met due to the developer's fault. If compliance with AM 1347 requires additional time, the developer may arguably be excused from the indemnity clause because of conditions created by the state. Additional contract concerns may be raised by the developer if the county approving the facility does not contain the site considered by the developer to be the least threatening to the health and safety of the general population of the area, state, and Compact region.

Again, it is our opinion that AM 1397 does not violate the Compact conditions. However, there are other concerns inherent in the Compact, federal laws, and the contract with the developer which may be affected by the passage of this amendment. It is impossible at this stage to determine whether the passage of the amendment would affect the Compact agreement, the contract with the developer, or the state's obligations under federal law. We have presented some of the potential problems which might arise. We do not represent that these concerns are all inclusive of the potential problems which may arise when performance conditions are changed at this stage nor do we represent that all or any of these problems would necessarily arise if the amendment were passed. We present this only as questions to be considered by the legislators.

You have also inquired whether the State Director of Environmental Control could issue a license to the developer to site the facility notwithstanding the enactment into law of any of the local approval provisions proposed in AM 1397. It is our conclusion that, based on the conditions contained in AM 1397, the

Director would be unable to issue a license to a developer prior to either approval by a local county or the requisite veto by five counties.

Sincerely,

ROBERT M. SPIRE
Attorney General

Linda L. Willard

Linda L. Willard
Assistant Attorney General

28-01-14.1

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

APPROVED:

Robert M. Spire

Attorney General