

"UTILITY CONSERVATION FINANCING  
PROGRAMS FOR NEBRASKA'S PUBLICLY  
OWNED UTILITIES: LEGAL ISSUES  
AND CONSIDERATIONS"

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## INTRODUCTION

This article is presented to the Nebraska State Energy Office in fulfillment of a contract entered into between Beverly Grenier of Steven D. Burns, P.C., Attorneys at Law, and the Nebraska State Energy Office. The final article was written in conjunction with Roger D. Colton, Attorney at Law, of the Community Action Research Group in Ames, Iowa.

The purpose of the contract was to explore the legal barriers preventing public utilities from extending credit to private parties for the purpose of promoting energy conservation. No direct energy savings will result from the fulfillment of this contract.

Central to this article is a provision of the Nebraska Constitution prohibiting the lending of the credit of the state to private entities. The drafters have evaluated this constitutional provision as it has been interpreted by the Nebraska Supreme Court. Considerable review of decisions from other jurisdictions has also been included. The Nebraska legislation specifically permitting utility conservation financing programs has also been reviewed.

It is the conclusion of the drafters that a utility conservation financing program following the guidelines of the Nebraska legislation would likely be viewed as constitutional by the Nebraska Supreme Court. This conclusion is based upon recent decisions of the Nebraska Supreme Court with regard to the concept of lending the State's credit. This conclusion is

also based upon the extensive legislative findings that exist in the Nebraska legislation declaring such conservation financing programs as serving a valid public purpose. Further support for the conclusion of the drafters is found in the judicial trends that emerge from the cases reviewed from other jurisdictions.

It is hoped that the following analysis will be useful to individual utilities in designing a conservation financing program.

I.

THE CONTEXT FROM WHICH THE ISSUE OF ENERGY CONSERVATION FINANCING PROGRAMS FOR PUBLICLY OWNED UTILITIES HAS ARISEN.

A. THE UTILITY PICTURE IN NEBRASKA.

This article is concerned with legal issues which have arisen or may arise when publicly owned utilities become involved in offering financing programs to their ratepayers who are interested in purchasing and installing energy conservation measures. Because of the nature of the issue, the article will be most relevant to the 406 electric utilities which exist in Nebraska.<sup>1</sup>

Public power had its beginnings in Nebraska in its early years of statehood. The cities of Schuyler and Fremont were the first cities to construct municipally owned power plants in Nebraska in the years 1893 and 1894 respectively. By the late 1920's, Nebraska had the largest number of municipally owned power plants in the nation. Probably most important of all, Nebraska had the leadership of Senator George W. Norris during the 1930's who was active in the development of public power on a national as well as a state level.<sup>2</sup>

The present structure of public power in Nebraska stems from 1933 state legislation permitting the formation of public power districts, public irrigation districts, and public power and irrigation districts. In the same decade, the Rural Electrification Administration was created and the Federal Rural Electrification Act was signed into law.<sup>3</sup>

Today, there are no investor-owned electric utilities in the State of Nebraska. This puts Nebraska ratepayers in the unique position of being both owners and customers of their public power companies. Nebraskans have the opportunity to give input on policies and rate structures, often enjoy lower rates than those of investor-owned utilities, and, most important to this article, have better access to capital to meet utility needs.<sup>4</sup> Publicly owned utilities enjoy the benefit of being tax-exempt issuers of debts, realizing a lower interest rate than taxable issuers. Further, publicly owned utilities have no dividends to be paid to stockholders and do not pay property or income tax, although they are required in Nebraska to make payments in lieu of taxes which are based on revenue.<sup>5</sup> This access to capital results in a lower cost of electricity for rate payers in Nebraska. Historically, these costs have been 25 to 30% below the national average.<sup>6</sup> It is this access to capital that makes the concept of conservation financing by publicly owned utilities so potentially beneficial. The ratepayer would enjoy the opportunity of borrowing money at a rate below the market rate while, at the same time, the utility would enjoy the opportunity of conserving its existing resources.

While electric rates in Nebraska are lower than those on a national basis, Nebraska ratepayers have experienced an increase in electric rates since 1976 of approximately 60-70%.<sup>7</sup> While this increase may be insignificant when compared to oil prices during the same period of time, it has been sufficient to generate interest in conservation.

One primary component of contemporary increases in electric rates<sup>8</sup> is the dramatic inflation in capital costs associated

with new generation.<sup>9</sup> Many factors have served to fuel this surge<sup>10</sup> including new federally mandated pollution control equipment<sup>11</sup> coupled with rapidly escalating interest rates.<sup>12</sup> Indeed, the "shock" associated with placing newly completed generating capacity into a utility's rate base has caused substantial recent regulatory concern.<sup>13</sup>

One mechanism frequently proposed to combat increasing electric rates is the development and implementation of "full energy services"<sup>14</sup> or "energy services planning."<sup>15</sup> Historically, electric utilities have viewed it their duty to deliver electricity to ratepayers at the lowest possible cost. However, over the past several years, utilities have begun to recognize that ratepayers are not interested in purchasing electricity, but are interested in purchasing services such as heating, cooling, lighting, and operation of their appliances in a cost-effective manner. Energy services planning, therefore, includes utility participation in the provision of such things as energy conservation, load management and renewable resource devices.<sup>16</sup> With this expanded role, proponents assert, the same utility can heat, cool, light and operate for the same consumers at a lesser cost.<sup>17</sup>

#### B. ENERGY SERVICE PLANNING AT THE STATE LEVEL.

Increasingly, legislative and administrative decisionmakers are recognizing the importance of this ability to "substitute" among energy services. The Oregon legislature, in 1977, for example, approved a statute which stated:

- (3) Insulation and other weatherization measures in many cases can conserve energy and make it available for other uses at less cost than energy from new sources.

- (4) Expenditures by energy suppliers on a conservation program is in many cases a prudent and cost-effective means of gaining new supplies for energy consumers.<sup>18</sup>

Similarly, the New York legislature enacted a program which provided for utility financing of energy conservation measures. That legislation stated in relevant part that the program would benefit "all energy users and consumers in this state since the demand for highly priced incremental sources of energy will be reduced."<sup>19</sup> The New York legislature further concluded that "savings to homeowners would be in terms of millions of dollars per year; jobs would be created; and energy supplies would be saved for wiser use."<sup>20</sup>

The Montana legislature has also passed legislation involving its utilities in financing energy conservation measures.<sup>21</sup> The Montana legislation allows utilities to extend credit to its customers for energy conservation in a dwelling. Utilities under the legislation are allowed to either install or pay for installation of energy conservation measures. Interest chargeable by the utility is limited to 7%. Although this is permissive legislation, utilities in Montana have become actively involved in conservation financing. The largest electric utility in Montana is the Montana Power Company located in Butte, Montana. This company offers no interest loans to its customers for purchase of energy conservation devices which, after an energy audit, the company technicians feel would be cost effective for the consumer. The items which qualify under the loan program are not limited to insulation and weatherstripping, but could include alternate energy systems if those systems would prove cost

effective to the consumer. Cost effectiveness to the consumer is the key, presumably because of the relationship between cost effectiveness in end use and savings to the power company responsible for providing the electricity.<sup>22</sup>

There are also publicly owned utilities in Montana which are involved in the conservation loan program sponsored by Bonneville Power. Those utilities include Missoula Electric Cooperative, Ravalli County Electric Cooperative,<sup>23</sup> Lincoln Electric Cooperative, Flathead Electric Cooperative, and Glacier Electric. These utilities perform energy audits and suggest particular conservation devices, secure bids and, if the consumer so requests, have the work performed. The utility pays for 85% of the cost of the work, leaving the remaining 15% as the responsibility of the consumer. To qualify for this program, a consumer must use electric heat. Cost of the program is actually borne by Bonneville and is designed to preserve their hydro-electric resources by purchasing energy back from retail consumers.<sup>24</sup>

State utility regulators, too, are beginning to pursue the concept of full energy services. The Idaho public Service Commission approved a utility-financed residential energy conservation program, including zero interest loans. That PSC stated:

The rationale for the zero interest loan is quite simple. The cost of new generation plants and transmission lines has now become so high that it is cheaper for Idaho utilities to augment existing electricity supplies by financing efficiency improvements instead of new plant investment.<sup>25</sup>

The Michigan Regulatory Commission has also considered the issue of public utility participation in conservation measures.<sup>26</sup>

In Michigan Consolidated Gas Company, the Commission approved an effort to promote conservation, comparing it to the established utility function of promoting the sales of natural gas. The Commission found that the program served the public interest by contributing to the national goal of conserving our scarce energy resources and approved the insulation program in question.<sup>27</sup>

The Commission based its decision on its opinion

"that the public interest requires gas utility companies to incur costs of service and investments which conserve, as well as distribute, existing supplies of natural gas. The Commission therefore finds that efforts to promote conservation of natural gas constitute a proper utility function."<sup>28</sup>

The Michigan Regulatory Commission could also have based its decision on the proper utility function of supplying energy resources to the public. A conservation financing program which defers the capital construction costs for utilities would result in net savings to all ratepayers and would thus be closely related to the historical duty to supply energy resources to the public.<sup>29</sup>

Commentators seem to agree that utility participation in conservation financing programs would not, if the utilities involved exercised prudent business judgment, violate traditional notions of proper utility function.<sup>30</sup> Other state utility regulatory commissions have ordered similar conservation financing programs making similar findings.<sup>31</sup> Moreover, many utility companies, public and private, have initiated finance programs on their own.<sup>32</sup>

C. ENERGY SERVICES PLANNING UNDER THE RELEVANT FEDERAL LEGISLATION.

On November 9, of 1978, the National Energy Act was signed into law.<sup>33</sup> The National Energy Conservation Policy Act is a portion of the National Energy Act and was itself comprised of six separate titles. Title II is the residential energy conservation portion of the Act and is the portion which is most relevant to the issue being addressed here.<sup>34</sup>

Title II of the National Energy Conservation Policy Act (NECPA) reflects awareness of the problems and potential solutions with regard to residential energy conservation. The legislation, however, covers only utilities which sell annually to residential customers at least 10 billion cubic feet of natural gas or 750 million kilowatt-hours of electricity.<sup>35</sup> Of all the entities in Nebraska which sell electricity to residential users, only three of these entities are affected by the federal legislation.<sup>36</sup>

Under Section 212 of the Act,<sup>37</sup> the Governor or an appointed state agency of each state is authorized to submit an energy conservation plan to the Secretary of Energy which must include the several requirements listed in Section 213 of the Act.<sup>38</sup> Among the various requirements listed in Section 213 is the requirement that the plan submitted include within it the requirement that each covered utility submit an energy conservation plan pursuant to Section 215 of the Act. Programs submitted under Section 215 must include, among other things: (1) procedures to inform customers of suggested energy conservation measures and techniques, including not only such traditional forms of conservation as insulation and storm windows, but also alternative

energy systems such as solar and wind power; (2) procedures under which it will (a) offer to inspect buildings owned by residential customers to determine cost of conservation measures, (b) arrange for a lender, and (c) arrange to have the measures installed.<sup>39</sup>

Prior to amendment on June 30, 1980, utilities covered by the Act were not allowed to supply or install energy conservation measures, except under a plan which had begun before passage of the Act.<sup>40</sup> Loans by the utility directly to its residential customers were strictly limited. Under Section 216(b), loans to individual customers were limited to \$300. All utilities covered by the Act were governed by this strict limitation unless they petitioned the Secretary of Energy for a waiver pursuant to Section 216(e).

As mentioned above, NECPA was amended on June 30, 1980<sup>41</sup> to remove any reference to a prohibition or limitation on loans to customers.<sup>42</sup> This amendment demonstrates a recognition on the part of the federal government of the positive effects of involving utilities in the financing aspect of home conservation improvements. This federal legislation has acted as a spring board for conservation programs throughout the country, including smaller utilities which are not required to follow the guidelines of federal legislation. As larger utilities have become involved in conservation services, including loans to their customers to purchase conservation measures, smaller, publicly owned utilities have also become interested in providing such programs.<sup>43</sup>

While the move toward utility participation in energy conservation financing gains momentum throughout the country, some

concern has arisen regarding whether public power entities<sup>44</sup> have the same flexibility to offer such programs as do investor owned companies.<sup>45</sup> The issue is raised by state constitutional restrictions on the use of public credit.<sup>46</sup>

D. GENERAL LEGAL ISSUES INVOLVED WHEN PUBLICLY-OWNED UTILITIES BECOME INVOLVED IN THE FINANCING OF VARIOUS CONSERVATION MEASURES FOR THEIR RATEPAYERS.

There appears in the Nebraska Constitution as Article XIII, Section 3, the following prohibition: "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation . . ." <sup>47</sup> Similar provisions appear in some form in most state constitutions. These provisions are set forth in the Appendix attached to this article.

These constitutional provisions were designed to protect the state taxpayers against losses resulting from the failure of a private enterprise guaranteed by the state.<sup>48</sup> In addition, these provisions were designed to protect private enterprise against competition by the state.<sup>49</sup>

The provisions were included in the constitutions of the various states, as a reaction to the negative financial experiences of many states during the early part of the 19th Century. For example, according to the Arizona court, the Arizona provision represents a reaction of the people of Arizona to the "orgies of extravagant dissipation of public funds" by public entities in their efforts to aid in the construction of railways, canals, and the like.<sup>50</sup> It appears that in the early part of the 19th Century, many states were anxious to encourage development of

railroads and other means of transportation within their borders. In their anxiousness to induce such companies to build in their area, many municipal corporations gave tax money, credit or other valuable advantages to the railroads and canal companies which led to economic disasters for the taxpayers.<sup>51</sup> The favors afforded to the railroads resulted in obligations for municipalities which were general in character. Often the private companies failed in their obligations, leaving the taxpayers to pay for the default.<sup>52</sup> This reckless guarantee of the obligations of privately owned railroads and other companies brought many states to the verge of bankruptcy.<sup>53</sup>

An example of this practice occurred in the State of New York. In 1840, to encourage the building of the Long Island Railroad, the New York Legislature passed a law authorizing the Railroad to sell certificates which would be insured by the state and reimbursable at its pleasure any time after the expiration of 20 years. In 1858, the New York Legislature fixed a payment date 15 years after the expiration of the first 20 years. The validity of this extension of the obligation was brought before the New York Supreme Court in a case decided in 1861.<sup>54</sup> The court found that the 1858 action of the Legislature was valid, forcing the holders of the certificates to wait a total of 35 years for redemption. This action of the Legislature, while likely unpopular with the holders of the certificates, was probably an effort to avoid out and out default which would require rescue by the taxpayers and would endanger the treasury of the state.<sup>55</sup>

Article XIII, §3 of the Nebraska Constitution was originally adopted as a portion of the Constitution of 1875. The provision was amended only once, in 1968, to allow for loans to students under certain circumstances. While Nebraska was not admitted to the Union until the latter half of the 19th Century, in 1867, the purposes of the drafters of the Nebraska Constitution in including this provision were similar to those discussed above.<sup>56</sup> The provision is considered central to this research project because it has been considered by some as a barrier to a public utility desiring to offer loans or other forms of financing to private entities for the purpose of promoting energy conservation.

Whether a publicly owned utility in Nebraska can offer such financing depends, in part, therefore, on the construction of Article XIII, §3. In construing a provision of the Nebraska Constitution, it is essential to consider first the function served by a state constitution. The Nebraska Supreme Court has recently considered this issue in State ex rel. Creighton Univ. v. Smith:<sup>57</sup>

Initially, the people have all legislative power. Unlike the federal Constitution, a state constitution is not a grant of power but a limitation of power. The widely accepted doctrine is that a state legislature may generally pass any act, because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised in the legislature by representatives of the people. [citations omitted]<sup>58</sup>

Courts can recognize and enforce only those limitations or restrictions constitutionally imposed. 'Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied.' [citations omitted]<sup>59</sup>

The court in Creighton v. Smith made it clear that a limitation on legislative power imposed by the state constitution will not be liberally construed.<sup>60</sup> No prohibition which is not within the literal language of the relevant provision will be imposed<sup>61</sup> unless it is clearly implied.<sup>62</sup> With these principles in mind, cases construing Article XIII, §3 and similar provisions in other states have been reviewed. The conclusion, based on this review, is that this provision will likely not be viewed by the court as a barrier to a publicly owned utility desiring to offer financing to its ratepayers for the purchase of energy conservation devices. This conclusion assumes that the policymakers for such a utility have first determined that conservation of its existing resources is beneficial to the system as a whole.

In the past, the Nebraska Supreme Court has read this constitutional provision quite inclusively. In State ex rel. Beck v. City of York,<sup>63</sup> the court said:

The prohibition clearly provides that the credit of the state may not be given or loaned to an individual, association or corporation under any circumstances.<sup>64</sup> (emphasis added)

The court held further that the prohibition extended to all political subdivisions of the state<sup>65</sup> and that it encompassed revenue bonds as well as general obligation bonds.<sup>66</sup> This broad construction has been substantially modified in recent years.<sup>67</sup>

It is the conclusion of these writers that it is possible to craft an energy conservation<sup>68</sup> financing program for publicly

owned utility systems which will not run afoul of constitutional provisions.<sup>69</sup> Two major issues need to be examined in detail regarding such a proposal:

1. Whether the "Credit of the State is being given or loaned." This issue actually involves three separate inquiries:
  - a. Whether the "credit" of the state is at issue;
  - b. Whether the credit "of the state" is at issue; and
  - c. Whether the credit of the state is being "given or loaned."
2. Whether the credit of the state is being given or loaned "in aid of any individual, association or corporation." This issue involves examination of the public purpose doctrine as it has evolved in Nebraska and other jurisdictions.

Each of the constitutional issues will be examined in depth below.

## II.

### THE CREDIT OF THE STATE IS NOT GIVEN OR LOANED WHEN A PUBLICLY OWNED UTILITY INITIATES A CONSERVATION FINANCING PROGRAM.

- A. A CONSERVATION FINANCING PROGRAM OFFERED BY A PUBLICLY OWNED UTILITY NEED NOT INVOLVE THE "CREDIT" OF THE STATE.

A utility program which makes available financing for energy conservation, load management and renewable resource measures would not involve the "credit" of the state and would, therefore, not implicate constitutional restrictions. A distinction exists in Nebraska constitutional law between the use of state monies<sup>70</sup> and the loaning or giving of the state's credit.<sup>71</sup> The two terms are not synonymous and, accordingly, the constitutional restrictions differ as well. Public money cannot be spent but

for public purposes.<sup>72</sup> The credit of the state "may not be given or loaned" to private interests "under any circumstances."<sup>73</sup>

The Nebraska Supreme Court decision in State ex rel. Beck v. York, addressed in some detail the circumstances under which the "credit" of the state would be found to have been "given or loaned." The court held:

The issuance of the bonds in the name of the city for the payment of the cost of the project evidences the fact that the credit of the city has been extended. The city is the payer of the bonds and it is primarily liable for their payment. The bonds become the obligations of the city. . . .A failure of payment is a default by the city.<sup>74</sup>

The court continued:

When the State or a political subdivision thereof becomes a payer of a revenue bond or any other evidence of indebtedness which is to be used in the accomplishment of a private as distinguished from a public purpose, the credit of the state has been given or loaned.<sup>75</sup>

Several indices guide whether the credit of the state has been given or loaned in aid of a private interest.<sup>76</sup> First, there must be some evidence of indebtedness incurred on the part of the public body. Generally issued in the form of revenue bonds, those bonds "are issued by the city in its own name to give them a marketability and value which they otherwise would not possess."<sup>77</sup> Second, the indebtedness must be a legal obligation of the city whereby the city is held to be a payer of the indebtedness. Use of the city as such a payer "is intended to give respectability to (the bonds) because of the general acceptability of cities as a source of bond issues in financial markets."<sup>78</sup>

A conservation financing program implemented by a public electric utility need not involve these elements of loaning the credit of the state. A program of financing which is funded through current operating revenues would not invoke the prohibition on lending the credit of the state.<sup>79</sup> The Nebraska Supreme Court has addressed the relationship of "operating expenses" in light of that state's constitutional restrictions. It held:

In this jurisdiction, under the general powers granted public corporations, the revenues derived are required to be devoted to the purposes for which the corporation is being operated, that is, the payment of operating expenses, indebtedness, and repairs,<sup>80</sup> extensions and improvements of the facilities.

Even charitable contributions, the court held, could be considered "operating expenses" if they "bring some benefits to the district."<sup>81</sup> Clearly, this supreme court language still leaves a number of issues to be resolved before a conservation financing program would be unequivocally approved. A public utility would need to establish that the provision of conservation, load management and renewable resource devices are among the "purposes for which the corporation is being operated." Alternatively, the utility could seek simply to establish that the implementation of such nontraditional energy service measures would involve the "extension and improvement of the (utility's) facilities."<sup>82</sup>

In either case, to the extent that an energy conservation financing program can be funded out of current operating revenues, no debt would need to be incurred and no constitutional restrictions would apply. A simple surcharge placed on current rates could raise the additional necessary capital in a way which, in the long-term, would minimize rates to consumers.<sup>83</sup> Such a surcharge, used to finance alternatives to central station capacity expansion,

might easily be justified economically. So long as the present value of the marginal cost of central station capacity exceeded the magnitude of the surcharge, ratepayers would receive financial and economic benefits from the conservation program.<sup>84</sup>

In summary, the Nebraska constitution proscribes lending the "credit of the state" in aid of individuals, associations or corporations. Lending the "credit of the state" necessarily involves the incursion of debt on the part of the municipality and the assumption of responsibility for payment of the indebtedness. An energy conservation financing program, however, need not involve the incursion of debt as a basis for funding. In the event that such a program is financed through current operating revenues, no constitutional restrictions apply.

**B. A CONSERVATION FINANCING PROGRAM OFFERED BY A PUBLICLY OWNED UTILITY NEED NOT INVOLVE THE CREDIT "OF THE STATE."**

The constitutional restrictions on the use of debt financing applies only to the state.<sup>85</sup> If a conservation financing program does not involve the credit "of the state," no constitutional infirmity exists. The Nebraska Supreme Court joined minority judicial opinion in construing the term "of the state" to include municipalities when it held that "the plain intention" of the constitutional provision requires "that state government, including political subdivisions thereof, shall not extend credit in aid of private persons and private enterprises."<sup>86</sup> Still, not all revenue bonds issued by an agency of the state government are considered to invoke the credit "of the state".

1. Express Disclaimer of State Liability.

The Nebraska Supreme Court most directly addressed the issue of what constitutes the credit "of the state" in State ex rel. Douglas v. Nebraska Mortgage Finance Fund.<sup>87</sup> In that proceeding, Nebraska's State Attorney General attacked the constitutionality of legislation which sought to "assist private mortgage lenders in providing mortgage financing for single family residences at reduced interest rates for low and moderate income families. . ."<sup>88</sup> The legislation authorized the Mortgage Finance Fund, a state government entity, to pursue one program wherein the Fund would "make loans to mortgage lenders which will use the proceeds to make mortgage loans."<sup>89</sup> The Nebraska Supreme Court held:

The principal function of the Fund is to issue tax-free revenue bonds and to use the proceeds (inter alia) to encourage lenders to make lower interest loans to low or moderate income persons. . .<sup>90</sup>

The state's bonds and resulting loans to mortgage lenders, the court said, were:

solely for the purpose of making mortgage loans to persons otherwise unqualified for mortgage financing because of insufficient personal or family income.<sup>91</sup>

The legislature expressly stated in The Mortgage Finance Fund Act that it was creating "a governmental body vested with the powers and duties specified in. . .(the Act)". It also stated that the fund involved "public money provided by the sale of revenue bonds (which) may be borrowed, expended, advanced, loaned or granted."<sup>92</sup> (emphasis added).

The Attorney General of Nebraska attacked the legislation as being in violation of the constitutional proscription on lending the credit of the state to private parties. The state supreme court firmly rejected this argument, holding:

If there is insufficient revenue with which to repay the bonds, the state in no manner becomes obligated or liable. The Act specifically provides that the bonds may not be a debt, liability, or general obligation of the state, and must contain on the face thereof a statement that neither the faith and credit nor the taxing power of the state is pledged to the payment of the principal of or the interest on such bonds.<sup>93</sup>

The court finally concluded that "revenue bonds which specifically deny any liability of the state do not constitute state debt" within the meaning of the constitutional prohibition.<sup>94</sup>

Further analysis by the Nebraska Supreme Court in the Mortgage Finance case indicates that bonds, the payment of which is limited to public utility revenues, have "no state funds involved in the repayment of any debt."<sup>95</sup> The court applied the doctrine to uphold utility financing of "the improvement on a light plant."<sup>96</sup> The Nebraska court also favorably cited a Washington state court case "where the construction of a waterworks system by a municipality was financed by obligations payable only from revenue derived from the operation of the system."<sup>97</sup>

This reading of the Nebraska Supreme Court is further buttressed by the court's decision in State ex rel. Meyer v. Duxbury.<sup>98</sup> In that case, the Supreme Court considered a challenge to the financing of the Nebraska Clean Waters Commission. The Commission was "authorized to issue bonds and notes and to loan money to municipalities"<sup>99</sup> so as to further its purposes of assisting

"municipalities in the planning and financing of waste water treatment works, wastewater collecting systems, and solid waste disposal facilities."<sup>100</sup> Challenge was brought asserting a violation of the constitutional ban on lending the credit of the state.<sup>101</sup> The Supreme Court rejected that argument on two grounds. First, the court said, it was not the credit of the state which was relied upon in the issuance of the bonds.

Rather:

The securities which may be pledged to secure the payment of the bonds and notes to be issued by the commission are the bonds and notes of municipal corporations. The bonds and notes issued by the commission actually represent the combined or collective credit of the municipal corporations which have borrowed money from the commission.<sup>102</sup>

Second, the court observed, there was a specific and express disclaimer of any obligation on the part of the state.<sup>103</sup> The Supreme Court said:

The act specifically provides that the bonds and notes issued by the commission shall be general obligations of the commission, payable solely from funds of the commission available for that purpose, and not a liability of the state.<sup>104</sup>

An energy conservation finance program could easily be crafted to meet the strictures of these two decisions. A disclaimer of municipal or state liability would seem appropriate in the instance of a publicly owned utility issuing the bonds. Moreover, a conservation finance program is squarely comparable to the Duxbury case. Bonds issued by a publicly owned utility generate funds which could be made available for conservation loans to ratepayers. The security for these bonds is the revenue derived by the utility from its operations. The bonds and notes

issued by the utility, therefore, actually represent the collective credit of the ratepayers. The only difference is that Duxbury involved corporate borrowing while the conservation situation involves individual borrowing.

In summary, the Nebraska Supreme Court in recent years, has seemed to loosen the holding in its York case, supra.<sup>105</sup> Revenue bonds issued by a state entity which expressly disclaim the general liability of the state for their repayment will not fall within the constitutional proscription of lending the credit of the state. Moreover, to the extent that utility revenue bonds are backed by the collective credit of the ratepayers, and not of the state, the credit of the state has not been given or loaned under the terms of Nebraska's constitution. An energy conservation finance program, even if debt-financed through the issuance of revenue bonds by a municipal or other publicly owned utility, would fall within the confines of these supreme court tests.

2. Nebraska State Statutes Indicate the Credit of the State is Not Loaned or Given in a Conservation Finance Program.

An energy conservation financing program offered by a Nebraska public utility easily falls within the terms and rationale of that state's supreme court constructions of constitutional proscriptions on lending or giving the credit of the state in aid of private interests. It is fundamental that a political subdivision can act only within the scope of the authority granted to it by the legislature.<sup>106</sup> In 1980, L.B. 954 was passed,

giving public utilities<sup>107</sup> authority to offer conservation financing programs.<sup>108</sup> Loans under such programs could be offered to owners of residential, agricultural or commercial buildings<sup>109</sup> "solely for the purchase or installation of energy conservation measures."<sup>110</sup> The legislature determined that these conservation "loans" could be made under two separate methods:

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 (Nebraska Statutes).<sup>111</sup>

(emphasis added).

Reliance upon the Nebraska Investment Finance Authority<sup>112</sup> settles any possible constitutional challenge to conservation loans as involving the gift or loan of the credit "of the state". The Investment Finance Authority is the successor agency to the Nebraska Mortgage Finance Fund.<sup>113</sup> Among the powers conferred upon the Finance Authority are:

- (1) "To borrow money and issue bonds as provided by the Nebraska Finance Authority Act;"<sup>114</sup>
- (2) "To issue bonds for the purpose of paying the cost of financing any project or projects, and to secure the payment of such bonds as provided in the Nebraska Investment Finance Authority Act;"<sup>115</sup>
- (3) "To enter into financing agreements with others with respect to one or more projects to provide financing for such projects upon such terms and conditions as the authority may deem advisable to effectuate the public purposes of the Nebraska Investment Finance Authority Act\* \* \*."<sup>116</sup>

The state legislature expressly included the financing of energy conservation projects within the Nebraska Investment Finance Authority Act. The legislature concluded that the

Finance Authority was necessary because energy problems "cannot alone be remedied through the operation of private enterprise or individual communities or both, but may be alleviated through the creation of a quasi-governmental body" to, among other things, "encourage the investment of private capital." The extension of energy conservation loans through public utilities under the auspices of the Finance Authority thus raises no constitutional problems. The Nebraska Supreme Court, in examining the predecessor agency, held both that the entity is "a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions"<sup>118</sup> and that "the credit of the state is not in any manner being given or loaned in aid of any individual."<sup>119</sup>

Nebraska's statutes also allow a utility to grant "an extension of credit . . . from its own capital,"<sup>120</sup> (emphasis added) and not only from the capital of the Finance Authority. It could be argued that this statute does not permit a utility to incur debt to make such loans. Rather, to be from the utility's "own capital", loans would need to be made from current operating revenues. For Nebraska's publicly owned electric utilities, however, the distinction is of no constitutional consequence.

The incurring of debt by such a utility would likely be held not to involve an extension of the credit of the state.<sup>121</sup>

Nebraska statutes provide that, for public power districts, "any and every indebtedness", however incurred:

shall be payable solely (1) from revenue, income, receipts, and profits derived by the district from its operation and management of power plants, systems\* \* \*, or  
(2) from the issuance or sale by the district of its warrants, notes, debentures,

bonds, or other evidences of indebtedness, payable solely from such revenue, income, receipts, and profits, or from the proceeds and avails of the sale of property of the district...<sup>122</sup> (emphasis added).

The statute provides further protection to purchasers or holders of public power district bonds "in order to protect and safeguard the security and the rights" of such persons.<sup>123</sup> The legislature has created a procedure whereby "in the event of default in performance of any duty or obligation", the purchasers or holders<sup>124</sup> may:

take possession and control of the business and the property of the district, and proceed to operate the same, and to collect and receive the income thereof. ...<sup>125</sup>

In such a circumstance, income is first to be used for the payment of current operating expenses with the surplus to be devoted to retiring past due principal and interest.<sup>126</sup>

When all legal taxes and charges, and all arrears or interest, and all matured revenue debentures, notes, warrants, or other evidences of indebtedness, have been paid in full, the control of the business and the possession of the property of the district shall then be restored to such district.<sup>127</sup>

The purchasers or holders of the evidences of indebtedness may utilize this procedure "as often as the occasion therefore may arise."<sup>128</sup>

It is clear from these statutes that, even in the event that a public power district incurs debt to provide capital for a conservation loan program, it is not the credit "of the state" which is being invoked. The statute expressly states that the state is not to be liable for the bonds or other indebtedness, however incurred, facing a public power district.<sup>129</sup>

It is the district which acquires the monies through the sale of bonds and it is the district which repays the bonds through revenue which it acquires.<sup>130</sup> As with the Mortgage Finance proceeding, "the credit of the state is not in any manner being given or loaned in aid of any individual."<sup>131</sup>

3. The Credit of Public Corporations Does Not Represent the Credit "of the State".

The credit of a public corporation is an item separate and distinct from the credit of the state and thus does not implicate constitutional prohibitions. The Nebraska Supreme Court, in State ex rel. Meyer v. Duxbury, supra, raised this distinction almost in passing. Nevertheless, the appropriate application of this principle could well be determinative of any challenge to a utility financing program for conservation measures. Duxbury involved a challenge to the Nebraska Clean Waters Commission. The Supreme Court observed:

It is important to observe that the commission is an agency of the state and not a separate corporation. This results in the commission being subject to constitutional requirements and restrictions that could not be applicable to a separate corporation.<sup>132</sup> (emphasis added).

This distinction was important to the Supreme Court, also, in its consideration of the Mortgage Finance case. In that proceeding, the court noted that the legislation under challenge:

creates 'a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions, to be known as the Nebraska Mortgage Finance Fund.<sup>133</sup>

Indeed, one initial constitutional challenge to the mortgage finance fund was that the legislation improperly "create(d) a

single public corporation."<sup>134</sup>

It appears as though the Nebraska legislature also intended to create public power districts as "public corporations" which are entities in many ways distinct from the state. In Wittler v. Baumgartner,<sup>135</sup> the Nebraska Supreme Court recognized the corporate nature of public power districts.<sup>136</sup> In that case, the court held that the public power act "created a single public corporation."<sup>137</sup> Such a corporation acts quite differently than an agency of government, the court noted. "A public corporation organized for purposes of generating, transmitting, and distributing electric energy operates in a proprietary as distinguished from a governmental capacity."<sup>138</sup> The court has held elsewhere that the Nebraska legislature, relative to public power districts "intended to put them on the same basis as private power corporations"<sup>139</sup> and intended them to "operate in a successful and profitable manner."<sup>140</sup>

It is quite possible to apply the same analysis to public power districts as the Nebraska Supreme Court applied to the Nebraska Mortgage Finance Fund. Both entities are bodies politic and corporate created by state statute. The bonds of that Fund were held not to invoke the credit of the state, the Supreme Court said, because:

Only the Fund is involved. It is the Fund which acquires the monies through the sale of bonds, and it is the fund which repays the bonds through revenue it acquires.<sup>141</sup>

Public power district bonds would require a similar analysis and an identical conclusion.

C. A CONSERVATION FINANCING PROGRAM OFFERED BY A PUBLICLY OWNED UTILITY NEED NOT INVOLVE THE CREDIT OF THE STATE BEING "GIVEN OR LOANED".

A utility conservation financing program, even if it involves a publicly owned Nebraska utility, need not entail a loan or gift of the credit of the state as contemplated by constitutional provisions proscribing such actions. In the instance where mutual consideration is exchanged, no loan of credit is implicated. The Nebraska Supreme Court directly faced this issue in Blue Flame Gas Association v. McCook Public Power District.<sup>142</sup> In that case, the court considered a constitutional challenge to a demand promotion program which McCook public power district had developed. The court explained the program to involve:

In the late spring of 1969, the defendant by advertisements offered to install a complete electric heating system in any home in its service area free upon the agreement of the customer to heat his home electrically for 5 calendar years. The equipment became the property of the customer after he had used it for the required 5 years, but if he failed to fulfill the agreement, the district had the right to remove the equipment.<sup>143</sup>

The public power district offered this program so as to stimulate electricity sales during the winter, McCook's off-peak season. McCook was a purchaser of wholesale power from the Nebraska Public Power District and its purchase contract contained a ratchet clause -- this clause works as a "take-or-pay" contract -- requiring payment for at least 70 percent of the amount of electric energy used in its peak demand month whether used or not.<sup>144</sup>

The court observed: "In the winter months particularly, the defendant was required to pay for wholesale energy for which it did not have a retail demand."<sup>145</sup>

The Nebraska Supreme Court rejected a claim that this program involved a loan or gift of the credit of the state to an individual as being "untenable" on these facts.<sup>146</sup> The rationale of the court is clear and is consistent with other state appellate courts which have addressed the same or similar issues.<sup>147</sup> In this situation, the retail utility neither loaned nor gave anything. Rather, a binding contract with mutual covenants consented to by each party had been created. In exchange for an agreement to use off-peak electric heating, the utility provided to the customer the equipment necessary to make the conversion. Each party to the contract benefitted. The utility was able to successfully market its purchased, but unneeded, off-peak power. The customer obtained the electric heating implements at "no cost".

A number of other state appellate court decisions have applied this rationale to approve similar contractual arrangements. The principle, quite simply, is that in the event that mutual considerations are exchanged, no loan or gift of the credit of the state is involved in a transaction.<sup>148</sup> Perhaps most notable in the utility area is the Washington State Supreme Court decision in Washington Natural Gas Co. v. Public Utility District No. 1 of Nohomish County.<sup>149</sup> In Washington Natural Gas, a natural gas distributor sought to restrain a county public utility district from offering inducements to encourage land developers to install underground electrical distribution systems. The utility district further sought to persuade homeowners in new housing developments to buy electrical energy and service.

The inducements were contained within a contract offered by the utility district to the land developer whereby the utility offered to install, at its own initial expense, a complete underground electric distribution system and an ornamental street lighting system.<sup>150</sup> In turn, the developer agreed to pay \$225 per lot to the utility within three years of the date of the date of the agreement with interest at six percent on the unpaid balance.<sup>151</sup> If, however, the developer erected a "total electric dwelling" within that three year period, the utility agreed to provide a \$150 credit or payment to the \$225 contract amount.<sup>152</sup> The gas company challenged this promotional scheme, asserting that it involved unconstitutional gifts and an improper granting of public credit.

The Washington court, in rejecting that challenge, looked to see if there was, in fact, "a beneficial contract" with "genuine mutuality."<sup>153</sup> The court found that:

not only is there an abundance of consideration moving directly to the PUD in the instant case to support its offer of a contract, but there will be an actual delivery of property and acquisition or ownership by the PUD in addition to the sale of electricity which will be made under the contracts.<sup>154</sup>

The utility stood to gain "measurable benefits" from the contractual arrangement the court said.<sup>155</sup> It would, among other things, "acquire a substantial number of total electric customers who will purchase from it greater amounts of electrical energy than ordinary customers."<sup>156</sup> As a result, the court concluded, "there is. . .no lending of money or credit. . .but rather a genuine exchange of concrete, specific, measurable consideration."<sup>157</sup>

The applicability of the reasoning of these cases to the "flip-side situation" is readily apparent. The Washington case was decided in 1969;<sup>158</sup> the Nebraska case is 1971.<sup>159</sup> During this era, electricity was a cheap source of energy and, by increasing demand, a utility could pass on to all of its customers, the benefits gained through economies of scale in generation. The situation today, to understate the matter, has changed. The U.S. Supreme Court recently held that:

We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority--and indeed the duty--to take appropriate action to further this goal.<sup>160</sup>

Similarly, the Nebraska state legislature made a legislative finding that "energy conservation. . .has been shown to be a prudent means of reducing energy consumption costs and the need for additional costly facilities to produce and supply energy."<sup>161</sup>

Today, in sharp contrast to the 1960s, the need of the prudent utility is to decrease, not to increase, demand. To the extent that a utility can purchase that decreased demand through conservation technologies, it receives a "genuine exchange of concrete, specific measurable consideration" as it did when the need was otherwise nearly two decades ago.<sup>162</sup>

D. "LENDING THE STATE'S CREDIT" IN A PUBLIC UTILITY CONTEXT: THE LESSONS FROM OTHER STATES.

A review of the judicial construction of constitutional limitations on the lending of state credit for private purposes in other states will help provide a framework within which to

evaluate the treatment of the issue by Nebraska's courts. Because of the broadness of the issue area, and the extensive litigation which has occurred, the discussion in this analysis will be limited to instances in which the courts have considered the constitutional provision within the context of public utilities.

These appellate court constructions have left considerable latitude to the utility industry to develop joint public/private ventures for the generation of electricity. It is not uncommon for different utilities to join together to pursue a large construction project in concert. The participation of a municipal utility, or an association of municipal utilities, in such a joint venture, however, will frequently involve the incurring of public debt with substantial advantage rebounding to the benefit of a private company. Thus the constitutional issue of lending public credit is raised.

The state appellate courts which have examined the issue have consistently applied traditional lines of analysis in reaching their "utility-related" decisions. Three analytic approaches stand out: distinguishing between revenue and general obligation bonds; evaluating whether the credit is of a "subdivision of the state"; and determining whether there has been a "loan" or a "gift" of public credit.

Both the Kentucky<sup>163</sup> and the Oregon<sup>164</sup> courts held that their utilities sought only to use revenue bonds, not general obligation bonds in the construction of generating facilities. As a result, the courts held, no "credit" was involved at all. The Kentucky court expressly said, "the rule is well established

that the issuance of revenue bonds to finance a public project. . . does not constitute a lending of credit. . . ."165

The states of Alabama<sup>166</sup> and Georgia<sup>167</sup> applied a time-honored constitutional analysis as well in holding that the public utilities involved did not represent "subdivisions of the state" to which constitutional restrictions applied. In Thompson v. Municipal Electric Authority of Georgia,<sup>168</sup> the Georgia Supreme Court approved a consortium of municipal governments joined together in an "Authority" the creation of which was permitted by state statute.<sup>169</sup> In Opinion of the Justices,<sup>170</sup> the Alabama Supreme Court gave its imprimatur, in an advisory opinion to the state House of Representatives, to the creation of a public corporation for the generation and distribution of electricity.<sup>171</sup> "In determining the application of this (constitutional) section to other public corporations, this court has found such corporations not to be 'subdivisions' of the state."<sup>172</sup>

Other state courts have relied upon the theory that the state does not "lend" its credit in situations where a quid pro quo is exchanged. Four different state court decisions have raised the issue of an exchange of mutual considerations in "credit" challenges. While the cases seem to misapply the theory, and reach erroneous legal results, the error comes in the application and not in the concept. The first case is from Georgia wherein bonds issued by a "Municipal Electric Authority" were held not to violate that state's constitutional proscription on lending the credit of the state. In Thompson v. Municipal

Electric Authority of Georgia,<sup>173</sup> the ability of the Authority, an association of municipal utilities, to issue \$1.6 billion in bonds was sought to be determined. The power and energy from the resulting generating facilities, however, had been previously committed by contract to Georgia Power Company, a privately-owned utility. Still, the Georgia Supreme Court said, no unconstitutional lending of the state's credit had occurred. The court said:

The contracts with the Georgia Power Company are not grants, donations or gratuities, but are for the purchase of undivided interests in facilities of the company. There is no constitutional prohibition against the Authority acquiring property, or an undivided interest therein, from private persons or contracting with private persons for the construction, operation, or maintenance of its project.<sup>174</sup>

The court never addressed, however, whether, having previously agreed to provide its entire energy entitlement to Georgia Power Company prior to plant construction, the municipal Authority had effectively retained any interest but a paper one in the generating station.

A similar issue was raised in Public Utility District v. Taxpayers and Ratepayers of Snohomish County,<sup>175</sup> a Washington State Supreme Court case. In that proceeding, a consortium of Washington municipalities agreed to take a 28 percent ownership share in a coal-fired power plant, sharing the plant with four other utilities.<sup>176</sup> The cities agreed to sell their share of that power for the first twelve years.<sup>177</sup> Still, the court found no unconstitutional lending of credit:

(A)ppellants argue that the financial participation of these public corporations in the project is 'in aid of' private corporations, for it enables the private owners to obtain additional financing, otherwise unavailable. However, even if the private owners are 'aided' by the respondents' participation, the issue is whether the aid comes in the form of gifts or loans of money or credit.<sup>178</sup>

The court held:

In return for their investments, respondents receive ownership interests commensurate to the size of their investments. Respondents are purchasing an ownership interest, and not only is their liability limited to their own acts, but their investment is restricted to an indebtedness proportionate to their individual participation.<sup>179</sup>

The court concluded that "there is no gift or loan of money or credit before us."<sup>180</sup>

A Missouri proceeding again addressed the same issue. In State ex rel. Mitchell v. City of Sikeston,<sup>181</sup> the Missouri Supreme Court considered the City of Sikeston's participation with Associated Electric Cooperative (AEC) among others, in the construction of a large coal-fired generating station.<sup>182</sup> The court held that the joint venture did not violate constitutional provisions because only revenue bonds were involved and because the provision of electric power was a public purpose.<sup>183</sup> The court failed to address the underlying challenge to the second line of reasoning, however. Sikeston purchased part of AEC's power plant knowing that the additional capacity was not necessary to serve the city's immediate needs. The court dismissed an argument that, as a result, no public purpose existed, stating:

The relators would have us hold that because Sikeston may not need to use the capacity of this plant for 20 years and, during that period,

plans to sell the surplus to others, it is not being constructed primarily for the benefit of Sikeston. Such a holding would compel Sikeston to build a plant that would be obsolete when it went on the line. During the oral argument, the amici power companies stated it is reasonable for power companies to anticipate power needs for 20 years when building a power plant.<sup>184</sup>

The final variation on the theme was addressed by the Wyoming Supreme Court in Frank v. City of Cody.<sup>185</sup> In that case, the Wyoming court considered an agreement whereby the city of Cody joined with seven other towns to form a non-profit corporation known as the Wyoming Municipal Power Agency.<sup>186</sup> This agency joined with several other utilities to become an owner, as a tenant in common with a one percent interest, in the Laramie power plant.<sup>187</sup> One section of the participation contract, however, provided that, should any party to the agreement default, the remaining parties would be required to make up the deficiencies in funds.<sup>188</sup> The contract seemed to create a surety situation, the classic example of lending the credit of the state which is historically condemned by the courts.<sup>189</sup> Nevertheless, the Wyoming Supreme Court held that in this utility setting, no lending of the credit of the participating cities occurred. It said:

While the section of the agreement in question does provide for making up deficiencies created by a defaulting participant, it also provides that a pro rata share of the portion in System entitlements, owned by the defaulter, shall accrue to the benefit of the other participants. This neutralizes any concept of giving or lending credit to anyone since something is received in return.<sup>190</sup>

The court concluded that "when there is an exchange of consideration

between the parties," no gift or lending of credit has taken place.<sup>191</sup> No analysis is undertaken whether there is a need for the additional power available from the defaulter. The court found that to be irrelevant. In expressly holding that the Wyoming contract did not create a suretyship, the court said "there exists no such a guarantee with a chance of loss as surety or guarantor of the debt of another. The Agency would acquire a greater interest in the System and have additional electricity available for sale."<sup>192</sup> Such partnerships, the court said, are "a practical, sensible solution to supply local energy and other utility needs."<sup>193</sup>

These latter court cases involving the exchange of consideration seem to reach fundamentally wrong legal conclusions. There must be some question as to whether there has been a gift or loan of public credit when a municipal government uses its credit to build generating capacity and then sells 20 years of a 30 year useful life to a private company. Nevertheless, the lesson remains that when engaging in this constitutional analysis within the context of public utility planning, the courts are willing to grant municipalities considerable leeway in their efforts. This is true even while courts strive to enrobe their constitutional analysis in traditional garb. There is no reason to believe that this historical deference to utility planners would be discarded when reviewing demand-side, rather than supply-side, capacity planning programs.

III.

THE CONSTITUTIONAL PROHIBITION IS NOT VIOLATED WHEN THE PURPOSE SERVED BY THE LEGISLATION OR PROGRAM IS A PUBLIC PURPOSE.

A. THE NEBRASKA LEGISLATURE HAS DETERMINED THAT A CONSERVATION FINANCING PROGRAM SERVES A PUBLIC PURPOSE.

Nebraska public utility companies are specifically empowered to offer energy conservation loans pursuant to Sections 66-1001 et seq. of the Nebraska Statutes. The state legislature has collectively found that:

- (1) Our present dependence on foreign oil has created a danger to the public health and welfare and a need for a dependable source of energy;
- (2) Conservation is one of the most prudent means of meeting our need for a dependable source of energy;
- (3) There is an urgent and continuing need for every person and business in the state to conserve energy;
- (4) There is an urgent and continuing need for capital to provide the initial investment necessary to make homes and other buildings more energy efficient;
- (5) It would be prudent for our publicly-owned electric utilities to supply this needed capital in order to avoid the greater costs of constructing new generation facilities; and
- (6) Involvement by our publicly-owned electric utilities in energy conservation programs serves a public purpose.<sup>194</sup>

The legislature went on to define "energy conservation measure" to include:

- (1) Caulking or weatherstripping on doors or windows;
- (2) Furnace efficiency modifications involving electric service;
- (3) Clock thermostats;
- (4) Water heater insulation or modification;
- (5) Ceiling, attic, wall or floor insulation;

- (6) Storm windows or doors, multiglazed windows or doors, or heat absorbing or reflecting glazed window and door material;
- (7) Devices which control demand of appliances and aid load management; and
- (8) Such other conservation measures as the State Energy Office shall identify.<sup>195</sup>

The legislature set forth extensive findings regarding why such public financing of conservation projects constituted and furthered a public purpose. In addressing the "energy problems" facing the state of Nebraska, the legislature found:

- (a) Adequate and reliable energy supplies are a basic necessity of life and sufficient energy supplies are essential to supplying adequate food and shelter;
- (b) The cost and availability of energy supplies has been and will continue to be a matter of state and national concern;
- (c) The increasing cost and decreasing availability of energy supplies for purposes of residential heating will limit the ability of many of Nebraska's citizens to provide the basic necessities of life and will result in a deterioration in living conditions and a threat to the health and welfare of the citizens of this state;
- (d) Energy conservation through building modifications including, but not limited to, insulation, weatherization, and the installation of alternative energy devices has been shown to be a prudent means of reducing energy consumption costs and the need for additional costly facilities to produce and supply energy;
- (e) Because of the high costs of available capital, the purchase of energy conservation devices is not possible for many Nebraskans. The prohibitively high interest rates for private capital create a situation in which the necessary capital cannot be obtained solely from private enterprise sources and there is a need for the stimulation of investment of private capital, thereby encouraging the purchase of energy conservation devices and energy conserving building modifications;

- (f) The increased cost per capita of supplying adequate life-sustaining energy needs has reduced the amount of funds, both public and private, available for providing other necessities of life, including food, health care, and safe, sanitary housing; and
- (g) The continuing purchase of energy supplies results in the transfer of every increasing amounts of capital to out-of-state energy suppliers.<sup>196</sup>

B. IN THE MAJORITY OF STATES, A PUBLIC PURPOSE QUALIFIES THE CONSTITUTIONAL PROHIBITION AGAINST THE LENDING OF CREDIT.

It is a fundamental requirement of the American theory of government that all legislative action must serve a public purpose.<sup>197</sup> Some courts have held that constitutional provisions prohibiting the lending of credit are merely a restatement of a basic constitutional doctrine that public funds must not be used for private purposes.<sup>198</sup> That constitutional doctrine, according to the United States Supreme Court, evolves from the due process notions of the Fifth and Fourteenth Amendments to the United States Constitutions.<sup>199</sup>

In the case of Green v. Frazier, which was decided in 1920, the United States Supreme Court had the opportunity to address the issue whether taxation under the laws of North Dakota had the effect of depriving citizens of North Dakota of property without due process of law in violation of the Fourteenth Amendment.<sup>200</sup> The legislation involved consisted of various acts which were passed under the authority of the state constitution. A glance at the North Dakota provision contained in the Appendix will demonstrate that the state constitutional questions were quite different from what they would be in Nebraska. However, the

same issue, whether or not the acts served a public purpose, was addressed by the North Dakota Supreme Court and ultimately by the Supreme Court of the United States. The challenged legislation involved the creation of an industrial commission to operate certain business projects and enterprises; the creation of a Bank of North Dakota which would be operated by the State with state funds and authorized to make loans to individuals; the creation of a mill and elevator association to engage in the business of manufacturing and marketing farm products; the creation of a home building association with power to purchase and lease real property; and the issuance of various types of bonds to support these various state activities, many of which were supported by the full faith and credit of the State of North Dakota. The Supreme Court ultimately found that the acts in question served a public purpose, giving deference to the findings of the legislature and and the findings of the State Supreme Court.<sup>201</sup> In reaching its decision, the Court discussed the constitutional principles involved:

"This legislation was adopted under the broad power of the State to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment, this power of the State was unrestrained by any federal authority. That amendment introduced a new limitation upon state power into the Federal Constitution. ...

"The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of states to tax does not include the right to impose taxes for merely private purposes."<sup>202</sup>

A majority of the states have held that legislation which involves the giving or lending of the credit of the state does

not violate the subject constitutional prohibition if said legislation serves a public purpose. It has been held that the purpose of these constitutional provisions is to preclude speculative forms of financing, not to preclude financial transactions between the state and its citizens that serve a public purpose.<sup>203</sup> The public purpose doctrine of Green v. Frazier has, therefore, become an exception to state constitutional prohibitions to lending of credit.<sup>204</sup> As might be expected, the public purpose doctrine has been interpreted in a variety of fashions by different jurisdictions. In general, courts have held that legislation which serves a valid public purpose is not in violation of state constitutional prohibitions regarding the lending of credit.<sup>205</sup>

The term public purpose is generally not susceptible in the eyes of courts to a precise definition. Each case must be viewed individually and the outcome turns upon the court's view of the particular object sought to be accomplished by the legislation.<sup>206</sup> Review of cases in various jurisdictions reveals that there are three principles with which few courts disagree.

Those principles are:

1. Benefit received by an individual from a public expenditure does not create, in and of itself, an illegal expenditure.<sup>207</sup>
2. The concept of what constitutes a public purpose changes with the times.<sup>208</sup>
3. Legislative findings and declarations of public purpose are entitled to great weight.<sup>208A</sup>

This principle has been stated, in various forms in Alaska, California, Delaware, Florida, Hawaii, Illinois, Minnesota, Massachusetts, Iowa, Missouri, Oklahoma, North Carolina, and others.<sup>209</sup>

These principles are applied, with slight variations, by the majority of the courts in the cases which are reviewed below. The Nebraska Supreme Court joins the majority and has adopted each of these principles.

C. A UTILITY CONSERVATION FINANCE PROGRAM WOULD LIKELY BE VIEWED AS CONSTITUTIONAL UNDER THE PUBLIC PURPOSE DOCTRINE BY THE NEBRASKA SUPREME COURT.

Although Nebraska has legislation in place which would allow publicly owned utilities to offer conservation loan programs, little has been done to initiate such programs. This hesitation is likely the result of uncertainty as to the constitutionality of the programs. However, a close review of Nebraska cases will demonstrate that the program would likely be considered valid by the Nebraska Supreme Court under the public purpose doctrine. This doctrine would validate the legislation even if conservation loans to ratepayers were considered by the Court as a lending of the credit of the state.

A clear statement of the public purpose doctrine was given by the Nebraska Supreme Court in Chase v. County of Douglas, in 1976.<sup>210</sup>

[T]he vital point in all such appropriations [by governmental subdivisions to private concerns] is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.<sup>211</sup>

The purpose to be served by energy conservation loans would be to conserve existing energy resources in a response to the current state and national concern over preservation of precious energy resources. The Nebraska Supreme Court has previously

accepted as a valid public purpose a program designed to respond to the current energy shortage by promoting the use of agricultural products for conversion into alcohol to be used as an energy source.<sup>212</sup> This previous case is a strong indication that the Court would again accept as a valid public purpose a program reasonably designed to respond to the concerns of the current energy situation.

The public purpose doctrine has roots in Nebraska opinions over a long period of time. Examples of expenditures of public funds which the Court agreed were for public purposes include: State v. Cornell,<sup>213</sup> (issuance of bonds to enable counties to participate in state expositions and fairs); Fisher v. Bd. of Regents,<sup>214</sup> (scientific research to aid in the protection and preservation of food, including the manufacture and sale of hog collera syrum); Standard Oil Company v. City of Lincoln,<sup>215</sup> (provision in City Home Rule Charter allowing city to engage in the business of selling gasoline); United Community Services v. The Omaha National Bank,<sup>216</sup> (donation by a public power district to a charitable organization); Chase v. County of Douglas,<sup>217</sup> (expenditures for publicity and advertising to promote the general growth and industry made through the Chamber of Commerce); State ex rel. Douglas v. Nebraska Mortgage Finance Fund,<sup>218</sup> (creation of a corporation to raise money through the sale of revenue bonds, proceeds of which were to be used for loans to lenders and to purchase mortgages for the purpose of encouraging low-cost housing); Lenstrom v. Thone,<sup>219</sup> (scholarship program to eligible students to post-secondary educational institutions,

both public and private); State ex rel. Creighton University v. Smith,<sup>220</sup> (a research grant to a non-public institution for cancer research).

Even in view of this long list of cases accepting valid public purposes and validating such expenditures, Article XIII, §3 still must be considered. There are cases, both remote and recent, in which the Court found there was an improper expenditure of public funds for private purposes. Included in this category are the following: Oxnard Beet Sugar Company v. State,<sup>221</sup> (bounty paid directly to growers of sugar beets); State ex rel. Beck v. City of York,<sup>222</sup> (the financing of specific private enterprises with public funds); Chase v. County of Douglas,<sup>223</sup> (the acquisition of real estate by a municipality for the purpose of industrial development).

In the paragraphs that follow, some of the above cases will be discussed in more detail. A thorough review of these cases reveals that the public purpose doctrine in Nebraska will validate legislation or programs which are challenged under Article XIII, §3 of the Nebraska Constitution unless, the legislation or program involves the extending of credit to private enterprise.<sup>224</sup> The Court seems to have made exceptions to the public purpose doctrine for this type of expenditure. The reasoning of the Court is that, in such circumstances, capital furnished by the state or its municipalities may decrease in value and the loss which could be incurred would be borne by the taxpayers.<sup>225</sup> This reasoning is consistent with the historical development of provisions similar to Article XIII, §3 in other state constitutions.<sup>226</sup>

The distinction between a public and private purpose was considered by the Nebraska Court in State ex rel. Beck v. City of York.<sup>227</sup> A public purpose, according to this Court, "must bear a reasonable relation to the public convenience and welfare". It must relate to the public good, "but general benefit to the economy of the community does not justify the use of public funds of the city unless it be for public as distinguished from a private purpose".<sup>228</sup> As this language indicates, the Nebraska courts, as other jurisdictions, have found no easily administered test for determining what is a public purpose. Except when a direct subsidy of a private enterprise is involved, the decision is generally left to the legislature. As stated by the Court in Oxnard Beet Sugar Company v. State,

"It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature."<sup>229</sup>

In Oxnard Beet Sugar Company v. State and State ex rel. Beck v. City of York, the expenditures involved were determined to not fall within the public purpose doctrine. It would appear that the public purpose doctrine has been expanding in Nebraska, as it has in other jurisdictions. The question whether a private, as opposed to a public, purpose was more recently addressed in Nebraska Mortgage Finance Fund.<sup>230</sup> The Court reaffirmed many of the holdings of its earlier decisions:

A public purpose has for its objectives the promotion of the public health, safety, morals, security, prosperity, contentment,

and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. . .it is the province of the legislature to determine matters of policy and appropriate the public funds. . . if reasonable men might differ. . ., it is essentially held that the matter is for the legislature."<sup>231</sup>

When a utility makes a loan to a customer for installation of an energy conservation measure, the concern from the point of view of the utility is conservation of energy, not improvement of the individual customer's property. A utility concerned with energy conservation is also concerned with slowing the increase in utility rates and insuring adequate supplies of energy for the future. A political subdivision directing credit toward a public purpose with incidental benefit to private entities does not violate Article XIII. §3 of the Nebraska Constitution.<sup>232</sup> Very recently, the Nebraska Supreme Court has reaffirmed this doctrine.<sup>233</sup> In State ex rel. Creighton Univ. v. Smith, Creighton University was likely to derive a benefit from a research contract with the State of Nebraska. The Court noted "the primary purpose and principal objective of the state's contract regarding cancer research is improved public health in Nebraska."<sup>234</sup> In response to the argument that the public purpose doctrine allows the legislature to do indirectly what it cannot do directly, the Court responded as follows:

"That overworked expression about circumvention by indirectness, if subjected to the test of ultimate application, would necessitate that a fire in a nonpublic school be extinguished by a nonpublic bucket brigade, not by a publicly funded fire department. Common sense and the Constitution abhor such an impractical conclusion."<sup>235</sup>

It would be difficult to imagine an expenditure of public funds for the public welfare that did not incidentally benefit private individuals. The Nebraska Mortgage Fund Act undoubtedly created benefits for the building industry, but as the court noted, the benefits were merely incidental. Since the overall purpose of the Act is a public purpose, these incidental private benefits do not in the opinion of the Court, invalidate the legislation.<sup>236</sup> In the words of the Court, "the vital point in all such disbursements is whether the purpose is public. If it is, it does not matter whether the agency to which it is distributed is public or not."<sup>237</sup>

A challenge to the constitutionality of a conservation financing program, if made prior to the 1973 oil embargo, may very well have been successful in Nebraska. However, as the Supreme Court has previously noted, the current energy situation is one which is worthy of expenditures of public funds.<sup>238</sup> Nebraska has noted, as has other jurisdictions, that "the notion of what is public use changes from time to time. . . the term public use is flexible, and cannot be limited to the public use known at the time of the forming of the constitution." [citations omitted]<sup>239</sup>

"Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and changes by individual efforts may vary. . . on the one hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. . . ." [citations omitted]<sup>240</sup>

The utility conservation program suggested by this article would create private benefits, but the overall purpose of the program would be to conserve energy, a public purpose. Accepting

the proposition that conservation of energy is a public purpose, it becomes clear that the recipient of the utility conservation loan is serving merely as an agency through which public funds are dispensed. As the Nebraska court has said, "it does not matter whether the agency through which it is dispensed is public or not."<sup>241</sup>

It would appear from the above cases that the judicial trend in Nebraska is for an expansion of the public purpose doctrine. The doctrine has one limitation. Under the view of the Nebraska Supreme Court, it will not validate legislation challenged under Article XIII, §3 if the legislation or program results in the extension by the state or any of its political subdivisions of its credit to private enterprise.<sup>242</sup> In all other circumstances, a valid public purpose will protect an expenditure from challenges under Article XIII, §3. To find a valid public purpose, the Nebraska Supreme Court will give great weight to the findings of the legislature, will view the concept of public purpose as a changing concept depending on the times and circumstances, and will not invalidate an expenditure merely because of an incidental benefit to private entities or agencies.<sup>243</sup>

The development of the public purpose doctrine by the Nebraska Supreme Court is consistent with development by the majority of jurisdictions on a national level. Consideration of the doctrine as it has developed in Nebraska, leads to the conclusion that a utility financing program wherein a publicly owned utility would offer energy conservation loans to its ratepayers, would

viewed as constitutional by the Nebraska Supreme Court. The following is a review of cases from other jurisdictions which leads to the conclusion that other courts would reach similar decisions.

D. JUDICIAL TREND IS TOWARD EXPANSION OF THE PUBLIC PURPOSE DOCTRINE.

It is the consensus of commentators that the Public Purpose Doctrine is expanding in scope.<sup>244</sup> This trend can be seen by a random view of cases in various jurisdictions, by a study of cases in a single jurisdiction, and by a study of cases regarding a specific type of legislation.

1. A Random View of Cases in Various Jurisdictions.

A random view of cases across the country involving challenges to legislation alleging a violation of state constitutional provisions limiting the lending of credit will be considered first. The vast majority of these challenges have been unsuccessful. In 1903, the North Carolina Supreme Court considered a challenge to the decision of a municipality to incur expense for the purpose of building and operating a water and light plant.<sup>245</sup> In holding that this action would not violate the North Carolina constitutional limitation on lending of credit, the Supreme Court explicitly overruled an earlier case which had reached the opposite result.<sup>246</sup> In 1931, the Idaho Supreme Court found that the deposit of public funds in a bank as a regular deposit would violate the relevant provision in the Idaho Constitution.<sup>247</sup> The exact opposite decision was rendered with regard to the same challenge by the Virginia Supreme Court in 1933.<sup>248</sup>

a. Examples of Cases from Jurisdictions Applying a Conservative Construction.

There are a few courts which strictly construe or even appear to reject the doctrine. In 1961, for example, the New Mexico Supreme Court specifically held that even though a private enterprise serves a highly commendable public purpose, this alone would not justify a lending of the public credit.<sup>249</sup> In 1974, the Supreme Court of Arizona held "merely because a private individual uses public funds or property for a public purpose is not sufficient in and of itself to remove that use from the provisions of Article IX, §7."<sup>250</sup> (emphasis supplied) The State of Wyoming does not appear to recognize the exception.<sup>251</sup> Finally, it would appear that the State of Washington rejects the public purpose doctrine according to the interpretation of state laws given by its Attorney General in 1979.<sup>252</sup>

In 1964, a challenge before the Massachusetts Supreme Court of a legislative appropriation of funds to political parties to defray the cost of political campaigns was successful.<sup>253</sup> Another successful challenge came in 1978 before the Iowa Supreme Court.<sup>254</sup> This challenge was to an indemnity agreement where the state agreed to be liable for the debts of a private entity. A 1980 challenge before the Michigan state court was also successful.<sup>255</sup> This challenge involved the question whether a computer tape compiled by a state university of students' names and addresses could be given free of charge to a private entity without violating the relevant provision in the Michigan Constitution. The Michigan court held that this computer tape compilation of student names was publicly owned property which could not be surrendered without

a fee.

There have recently been successful challenges to actions also in Wyoming and South Carolina. In Wyoming, the City of Laramie had created a nonprofit corporation for the purpose of issuing bonds and purchasing a ranch. The city wished to acquire control of this ranch in order to secure a water supply for its residents in the future. This transaction was viewed by the Wyoming Supreme Court as violative of the relevant constitutional provision in the state constitution. This case was decided in 1980.<sup>256</sup> The Wyoming Supreme Court did not consider the issue of public purpose. In 1981, there was a challenge before the South Carolina Supreme Court to legislation allowing the issuance of state capitol improvement bonds for the purpose of promoting an alcohol fuel development program.<sup>257</sup> The court felt that the public benefit was too remote and indirect to come within the ambit of the public purpose doctrine. The South Carolina Supreme Court held that the challenged legislation was unconstitutional.

Some courts have held that the private benefits which result from the use of public funds or credit must be purely incidental to the public benefits in order for the legislation calling for the expenditure to be deemed constitutional. In a 1976 case, this was the holding of the Illinois Supreme Court.<sup>258</sup> Other states with strict interpretation of the public purpose doctrine are Texas<sup>259</sup>, Maryland<sup>260</sup>, Missouri<sup>261</sup>, and Colorado.<sup>262</sup> Courts which have applied a strict interpretation of the public purpose doctrine may be less likely to allow a publicly owned utility to grant loans to individual customers. However, some

of these same courts have applied the public purpose doctrine to find challenged legislation constitutional. For example, the Colorado Supreme Court and the Maryland Supreme Court have both recognized that the public purpose doctrine is a specific exception to the prohibitions contained in their state constitutions.<sup>263</sup>

b. Examples of Cases From Jurisdictions Applying A More Expansive Construction.

The list of unsuccessful challenges to legislation and governmental actions as improper lending of state credit is much longer than the list of successful challenges. In 1982, the Alaska Supreme Court considered a challenge to a loan guarantee payment by the State. The payment was actually reimbursement to a guarantor who had paid a hospital construction loan related to the construction of a non-profit hospital. This payment was held by the court to be within the ambit of the public purpose doctrine.<sup>264</sup> In 1982, the California Supreme Court was faced with a challenge to legislation which retroactively allowed a tax break which would promote recovery of oil and gas resources in California.<sup>265</sup> The challenge was made that this retroactive application constituted a gift in violation of the relevant California constitutional provision. The court cited the rule that expenditures of public funds which involve a benefit to private persons are not gifts within the meaning of the constitutional prohibition if such expenditures are for a public purpose.<sup>266</sup> The court found that since it was the public policy of the State of California to maximize the ultimate recovery of oil and gas,

the legislation was valid under the public purpose doctrine.<sup>267</sup>

In an earlier decision the California Supreme Court had determined that the conversion of a blighted area into a residential development including residential and commercial property which would be sold and leased at fair market value, with no income test for loans or purchase, was also valid within the public purpose doctrine.<sup>268</sup>

In 1983, The Supreme Court of Illinois upheld the validity of legislation creating an equity assurance program for single family residents.<sup>269</sup> In this program, the Village agreed to pay 80% of the difference between the appraised value of a home at the time of certification with the program and the value at the time of sale. The purpose of the program was to prevent "white flight". The court found that this program met the public purpose test and was valid under the relevant provision of the Illinois Constitution. The Hawaiian court, in 1976, upheld the issuance of bonds to finance a governmentally mandated anti-pollution project.<sup>270</sup> Also in the same year, the Georgia Supreme Court considered a challenge to a municipal electric authority which had been created by various publicly owned utilities for the purpose of issuing tax-exempt financing. The Georgia Supreme Court found that this was within the limitations of the Fourteenth Amendment and, therefore, did not violate the prohibition against the lending of the State's credit in the Georgia Constitution.<sup>271</sup>

In 1981, the Missouri Court considered a challenge to the use of a public prosecutor in child support collection proceedings. Even though this procedure benefitted the custodial parent by

providing legal representation free of cost. The Court upheld the procedure under the public purpose doctrine. A 1981 case before the Ohio Court involved the issue of economic development bonds by a county for the purpose of acquiring and constructing a building with rental space for physicians, dentists, pharmacists and laboratories. The court found that this was within the exception of the public purpose doctrine. The legislature had found the legislation served a public purpose and the court felt it was their judicial duty only to see whether the decision of the legislature was arbitrary or unreasonable. <sup>272</sup>

In 1981, the Oklahoma Supreme Court found that appropriation of funds to a non-profit corporation for the purpose of soliciting meetings and conferences and encouraging tourism within the state was a proper expenditure of public money under the public purpose doctrine. <sup>273</sup> In 1975, the Pennsylvania Supreme Court found that general obligation bonds of the Commonwealth for the purpose of making loans for nursing homes did not violate the applicable provision in the Pennsylvania Constitution. These bonds did, however, have voter approval. <sup>274</sup>

A case was mentioned above where a successful challenge had been made to the Supreme Court of South Carolina to the financing of an alcohol fuel development program. <sup>275</sup> The opposite result was reached in another challenge brought before the same court in 1982. In this case, the South Carolina Supreme Court held that an agreement between the South Carolina Farm Bureau Marketing Association and the State Ports Authority for the operation of grain elevators owned by the State did not violate the South Carolina constitutional provision. <sup>276</sup>

In 1978, the Peninsula Ports Authority of Virginia and the Virginia Port Authority had entered into a contract for the transfer of port facilities from the former to the latter. Under the terms of the lease, the present lessee was to be removed and the City of Newport News was required to make a donation to pay the deficiency left by the former lessee. This agreement was challenged as a violation of Article X, §10 of the Virginia Constitution. The Virginia Supreme Court found that the agreement was valid because it served a dominant public purpose.<sup>277</sup>

In 1975, the Wisconsin Supreme Court approved the issuance of bonds for a solid waste recycling program.<sup>278</sup>

In 1965, the North Carolina Supreme Court considered the challenge to the purchase of a lake and electric power plant by the town of Lake Lure.<sup>279</sup> The purchase of the lake and power plant also included the purchase of recreational facilities. The court considered the findings of the legislature declaring a public purpose to be entitled to great weight. The court also noted that though private individuals may benefit from the purchase of the recreational areas, the development of the town as a resort area was a public purpose which was sufficient to validate the entire transaction.

This review of cases demonstrates the wide variety of issues and circumstances which are challenged under state constitutional provisions with regard to the lending of credit. In the vast majority of circumstances, the challenges have been unsuccessful. Courts have generally taken the position that a valid public purpose exists if there are legislative findings and declarations

which are not arbitrary or unreasonable. The courts seem to agree that a benefit to individuals does not in and of itself invalidate legislation which otherwise serves a public purpose. The courts, as a review of the above facts will indicate, also tend to agree that the concept of what constitutes a public purpose changes with the times.

2. A Study of Cases in a Single Jurisdiction.

A review of cases in a single jurisdiction will demonstrate, that while the concept of public purpose is expanding, it is not without limitations. Article VII, §10 of the Florida Constitution prohibits the state or a subdivision thereof from giving or lending its taxing power or credit to any corporation, association, partnership or person. The section lists several exceptions, including revenue bonds to finance certain projects such as airports and industrial manufacturing plants. This listing of constitutional exceptions has not appeared to limit the expansion of the public purpose doctrine by the Florida Supreme Court. In 1971, the Court held that the list of exceptions contained in the Constitution was not exclusive.<sup>280</sup> This case involved a challenge to the issue of industrial development bonds for construction of dormitories at a private non-profit university. The Court deferred to the legislative findings that higher educational facilities of all sorts serve a paramount public purpose.<sup>281</sup> This holding of Nohrr v. Brevard County Ed. Fac. Auth. affected the results in subsequent cases.

The Nohrr Court held that legislative findings of public purposes are determinative unless the findings are clearly erroneous.<sup>282</sup> In 1980, subsequent to the Nohrr decision, the legislature amended

its statutes to declare that projects involving "architecture, tourism, urban development, and health care industries, among others," served a predominantly public purpose.<sup>283</sup> In 1982, the Florida Supreme Court continued the trend of expansion of the public purpose doctrine and deference to legislative findings.<sup>284</sup> The Supreme Court here considered a challenge to the constitutionality of a statute which authorized the use of industrial development bonds for the construction of a convention center and "all appurtenances and facilities incidental thereto, such as . . . public lodging . . ."<sup>285</sup> Relying on Nohrr, the Florida Supreme Court upheld the validity of the statute by deferring to the findings of the legislature with regard to public purpose.<sup>286</sup>

A more specific interpretation of this statute came with the 1982 case involving the use of industrial development bonds to finance a motel located near Disney World.<sup>287</sup> It was conceded that neither the credit of the state nor of any political subdivision was pledged for the repayment of the bonds. However, it was still urged that financing of this motel was unconstitutional because the facility did not serve a paramount public purpose.<sup>288</sup> The court noted that the legislature had expressly determined that a project consisting of a lodging facility such as a motel serving a tourism attraction is a tourism facility and therefore serves a predominantly public purpose.<sup>289</sup> The court gave great weight to the legislative findings holding

"we should not substitute our judgment for that of the legislature on the general question of whether tourism is vital to the economy. . . . The state has failed to demonstrate that the legislature's determination of public purpose was so clearly wrong as to be beyond the power of the legislature."<sup>290</sup>

The extent to which the public purpose doctrine was expanded in this case caused one commentary writer to bemoan the demise of the public purpose doctrine and fear for the integrity of the free enterprise system in Florida.<sup>291</sup> The fears of this commentator may have been relieved somewhat when, in 1983, the Supreme Court considered the validity of industrial development revenue bonds to finance the construction of a television station.<sup>292</sup> Because of the specific exceptions contained in Article VII, §10 of the Florida Constitution, the first consideration of the Florida Supreme Court was whether a television station was an "industrial or manufacturing plant" within the meaning of this section and the applicable statutes. Holding that a commercial television station did not fit within this category, the court applied a two-prong test to determine whether this use of revenue bonds was valid under the constitution. The criteria used by the Court were:

1. Whether the revenue bonds contemplated a pledge of the credit of the state or political subdivision, and
2. Whether the funded project serves a paramount public purpose, although there may be an incidental private benefit.<sup>293</sup>

There was agreement that the bonds were strictly revenue bonds and therefore did not involve the credit of the state. The court, however, found that the proposed project would not serve a paramount public purpose but rather a paramount private purpose.<sup>294</sup> The court held that only a minimal increase in employment and a small advancement of the general welfare of the people through local news coverage, etc. was not sufficient to sustain the

public purpose requirements of the Constitution. The bonds were thereafter invalidated.<sup>295</sup>

This is not the latest chapter at this writing of the development in Florida. Also in 1983, the Florida Supreme Court considered whether revenue bonds could be used to finance a construction of a regional headquarters office building for a multi-state insurance company.<sup>296</sup> The court found that a regional headquarters for an insurance company was not an "industrial manufacturing plant" within the meaning of Article VII §10. However, as we have seen above, this does not decide the issue. The next step is to apply the two-prong test, whether the public credit is involved and, whether a public purpose is served.<sup>297</sup> The court took one step farther than it had taken several months earlier in Orange County Industrial Development Authority v. State, regarding a commercial television station. The court held that the test of a "'paramount public purpose' test developed by case law under the Constitution of 1885 lost much of its viability. The test is still applicable when a pledge of credit is involved, but where such pledge is not involved, as here, it is enough to show only that a public purpose is served."<sup>298</sup>

Within the period of less than one year, the Florida Supreme Court had lessened the test from the requirement of a "paramount public purpose" to the requirement only of a "public purpose" whenever a pledge of public credit is not involved. The court went on to find that the construction of this regional headquarters office building did serve a public purpose. The court gave the legislative determination of a public purpose great weight.

The bonds were validated.<sup>299</sup>

The above review of judicial decisions in Florida demonstrates, within the limits of that jurisdiction, the judicial trend toward an expansion of the public purpose doctrine. In the remainder of this section, cases regarding a specific type of legislation, industrial development bonds in general, will be reviewed.

3. A Study of Cases Regarding a Specific Type of Legislation.

Perhaps the greatest leap taken by the public purpose doctrine has been through cases involving the concept of industrial development bonds. Most of these cases appeared in the 1950's and 1960's. The concept of the use of public monies to encourage private enterprise had been considered a public purpose even earlier. In 1938, the Mississippi Supreme Court held that the use of tax money for the purpose of acquiring lands and constructing factories which would be leased to private entities was constitutional. The terms of the leases were designed to ensure the continued operation of the entities and were therefore also designed to relieve unemployment and aid the development of agriculture and industry in the state.<sup>300</sup> This case represents one of the earliest examples of judicial expansion of the public purpose doctrine.

In the words of the Oregon Supreme Court in the year 1968:

"It was probably inevitable, the way having been shown to revenue financing that is kept inviolate the general taxation that there would be an attempt to enlarge the concept of 'public purpose' to include within this method financing of industries in order to induce them into area. Heavy federal income taxes, coupled with the

exemption already noted for the income from municipal securities, supplied a substantial incentive for industry to try to finance by this method. State after state has authorized one or more classes of its municipalities to offer this financing method to private industries until now it appears that it is accepted as valid in at least 22 states."<sup>301</sup>

Article XI, §7 & §9 of the Oregon Constitution contains the same prohibition against the lending of credit which is contained in the Nebraska Constitution. The Oregon Court noted that similar constitutions appeared in many states' constitutions and had been construed by most courts as no obstacle to industrial development bond financing.<sup>302</sup> The Oregon Court did note that a few state supreme courts have ruled to the contrary.<sup>303</sup> There were only three jurisdictions cited by the Oregon Supreme Court as being in the minority group. However, one of these was the jurisdiction of Nebraska. Shortly after State ex rel. Beck v. City of York, the Nebraska Constitution was changed to specifically allow industrial bond financing. As it was demonstrated above, the Nebraska position on lending of credit has changed substantially since 1957.

The Oregon Supreme Court, although holding that the public credit had not been loaned by the use of revenue bonds, did address the issue of public purpose. The test used by the Oregon Supreme Court was:

"The relevant inquiry would seem to be whether the proposed project will augment the community's total value position [citation omitted].

"The only valid criterion would seem to be whether the expenditures are sufficiently beneficial to the community as a whole to

justify governmental involvement; but such a judgment is more appropriate for legislative than judicial action. The judiciary should invalidate expenditures only where reasonable men could not differ as to their lack of social immunity. [citations omitted]"<sup>304</sup>

The Oregon Court concluded that the issuance of industrial development revenue bonds would not violate the relevant provision of the Oregon Constitution.

The same issue was addressed by the Minnesota Supreme Court in 1970.<sup>305</sup> The Minnesota Court noted that the concept of public purpose was an expanding concept which changed with the changing conditions of society.<sup>306</sup> The Court noted further, that the doctrine is broadest under the view that economic welfare is one of the main concerns of a state or city government.<sup>307</sup> The Court further noted that the great majority of the courts had at that date upheld the validity of legislation authorizing industrial development bonds. In 1970, there were 22 jurisdictions which had upheld the validity of such legislation without constitutional amendments and only 4 states which had not.<sup>308</sup> The Minnesota Supreme Court eventually joined the ranks of the majority of courts in upholding the validity of industrial revenue bond financing. In reaching this conclusion, the court considered the possibility that "should we declare our act unconstitutional, it may place Minnesota at a competitive disadvantage in attracting industry to this state. Certainly avoidance of such result constitutes a public purpose."<sup>309</sup> The Court also cited with approval an Iowa case holding "the legislative determination of what is a public purpose will not be interfered with by the

courts unless the judicial mind concedes it to be without reasonable relation to the public interest or welfare . . . ."310

#### CONCLUSION

It is the conclusion of these writers that it is possible for a publicly owned utility to offer a constitutionally valid conservation program to its ratepayers. The major concern of these drafters has been the effect of Article XIII, §3 of the Nebraska Constitution upon the financing aspect of any such program. There are, of course, other considerations which are beyond the scope of this article. Among those considerations would be bond ordinances. Also, each individual utility would be required to evaluate its own individual needs in order to create a program responsive to those needs.

This article has also centered somewhat upon the basic concept of a utility offering loans to its ratepayers for the purpose of purchasing conservation devices. There are, however, a number of options for a financing program which individual utilities should consider in creating a program to meet their own needs.

One such option would be for a utility to act as a surety. In this situation, the utility would sign as a guarantor to a commercial loan obtained by a ratepayer for the purpose of purchasing conservation devices. This procedure involves the classic example of the "lending of credit". For this reason,

It would be advisable for a utility to analyze thoroughly the gains for the system as a whole before engaging in such a program. The concept is, however, presently being used by the Bonneville Power Administration as discussed above.

The ultimate conclusion of these drafters is that the constitutional and statutory restrictions on the use of public credit for private purposes do not create insurmountable legal barriers to the extension of financing by municipally owned utilities to its ratepayers for the purpose of purchasing energy conservation measures and renewable resources. While there are numerous ways to structure such a program, a basic program involving a loan to a ratepayer to purchase such devices would not, under the doctrine of the Mortgage Finance Fund case, involve a lending of the credit of the state. In addition, the program would, under current conditions, likely be viewed as serving a valid public purpose. Legal barriers do continue to exist to the extent that each individual utility must evaluate its own need for energy conservation and create a conservation program designed to meet these needs specifically. In addition, a publicly owned utility is created by the legislature and is authorized only to act within the scope of the authority granted by the legislature. Each utility is, therefore, urged to evaluate the legislation addressed above in order to ensure that the program it has created falls within its statutorily granted authority.

With these caveats in mind, Nebraska's publicly owned utilities are urged to evaluate their own needs for an energy

it would be advisable to avoid creating a program in this manner.<sup>311</sup>

A second option is a direct loan from the utility to the customer such as what we have addressed throughout this article. Such loans could be made at either a market interest rate or at a subsidized or reduced interest rate. Either one of these options would likely be viewed as valid by the Nebraska Supreme Court under the doctrine of the Mortgage Finance case.<sup>312</sup> Another option is a rebate program where the customer purchases conservation measures and is given a rebate in cash by the utility or is offered credit on the monthly utility bill. This type of financing program is actually being conducted by the Lincoln Electric System to encourage use of electric heat pumps. This procedure is viewed to be constitutional under the theory that the credit of the State is not involved. Also, the options discussed in this paragraph would likely be validated under the public purpose doctrine.<sup>313</sup>

Many conservation devices could be leased by a utility to their ratepayers or sold on an installment basis. This sort of program, in addition to being validated under the public purpose doctrine, would also likely be viewed as valid under the doctrine in the Blue Flame Gas decision discussed earlier.<sup>314</sup>

Finally, several utilities are at present involved in a program where energy-conserving appliances or conservation devices are actually purchased by the utility and donated to the ratepayers. This general program could be validated under the doctrine of the First National Bank case.<sup>315</sup> This type of program would probably be subjected to much more strict scrutiny.

conservation financing programs. All utilities who have such needs are urged to offer such a program to their ratepayers.

An energy conservation finance program which includes loans to ratepayers which are funded either through current operating revenues or from the issuance of revenue bonds would not constitute the lending of the credit of the state. The Nebraska Legislature has declared energy conservation loans, either through the Nebraska Investment Finance Authority or through the Nebraska utilities, serve a valid public purpose. In view of the changing needs of our society, these findings are neither arbitrary nor unreasonable. The incidental benefit to the private entities is not impermissible. It is for these reasons, that it is concluded that a carefully drafted program designed to meet the needs of an individual utility is constitutionally valid.

FOOTNOTES

1. Nebraska Power Association Reference Manual, 1983, p. 12-1 [Hereinafter referred to as NPA Reference Manual].
2. Id.
3. Id.
4. Id. at 12-2.
5. 26 U.S.C. §103; APPA Reference Manual, p. 8-2.
6. Id. at 8-2.
7. Id. at 7-4.
8. See, e.g., Sheehan, "Policy Options for Dealing with the Impact of Continuing Energy Price Increases on the Iowa Economy," Iowa Legislative Extended Assistance Group (LEAG) Report (1982).
9. See, generally, C. Komanoff, Power Plant Cost Escalation, Komanoff Energy Associates, New York, New York (1981).
10. Id., at 235.
11. Id., at 2 - 3.
12. Colton, "Prudence, Planning and Principled Ratemaking," 35 Hastings L. Rev. \_\_\_\_ (1984). (forthcoming).
13. Massella, "Rate Moderation Plans -- Cushioning 'Rate Shock'", Public Utilities Fortnightly, 52 (February 16, 1984).
14. See, e.g., Schroeder & Miller, "The Validity of Utility Conservation Programs According to Generally Accepted Regulatory Principles," 3 Solar Law Reporter 967 (1982).
15. NPA Reference Manual, p. 9-1.
16. See, e.g., Iowa Code Supplement, Section 476A.6 (1983).
17. See, e.g., H.B. 2157, Ch. 889, 1977 Oregon Laws, Sections 2(3), 2(4); see also, In Re. Class A Gas Utility Residential Insulation Program, Wis. PSC Docket No. 05-GV-2 (September 22, 1977).
18. H.F. 2157, Ch. 889, 1977 Oregon Laws, Section 2(3), 2(4).
19. Ch. 858, 1977 N.Y. Laws, Section 1.

20. Id.
21. Mont. Rev. Codes Ann. §84-7405 ( 1977 Cum. Supp.).
22. This information was received through a phone conversation with the Montana Census and Economic Information Center in Helena, Montana. This Center is a division of the Montana Department of Commerce.
23. This information was obtained through a phone conversation with Nancy McLane of the Energy Division for the State of Montana and conversations with the Conservation Manager for the Missoula Electric Cooperative.
24. This information was obtained from Bob Touse of the Missoula Electric Cooperative in Missoula, Montana.
25. In the Matter of the Washington Water Power Co., Util. Law Reporter (CCH), para. 23,191.01 (September 26, 1980).
26. Michigan Consolidated Gas Company, 1 Pub. Util. Rep. 4th 229 (Mich. Pub. Serv. Commission 1973).
27. Id. at 232-233, 236.
28. Id. at 234.
29. William H. Lawrence & John H. Minan: "Financing Solar Energy Development Through Public Utilities," 50 Geo. Wash. L. Rev. 371, 406 (1982).
30. Id.; Mary Ray White, "Solar Investments by a Municipal Utility," N.D. L. Rev. 409 (19 ).
31. See, e.g., Re. Detroit Edison Co., Mich. PSC Docket No. U-5174 (December 6, 1979); see also, In the Matter of the Application of Duke Power Company for an Adjustment of its Rates and Charges in Its Service Area Within North Carolina, North Carolina PSC Docket No. E-7, SUB 237 (August 31, 1978).
32. See, generally, Geller, "Say Good-bye to Electricity Guzzlers," Public Utilities Fortnightly, 42 (July/August, 1983).  
Perhaps the most notable utility which has initiated a low-interest finance program for the implementation of conservation strategies is the U.S. Rural Electrification Administration through its Energy Resource Conservation (ERC) program. One recent report states: "Recently, the U.S. Rural Electrification Administration (REA) made available to the nation's cooperatives a program which could easily be used as a cost-savings measure. The Energy Resource Conservation financing program of the REA

provides local RECs with the opportunity to offer their members low-interest/no-interest energy home improvement loans. The program allows RECs to defer payments of principal on outstanding REA notes in order to use that money to provide the financing for energy efficiency to their members. Loans can be used for such diverse actions as replacing old windows with energy efficient storm windows, insulating attics and walls, providing heat pumps for heating and cooling, and replacing inefficient hot water heaters." Colton, "Rural Electric Cooperatives: The ERC Program as a Cost-Containment Measure," New Criteria Publishing Company, Ames, Iowa (2d ed. 1984).

33. The National Energy Act was comprised of five separate bills. The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617; The Energy Tax Act of 1978, Pub. L. No. 95-618; The National Energy Conservation Policy Act of 1978, Pub. L. No. 95-619; The Power Plant Industrial Fuel Use Act of 1978, Pub. L. No. 95-620; and The Natural Gas Policy Act of 1978, Pub. L. No. 95-621.
34. Pub. L. No. 96-619, Title II.
35. 42 U.S.C. §8212(a).
36. Power Study Subcommittee of the Legislature, Neb. Power Industry Task Force, Final Report (Nov. 29, 1978) (prepared pursuant to L.R. 34).
37. 42 U.S.C. §8213
38. 42 U.S.C. §8214.
39. 42 U.S.C. §8216.
40. Pub. L. No. 95-619, Title II, Part I §216.
41. June 30, 1980, Pub. L. 96-294, Title V, Subtitle B. Prior to this amendment, 42 U.S.C. §8217(a) read as follows:
  - "(a) Except as provided in this section, no public utility may --
    - (1) Supply or install an energy conservation measure, or
    - (2) Make a loan to any residential customer for the purchase or installation of any residential energy conservation measure."Prior to the amendment, Subsection (c) read as follows:
  - "(c) The prohibition contained in Subsection (a)(2) shall not apply to any loan to residential customer which does not exceed the greater of --
    - (1) \$300, or
    - (2) The cost of purchase, and installation at such customer's residence, of items referred to in subsection (b)."

42. 42 U.S.C. §8217. Presently 42 U.S.C. §8217(a) and (c) read as follows:

- "(a) Prohibition on supply, installation, or financing. Except as provided in this section, no public utility may supply or install a residential energy conservation measure for any residential customer.
- (c) Exemption from prohibition on financing. (1) The prohibition contained in subsection (a) shall not apply to any residential energy conservation measure supplied or installed by a public utility through contracts between such utility and independent suppliers or contractors where the customer requests such supply or installation and each such supplier or contractor --
- (A) is on the list of suppliers and contractors referred to in section 213(a)(2) [42 U.S.C.S. §8214(a)(2)];
  - (B) is not subject to the control of the public utility, except as to the performance of such contract, and is not an affiliate or a subsidiary of such utility; and
  - (C) if selected by the utility, is selected in a manner consistent with paragraph (2)
- (2) As provided under the provisions described in section 213(b)(2)(D) [42 U.S.C.S. §8214(b)(2)(D)], activities of a public utility under paragraph (1)--
- (A) may not involve unfair methods of competition;
  - (B) may not have a substantial adverse effect on competition in the area in which such activities are undertaken nor result in providing to any supplier or contractor an unreasonably large share of contracts for the supply or installation of residential energy conservation measures;
  - (C) shall be undertaken in a manner which provides, subject to reasonable conditions the utility may establish to insure the quality of supply and installation of residential energy conservation measures, that any financing by the utility of such measures shall be available to finance supply or installation by any contractor on the lists referred to in section 213(a)(2) [42 U.S.C.S. §8214(a)(2)] or to finance the purchase of such measures to be installed by the customer;
  - (D) to the extent practicable and consistent with subparagraphs (A), (B), and (C) shall be undertaken in a manner which minimizes the cost of residential energy conservation measures to such customers; and
  - (E) shall include making available upon request a current estimate of the average price of supply and installation of residential energy conservation measures subject to the contracts entered into by the public utility under paragraph (1).

43. Burchett, William H., "Residential Energy Conservation Programs: Extension of Credit by Municipal Electric Utilities," presented at the 1979 APPA Legal Seminar, New Orleans, La., Oct. 30, 1979. See note 69 below.

According to Mr. Burchett, larger utilities under the mandate of federal law have offered a variety of services to their customers, including financial assistance. These utilities have generated in smaller utilities a desire to provide similar services:

"Because of competition with large systems that supply the services, there is pressure on small utilities to provide these same services. This 'yardstick' competition is particularly paramount in those instances in which the smaller utility system has contiguous or dually certified service areas with a large utility. The question posed by customers of small publicly owned systems is: 'Why is it my neighbor receives an energy audit and financial assistance in purchasing and installing conservation measures and I do not?' In response to this inquiry, some utility systems have either voluntarily undertaken to provide these services, or have indicated an interest in doing so in the future.

"The publicly owned/municipal utility systems, however, are confronted with a complicated dilemma. Due to the existence of various state constitutional prohibitions precluding state and municipal entities from extending credit to private individuals and associations, municipal utility systems must first determine the legality of extending credit to their customers."

44. Public power entities for the purposes of this report will refer to Nebraska's municipal electric companies and to Nebraska's Public Power Districts (PPDs), to Rural Power Districts, and to Electric Cooperative Corporations.
45. The issue to which this report is directed regards whether a public power entity which desires to offer conservation financing has the constitutional authority to do so in light of restrictions on lending the state's credit. The issue, in this respect, differs from that situation involving a state regulatory body mandating an unwilling public utility to provide financing.
46. See, Appendix A, infra.
47. Neb. Const., Art. XIII, §3 (Reissue 1979).
48. Button v. Day, 203 Va. 687, 127 S.E.2d 122 (1962).
49. Almond v. Day, 199 Va. 1, 97 S.E.2d 824 (1957).
50. City of Tempe v. Pilot Properties, Inc., 527 P.2d 515, 519 (1974).

51. Carruthers v. Port of Astoria, 438 P.2d 725, 727 (Ore. 1968).
52. Id.
53. Md. Indus. Develop. Financing Auth. v. Helfrich, 250 Md. 602, 243 A.2d 869 (1968).
54. People v. Denniston, 23 N.Y. 247 (1861).
55. Md. Indust. Develop. Financing Auth. v. Helfrich, supra.
56. United Community Services v. Omaha Nat'l Bank, 162 Neb. 786, 800, 77 N.W.2d 576 (1956).
57. State ex rel. Creighton Univ. v. Smith, 217 Neb. 682, \_\_\_ N.W.2d \_\_\_ (1984).
58. Id. at 687.
59. Id. at 688.
60. Id.
61. Id. at 689.
62. Id. at 688.
63. 82 N.W.2d 269 (Neb. 1967).
64. Id., at 272.
65. Id. at 271.
66. Id., at 272.
67. State ex rel. Douglas v. Nebraska Mortgage Finance Authority, 204 Neb. 445, 283 N.W.2d 12 (1979).
68. For purposes of this report, the term "conservation" refers to all items listed in Nebraska Revised Statutes, Section 66-1004 and implementing regulations.
69. Burchette, William H., "Residential Energy Conservation Programs: Extension of Credit by Municipal Electric Utilities," an unpublished paper presented at the 1979 APPA Legal Seminar, New Orleans, Louisiana, October 30, 1979. William H. Burchette is an attorney who, in 1979, was practicing with the law offices of Northcutt-Ely, Washington, D.C.

Mr. Burchette reached the following conclusion:

Notwithstanding the existence of constitutional prohibitions against extensions of credit by state and municipal governments, the trend, in light of the judicial interpretations of the public purpose doctrine,

would appear to be away from strict adherence to these prohibitions. The public purpose doctrine, while illusive, certainly provides courts an opportunity to uphold what might otherwise be unconstitutional uses of government funds and credit for public benefit. In the context of contemporary social and economic views, lending the credit of the municipality to customers for purposes of energy conservation should be deemed within the public purpose exemption. The question, however, must be analyzed on a state-by-state basis.

70. "Our organic law prohibits the expenditure of public money for private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise."
71. "When the State or a political subdivision thereof becomes a payer of a revenue bond or any other evidence of indebtedness which is to be used in the accomplishment of a private as distinguished from a public purpose, the credit of the State has been given or loaned. . . ." 82 N.W.2d at 272.
72. 82 N.W.2d at 273.
73. 82 N.W.2d at 272. The Nebraska Supreme Court expressly distinguishes between the public money and the public credit, stating: "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." 82 N.W.2d at 274. (emphasis added).
74. 82 N.W.2d at 272.
75. Id.
76. City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 885 (N.Mex. 1945).
77. 82 N.W.2d at 272.
78. Id.
79. See, State v. Duxbury, 160 N.W.2d 88, 91-92 (Neb. 1968).
80. United Community Services v. Omaha National Bank, 77 N.W.2d 576, 584 (Neb. 1956).
81. Id. at 584.
82. Id.
83. See, e.g., Direct testimony of Dr. Michael F. Sheehan, In the Matter of the Application of Otter Tail Power Co. for Increased Electric Rates, South Dakota PSC Docket No. F-3418. (August, 1983).

84. The pursuit of such strategies will have beneficial impact on public utilities in the short-term as well. These impacts were discussed in a recent report prepared for the Nebraska Energy Office. See, Colton, "Public Utilities and Community Energy Management: Industry Fiscal and Financial Implications," February, 1984.
85. This section assumes that whether the particular loan is "in aid of an individual, association or corporation" is not at issue.
86. 82 N.W.2d 269, 271 (Neb. 1957).
87. 283 N.W.2d 12 (Neb. 1979).
88. 283 N.W.2d at 16.
89. Id.
90. Id.
91. Id.
92. Section 76-1605, Rev. Stat. Supp. 1978.
93. 283 N.W.2d at 23.
94. Id., (citations omitted).
95. Id.
96. Carr v. Fenstermacher, 228 N.W. 114 (Neb. 1929).
97. 283 N.W.2d at 23, citing Winston v. Spokane, 12 Wash. 524, 41 P. 888 (1895).
98. 160 N.W.2d 88 (Neb. 1908).
99. Id., at 90.
100. Id.
101. Id., at 91. The other constitutional challenges raised in this proceeding are not relevant to this discussion.
102. Id., at 93.
103. Id.
104. Id.
105. State ex rel. Beck v. York, 82 N.W.2d 269, 272 (Neb. 1957).

106. Chase v. County of Douglas, 195 Neb. 838, 848-850 (1976).
107. "Utility shall mean a publicly-owned electrical utility providing either wholesale or retail service within the state." Section 66-1006, Neb. Rev. Stat. Supp. 1983.
108. Neb. Rev. Stat., Section 66-1007.
109. Neb. Rev. Stat., Section 66-1003.
110. Neb. Rev. Stat., Section 66-1005.
111. Section 66-1005, Neb. Rev. Stat. Supp. 1983.
112. Neb. Rev. Stat., Section 58-201.
113. Neb. Rev. Stat., Sections 58-204, 58-205.
114. Neb. Rev. Stat., Section 58-239(9).
115. Neb. Rev. Stat., Section 58-239(18).
116. Neb. Rev. Stat., Section 58-239(22).
117. Neb. Rev. Stat., Section 58-203(1).
118. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 283 N.W.2d 12, 16 (Neb. 1979).
119. Id., at 23.
120. Neb. Rev. Stat., Section 66-1005.
121. This discussion concentrates only on whether the state's credit is implicated and not on whether there is a public purpose involved with the expenditure.
122. Neb. Rev. Stat., Section 70-232.
123. Neb. Revised Stat., Section 70-647.
124. The creditors of the power district may alternatively seek to have a receiver appointed to perform these tasks. Neb. Rev. Stat., Section 70-648.
125. Neb. Rev. Stat., Section 70-647.
126. Neb. Rev. Stat., Section 70-647.
127. Neb. Revised Stat., Section 70-647.
128. Neb. Rev. Stat., Section 70-647; see also, Neb. Rev. Stat., Section 70-646.

129. Compare, 283 N.W.2d at 23.
130. Compare, 283 N.W.2d at 23.
131. Compare, 283 N.W.2d at 23.
132. 160 N.W.2d 88, 91.
133. 283 N.W.2d 12, 16.
134. Id., at 18.
135. 144 N.W.2d 62 (Neb. 1966).
136. Id., at 69.
137. Id., at 68. The Public Power Act was held unconstitutional on other grounds. 144 N.W.2d at 72-73.
138. Id., at 67.
139. Schreiner v. Irby Construction Co., 166 N.W.2d 121, 123 (Neb. 1969).
140. Blenkinship v. Omaha Public Power District, 237 N.W.2d 86, 88 (Neb. 1976).
141. 283 N.W.2d 12, 23.
142. 186 N.W.2d 498 (Neb. 1971).
143. Id., at 499.
144. Id.
145. Id.
146. Id., at 501.
147. See, e.g., Cremer v. Peoria Housing Authority, 78 N.E.2d 276, 284 (Ill. 1948); see also, text accompanying notes 167-189, infra.
148. See generally, Holston Corp. v. Wise County, 131 Va. 142, 109 S.E. 180 (1921).
149. 459 P.2d 633 (Wash. 1969).
150. Id., at 636.
151. Id., at 637.
152. Id.

153. Id., at 638.
154. Id.
155. Id., at 638-39.
156. Id., at 639.
157. Id.
158. Id., at 633.
159. 186 N.W.2d 498.
160. Central Hudson Gas Co. v. PSC, 447 U.S. 557 (1980).
161. Neb. Rev. Stat., Section 58-202(3)(d); see also, Neb. Rev. Stat., Section 66-1001.
162. Compare, Re. Detroit Edison Co., Michigan PSC Docket No. U-5174 (issued Dec. 6, 1979); Compare also, In the Matter of the Application of Michigan Consolidated Gas Co. for Authorization of a Program for the Conservation of Natural Gas, 1 P.U.R.4th 229, 234 (Mich. PSC 1973).

Language in a Washington Supreme Court case, however, raises the issue of whether there is an adequate consideration to avoid constitutional restraints in the context of "buying" energy conservation in the event that the utility provided subsidized, i.e., lower than market cost, interest rates. In Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County, 459 P.2d 633 (Wash. 1969), the state supreme court spoke of the constitution prohibiting, as lending of the state's credit, the provision of "short term credit" which allowed "the customer to convert this concession into a profitable hypothecation of credit with third persons." 459 P.2d at 639. This potential problem should, however, provide no barrier to interest rate reductions in Nebraska. The question of whether a reduced interest rate would, in itself, constitute "lending the credit of the state" in violation of constitutional restrictions should be answered by the legislative findings in Section 58-202(3)(a)-(e), Nebraska Revised Statutes. Indeed, Section 58-202(e) expressly states: "Because of the high cost of available capital, the purchase of energy conservation devices is not possible for many Nebraskans. The prohibitively high interest rates for private capital create a situation in which the necessary capital cannot be obtained solely from private enterprise sources. . . ." This is the same type of legislative finding which supported the Nebraska Supreme Court's approval of the Nebraska Home Mortgage Finance Fund as not being in violation of the constitutional ban on lending the state's credit. 283 N.W.2d 12 (1979). See also, the discussion of "conservation subsidies" at Schroeder and Miller, "The Validity of Utility Conservation Programs According to Generally

Accepted Regulatory Principles," 3 Solar Law Reporter  
967, 1027-1029 (1982).

163. Miller v. City of Owensboro, 343 S.W.2d 398 (Ky. 1961).
164. Miles v. City of Eugene, 451 P.2d 59 (Oregon 1968).
165. 343 S.W.2d at 402.
166. Opinion of the Justices, 319 So.2d 699 (Ala. 1975).
167. Thompson v. Municipal Electric Authority of Georgia,  
231 S.E.2d 720 (Georgia 1976).
168. 231 S.E.2d 720 (Georgia 1976).
169. Id., at 725.
170. 319 So.2d 699 (Ala. 1975).
171. Id., at 701.
172. Id., at 703.
173. 231 S.E.2d 720 (Georgia 1976).
174. Id., at 725.
175. 479 P.2d 61 (Wash. 1971).
176. Id., at 62.
177. Id., at 65.
178. Id., at 63.
179. Id.
180. Id.
181. 555 S.W.2d 281 (Mo. 1977).
182. Id., at 283.
183. Id., at 290-291.
184. Id. at 287.
185. 572 P.2d 1106 (Wyoming 1977).
186. Id., at 1107.
187. Id., at 1108.
188. Id., at 1111.

189. Historically, the constitutional prohibition on lending the credit of the state sought only to bar the state acting as a surety for private industry. "Manifestly, the only purpose of this provision is to prohibit the state from acting as a surety or guarantor of the collateral obligation of another party." *State v. Giesel*, 72 N.W.2d 577, 584 (Wis. 1955); see also, *Grout v. Kendall*, 195 Iowa 467, 192 N.W. 529 (1923); *Guren v. State Tax Commission*, 2 Wn. App. 366, 469 P.2d 922 (1970).
190. 572 P.2d 1111-1112.
191. Id., at 1112.
192. Id.
193. Id.
194. Neb. Rev. Stat., Section 66-1001.
195. Neb. Rev. Stat., Section 66-1004.
196. Neb. Rev. Stat., Section 58-202(3).
197. *State ex rel. McLeod v. Riley*, 278 S.E.2d 612, 614 (S.C. 1981); *Carruthers v. Port of Astoria*, 438 P.2d 725 (Ore. 1968); *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 690-691 (1984).
198. *Fraternal Order of Firemen v. Shaw*, 196 A.2d 734 (Del. 1963); *Troy v. Walker*, 218 Va. 739, 241 S.E.2d 420 (1978).
199. *Green v. Frazier*, 253 U.S. 233, 40 S.Ct. 499 (1920).
200. Id., at 500.
201. Id., at 503.
202. Id., at 501 citing *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 155.
203. *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975).
204. *Fraternal Order of Firemen v. Shaw*, supra at 735; *Troy v. Walker*, 218 Va. 739, 241 S.E.2d 420 (1978).
205. *Pipestone v. Madsen*, 178 N.W. 594 (Minn. 1970).
206. 15 McQuillan, *Municipal Corporations* (3d ed.) §39.19.
207. *Town of Gila Bend v. Walled Lake Door Co.*, 490 P.2d 551, 555 (Ariz. 1971); *Keeter v. Town of Lake Lure*, 141 S.E.2d 634, 264 N.C. 252 (1965).

208. Fawcett v. Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903);  
Pipestone v. Madsen, 178 N.W.2d 594, 600 (Minn. 1970).
- 208A. Keeter v. Town of Lake Lure, supra, see note 207.
209. Walker v. Alaska State Mort. Assoc., 416 P.2d 245 (Alas. 1966); Redevelopment Agency of the City of San Pueblo v. Shepherd, 142 Cal. Rptr. 212 (1977); Op. of Justices, 54 Del. 366, 177 A.2d 205 (1962); State v. Osceola Co. Indus. Dev. Auth., 424 So.2d 739 (Fla. 1982); State ex rel. Amemiya v. Anderson, 545 P.2d 1175 (Hawaii 1976); Clayton v. Village of Oak Park, 453 N.E.2d 937 (Ill. 1983); Pipestone v. Madsen, 178 N.W.2d 594, 599 (Minn. 1970); McLean v. City of Boston, 97 N.E.2d 542 (Mass. 1951); Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5, 17 (19 ); State ex rel. Leet v. Leet, 625 S.W.2d 21 (Mo. 1981); Way v. Grand Lake Assoc., Inc., 635 P.2d 1010, 1017 (Okla. 1981); Keeter v. Town of Lake Lure, supra.
210. Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 334 (1976).
211. Id., at 847.
212. State ex rel. Douglas v. Thone, 204 Neb. 837, 844 (1979).
213. 53 Neb. 556, 74 N.W. 59 (1893).
214. 108 Neb. 666, 189 N.W. 161 (1922).
215. 114 Neb. 243, 207 N.W. 172 (1925).
216. 162 Neb. 786, 77 N.W.2d 576 (1956).
217. 195 Neb. 838, 241 N.W.2d 334 (1976).
218. 204 Neb. 445, 283 N.W.2d 12 (1975).
219. 209 Neb. 783, 313 N.W.2d 884 (1981).
220. 217 Neb. 682, \_\_\_ N.W.2d \_\_\_ (1984).
221. 73 Neb. 66, 105 N.W. 716 (1905).
222. 164 Neb. 223, 82 N.W.2d 269 (1957).
223. Chase v. County of Douglas, supra note 217.
224. Lenstrom v. Thone, supra at 791, note 219.
225. Chase v. County of Douglas, supra at 849.
226. See Section ID above.

227. 164 Neb. 223, 82 N.W.2d 269 (1957).
228. Id., at 230.
229. Oxnard Beet Sugar Co. v. State, supra at 67.
230. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra.
231. Id., at 458.
232. Cosentino v. City of Omaha, 186 Neb. 407, 413, 183 N.W.2d 475 (1971).
233. State ex rel. Creighton Univ. v. Smith, supra.
234. Id. at 690.
235. Id.
236. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra at 461.
237. Id., at 460.
238. State ex rel. v. Thone, supra at 844. In this case, the court specifically found that the expenditures of public funds, including the use of general obligation bonds, for the purpose of promoting the use of agricultural products by converting them into alcohol, would not violate Article XIII, §3 of the Constitution. The program involved, however, was found to be unconstitutional under Article XIII, §1 of the Nebraska Constitution, the state limitation on debt. Similar problems should not be experienced with other utility conservation loan programs because it would not involve, as did the alcohol fuel program, the possibility of expenditures of public tax money for deficiency in the program. See also the decree of the Supreme Court at page 31, note 160 supra.
239. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra at 457.
240. Id. at 459.
241. Id., at 460.
242. Lenstrom v. Thone, supra at 791.
243. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra.

244. Comment, "Industrial Development Bonds: The Demise of the Public Purpose Doctrine," 35 U. Fl. L. Rev. 541; State ex rel. Leet v. Leet, supra.
245. Fawcett v. Mt. Airy, supra.
246. Mayo v. Board of Commissioners, 122 N.C. 5, 29 S.E. 343 (19 ).
247. White v. Pioneer Bank & Trust Company, 298 P.2d 933 (Idaho 1931).
248. United States Fidelity & Guaranty Co. v. Carp, 161 Va. 381, 170 S.E.2d 764 (1933).
249. State ex rel. City of Albuquerque v. Lavendar, 69 N.M. 220, 365 P.2d 652 (1961).
250. City of Tempe v. Pilot Properties, supra at 521.
251. Laramie Citizens for Good Government v. Laramie, 617 P.2d 474 (Wyo. 1980).
252. Op. Atty. Gen. Wash. 1979, L.O. #4.
253. Opinion of Justices, 197 N.E.2d 691 (Mass. 1964).
254. Chicago & N.W. Transport Co. v. Hurst Excavating, Inc., 498 F. Supp. 1 (D.C. Iowa 1978).
255. Kestenbaum v. Mich. State Univ., 97 Mich. App. 5, 294 N.W.2d 228 (1980), aff'd 414 Mich. 510, 327 N.W.2d 783.
256. Laramie Citizens for Good Government v. Laramie, supra, note 251.
257. State ex rel. McLeod v. Riley, 278 S.E.2d 612 (S.C. 1981).
258. O'Fallon Dev. Co. v. City of O'Fallon, 43 Ill. App. 3d 348, 356 N.E.2d 1293 (1976).
259. Lopez v. Ramirez, 558 S.W.2d 954 (Tex. 1977).
260. Wilson v. Bd. of City Commrs. of Allegheny Co., 273 Md. 30, 327 A.2d 488 (1974).
261. State v. Bott, 412 Mo. 97, 518 S.W.2d 726 (1974).
262. Lyman v. Town of BowMar, 188 Colo. 216, 533 S.W.2d 1129 (1975).
263. Gude v. City of Lakewood, 636 P.2d 691 (Colo. 1981); Johns Hopkins Univ. v. Williams, 86 A.2d 892 (1952).

264. Lake Otis Clinic, Inc. v. State, 650 P.2d 388 (Alas. 1982).
265. Atlantic Richfield v. County of Los Angeles, 180 Cal. Rptr. 901 (1982).
266. Id., at 906.
267. Id., at 907.
268. Redevelopment Agency of the City of San Pueblo v. Shepherd, *supra*.
269. Clayton v. Village of Oak Park, supra at 943.
270. State ex rel. Ameniya v. Anderson, supra.
271. Thompson v. Muniy Electric Auth. of Georgia, 238 Ga. 19, 231 S.E.2d 720 (1976).
272. County of Stark v. Ferguson, 440 N.E.2d 816 (Ohio 1981).
273. Way v. Grand Lake Assoc., Inc., 635 P.2d 1010 (Okla. 1981).
274. Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975).
275. State v. Riley, supra.
276. South Carolina Farm Bureau Marketing Assoc. v. South Carolina State Ports Auth., 293 S.E.2d 854 (S.C. 1982).
277. Troy v. Walker, 218 Va. 739, 241 S.E.2d 420, 425 (1978).
278. Wisconsin Solid Waste Recycling Auth. v. Earl, 235 N.W.2d 648 (Wis. 1975).
279. Keeter v. Town of Lake Lure, *supra*, note 207.
280. Nohrr v. Brevard County Educational Facilities Auth., 247 So.2d 304 (Fla. 1971).
281. Id., at 309.
282. Id., at 309.
283. Fla. Stat. §159.26 (1980).
284. State v. Orange County Indus. Deve. Auth., 417 So.2d 959 (Fla. 1982).
285. Fla. Stat. §159.27(5) (1981).
286. Id., at 962.

287. State v. Osceola Co. Indus. Develop. Auth., 424 So.2d 739 (Fla. 1982).
288. Id. at 740.
289. Id., at 742.
290. Id.
291. Comment, "Industrial Development Bonds: The Demise of the Public Purpose Doctrine," 35 U. of Fl. L. Rev. 541.
293. Orange Co. Indus. Development Auth. v. State. 427 So.2d 174 (Fla. 1983).
293. Id., at 178.
294. Id., at 179.
295. Id.
296. Linscott v. Orange Co. Indus. Development Auth., 443 So.2d 97 (Fla. 1983).
297. Id.
298. Id. at 101.
299. Id.
300. Albritton v. Winona, 181 Miss. 75, 178 So. 799 (1938).
301. Carruthers v. Port of Astoria, 438 P.2d 725, 728 (Ore. 1968).
302. Id., citing "Constitutional provisions like those of §§7 and 9, Art. XI, supra, have been construed with few exceptions, as no obstacle. Newberry v. City of Andalusia et al., 257 Ala. 40, 57 So.2d 629 (1952); DeArmond v. Alaska State Development Corporation, 376 P.2d 717, 721 (Alaska 1962); Roan v. Connecticut Industrial Building Commission, 150 Conn. 333, 189 A.2d 399, 404 (1963); Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Hebert v. Police Jury of West Baton Rouge Parish, 200 So.2d 877 (La. 1967); City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966); Village of Deming v. Hosdreg Company, 62 N.M. 18, 303 P.2d 920 (1956); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951); Industrial Development Authority of City of Chesapeake v. Suthers, 208 Va. 51, 155

S.E.2d 326 (1967). Many more cases could be cited which hold to the same effect."

303. Id., citing State v. Clay County Development Auth., 140 So.2d 576 (Fla. 1962); Village of Moyie Springs, Idaho v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State, ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).
304. Id., at 730.
305. Pipestone v. Madsen, 178 N.W.2d 594 (Minn. 1970).
306. Id., at 600.
307. Id.
308. Id., note 3.
309. Id., at 601.
310. Id., at 603.
311. See note 189 above, part IID.
312. State ex rel. Douglas v. Nebraska Mortgage Finance Auth., supra.
313. United Community Services v. Omaha National Bank, supra note 80, section IIA; see generally, Gardels, Margaret, "Utility Financing: Loans or Rebates," Solar L. Rev. 447 (1981).
314. Blue Flame Gas Association v. McCook Public Power District, supra note 142.
315. United Community Services v. Omaha National Bank, supra note 80.

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Ala.	May, 1983	§94, Amended By Amend. 112	<p>"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for such purpose."*</p> <p>*There, are, however, several constitutional amendments excepting particular subdivisions from this prohibition.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Alaska	Dec. 1982	Art. IX §6	"SECTION 6. No tax shall be levied, or appropriation of public money made, or public property transferred nor shall the public credit be used, except for a public purpose."  Also, Art. II, §19 prohibits local laws if general possible.

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Ariz.	Oct. 1982	Art. IX §7	<p><u>Sec. 7. Gift or loan of credit; subsidies; stock ownership; joint ownership.</u> Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Ark.	Aug. 1982	Art. 16 §1 As amended by Amend. #13	<p>"Sec. 1. State and political subdivisions prohibited from lending credit--Bond issues--Cities of first and second class.--Neither the State nor any city, county, town or other municipality in this State, shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the State shall never issue any interest bearing treasury warrants or scrip."*</p> <p>*The section goes on to provide that, with the approval of the majority of the qualified electors, there are exceptions to this prohibition for cities of the first and second class. It is specifically provided, however, that:</p> <p>"No municipality shall ever grant financial aid toward the construction of railroads or other private enterprises operated by any person, firm or corporation, and no money raised under the provisions of this amendment by taxation or by sale of bonds for a specific purpose shall ever be used for any other or different purpose."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Cal.	Jan. 1984	Art. XVI §6	<p>SEC. 6. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities or any individual association, municipal or other corporation whatever nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; ... and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever,"*</p> <p>*There are several exceptions to this prohibition, such as public assistance, water projects, insurance pools, etc.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Colo.	Sept. 1983	Art. XI §1	"Section 1. <u>Pledging credit of state, county, city, town, or school district forbidden.</u> Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Ky.	Sept. 1983	§179	"Section 179. . . . The General Assembly shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads; Provided, If any municipal corporation shall offer to the Commonwealth any property or money for locating or building a Capitol, and the Commonwealth accepts such offer, the corporation may comply with the offer."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
La.	Dec. 1980	Art. VII §14	<p>"Section 14. (A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private. Neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.</p> <p>(B) Authorized Uses. Nothing in this Section shall prevent (1) the use of public funds for programs of social welfare for the aid and support of the needy; (2) contributions of public funds to pension and insurance programs for the benefit of public employees; or (3) the pledge of public funds, credit, property, or things of value for public purposes with respect to the issuance of bonds or other evidences of indebtedness to meet public obligations as provided by law."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Maine	June 1979	Art. IX §14 (amended)	There is no provision at present, but the following appeared in earlier constitutions:  "The credit of the State shall not be directly or indirectly loaned in any case, except as provided in sections 14-A, 14-B, 14-C, 14-D and 14-E."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Mary- land	Oct. 1982	Art. III §34	"SEC. 34. . . . The credit of the State shall not in any manner be given, or loaned to, or in aid of any individual association or corporation; . . ."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Mass.	Aug. 1982	Art. LXII	"SECTION 1. The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Mich.	May, 1983	Art. IX §18	<p><u>"State credit.</u></p> <p>Sec. 18. The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution."*</p> <p>*There are exceptions, such as school loans.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Minn.	Dec. 1982	Art XI §§2-5	<p>"Sec. 2. <u>Credit of the state limited.</u> The credit of the state shall not be given or loaned in aid of any individual, association or corporation except as hereinafter provided."*</p> <p>*The following sections refer to internal improvements.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Miss.	Oct. 1982	Art. 14 §258	"Section 258. The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; and the state shall not become a stockholder in any corporation or association, nor assume, redeem, secure, or pay any indebtedness or pretended indebtedness alleged to be due by the state of Mississippi to any person, association, or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as "Union Bank" bonds and "Planters Bank" bonds."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Mo.	Dec. 1982	Art. III §38(a)	"Section 38(a). ... --The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Mont.	Dec. 1982	Art. V §11(5)	<p><u>"Section 11. Bills.</u></p> <p>...</p> <p>(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Neb.		Art. XIII §3	From <u>Neb. Rev. Stat.</u> (Reissue 1979)  " <u>Sec. 3. Credit of state.</u> The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Nev.	Dec. 1982	Art. 8 §§9&10	<p>"Sec: 9. <u>Lending public credit; gifts to corporations.</u> The State shall not donate or loan money, or its credit, subscribed to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes."</p> <p>"Sec: 10. <u>Loans of public credit by counties, municipal corporations to corporations.</u> No county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation or association whatever, or loan its credit in aid of any such company, corporation or association, except rail-road corporations[,] companies or associations."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
New Hamp.	Dec. 1982	Part 2d Art. 5th	"... <u>provided</u> that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stock or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
New Jersey	Aug. 1982	Art. VIII §II ¶1	"1. The credit of the State shall not be directly or indirectly loaned in any case."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
New Mexico	Aug. 1982	Art. IX §14	<p>"Sec. 14. Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons, nor shall it prohibit the state from establishing a veterans' scholarship program for Vietnam conflict veterans who are post-secondary students at educational institutions under the exclusive control of the state by exempting such veterans from the payment of tuition. For the purposes of this section a "Vietnam conflict veteran is any person who has been honorably discharged from the armed forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces from New Mexico and who has been awarded a Vietnam campaign medal for service in the armed forces of this country in Vietnam during the period from August 5, 1964 to the official termination date of the Vietnam conflict as designated by executive order of the president of the United States. The state may also establish by law a program of loans to students of the healing arts, as defined by law, for residents of the state who, in return for the payment of educational expenses, contract with the state to practice their profession for a period of years after graduation within areas of the state designated by law. (As amended November 5, 1974)."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
New York	Dec. 1982	Art. VII §8	<p>"§8.1. The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes."*</p> <p>*Subsection 2 and 3 contain several further exceptions such as aid to the needy, industrial development loans and pensions.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
North Carol.	Sept. 1983	Art. V §3(2) §4(3)	<p>"(2) <u>Gift or loan of credit regulated.</u> The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the State, and is approved by a majority of the qualified voters who vote thereon."</p> <p>"(3) <u>Gift or loan of credit regulated.</u> No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
North Dakota	May 1983	Art. X §§14,18	<p>"Section 14.</p> <p>1. Notwithstanding any other provision in the constitution, and for the purpose of promoting the economic growth of the state, the development of its natural resources, and the prosperity and welfare of its people, the state may issue bonds and use the proceeds thereof to make loans to privately or cooperatively owned enterprises to plan, construct, acquire, equip, improve, and extend facilities for converting natural resources into power and generating and transmitting such power, and to acquire real and personal property and water and mineral rights needed for such facilities."</p> <p>"Section 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Ohio	Sept. 1983	Art. VIII §§4, 6	<p>"§4. ... The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."</p> <p>"§6. ... No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Okla.	Jan. 1984	Art. X §15	"The credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State; nor shall the State become an owner of stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.

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The following, unless otherwise noted, were taken from Legislative Drafting Research Fund of Columbia University, Constitutions of the United States (2nd Rev. Ed. 1984). The date of issue below is the date of the particular state constitution which appears in the above-referenced source.

<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Oregon	Jan. 1984	Art. XI-J §§1-5	<p><u>"Section 1. State empowered to loan credit for small scale local energy loans.</u> Notwithstanding the limits contained in sections 7 and 8, Article XI of this Constitution, the credit of the State of Oregon may be loaned and indebtedness incurred in an amount not to exceed one-half of one percent of the true cash value of all the property in the state for the purpose of creating a fund to be known as the Small Scale Local Energy Project Loan Fund. The fund shall be used to provide financing for the development of small scale local energy projects. Secured repayment thereof shall be and is a prerequisite to the advancement of money from such fund.</p> <p><u>"Section 2. Bonds.</u> Bonds of the State of Oregon containing a direct promise on behalf of the state to pay the face value thereof, with the interest therein provided for, may be issued to an amount authorized by section 1 of this Article for the purpose of creating such fund. The bonds shall be a direct obligation of the state and shall be in such form and shall run for such periods of time and bear such rates of interest as provided by statute.</p> <p><u>"Section 3. Refunding bonds.</u> Refunding bonds may be issued and sold to refund any bonds issued under authority of sections 1 and 2 of this Article. There may be issued and outstanding at any time bonds aggregating the amount authorized by section 1 of this Article but at no time shall the total of all bonds outstanding including refunding bonds, exceed the amount so authorized.</p> <p><u>"Section 4. Source of revenue.</u> Ad valorem taxes shall be levied annually upon all the taxable property in the State of Oregon in sufficient amount to provide for the payment of principal and interest of the bonds issued</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Oregon (cont.)	Jan. 1984	Art. XI §§7,9	<p>pursuant to this Article. The Legislative assembly may provide other revenues to supplement or replace, in whole or in part, such tax levies.</p> <p>"Section 5. <u>Legislation to effectuate Article.</u> The Legislative Assembly shall enact legislation to carry out the provisions of this Article. This Article supersedes any conflicting provision of a county or city charter or act of incorporation."</p> <p>"Section 7. The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly, or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars . . . .</p> <p>"Section 9. No county, city, town, or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association. . . .</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Penn.	Dec. 1980	Art. VIII §8	"The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Rhode Island	May 1983	Art. IV §13	"SEC. 13. The general assembly shall have no power, hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall they in any case, without such consent pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with this state by the government of the United States."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
South Carol.	May 1983	Art. X §11	"S 11. The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner or stockholder in any company, association or corporation. The General Assembly may, however, authorize the South Carolina Public Service Authority to become a joint owner with privately owned electric utilities, including electric cooperatives, of electric generation or transmission facilities, or both, and to enter into and carry out agreements with respect to such jointly owned facilities."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
South Dakota	Oct. 1982	Art. XIII §1,12	Sec. 1.  "For the purpose of developing the resources and improving the economic facilities of South Dakota, the state may engage in works of internal improvement, may own and conduct proper business enterprises, may loan or give its credit to, or in aid of, any association, or corporation, organized for such purposes. But any such association or corporation shall be subject to regulation and control by the state as may be provided by law. No money of the state shall be appropriated, or indebtedness incurred for any of the purposes of this section, except by the vote of two-thirds of the members of each branch of the Legislature. The state may also assume or pay any debt or liability incurred in time of war for the defense of the state. The state may establish and maintain a system of rural credits and thereby loan and extend credit to the people of the state upon real estate security in such manner and upon such terms and conditions as may be prescribed by general law. ..."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Tenn.	Oct. 1982	Art. II §29	Section 29. ... But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority.

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Texas	Sept. 1983	Art. 3 §§50, 52	<p>"Sec. 50. LOAN OR PLEDGE OF CREDIT OF STATE. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.</p> <p>"Sec. 52. COUNTIES, CITIES OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."*</p> <p>*There are exceptions which apply upon a vote of two-thirds majority of the resident property taxpayers.</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Utah	Sept. 1983	Art. VI §29	"The legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Vermont	Aug. 1982	<u>NONE</u>	

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Va.	Aug. 1982	Art. X §10	"Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Wash.	Dec. 1982	Art. VIII §5 & §7	<p>"§5. <u>Credit not to be loaned.</u> The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation."</p> <p>"§7. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation."</p>

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
W.Va.	Oct. 1982	Art. X §6	"6. The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Wisc.	Dec. 1982	Art. VIII §3	"... s. 7(2), the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation."

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<u>STATE</u>	<u>DATE OF ISSUE</u>	<u>CITE</u>	<u>PROVISION</u>
Wyoming	Sept. 1983	Art. 16 §6	"Sec. 6. <u>Loan of credit; donations prohibited; works of internal improvement.</u> --Neither the state nor any county, city, township, town, school district, or any other political sub-division shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation. The state shall not engage in any work of internal improvement unless authorized by a two-thirds vote of the people."

