

SEVENTY-FIRST DAY - APRIL 26, 2007**LEGISLATIVE JOURNAL****ONE HUNDREDTH LEGISLATURE
FIRST SESSION****SEVENTY-FIRST DAY**

Legislative Chamber, Lincoln, Nebraska
Thursday, April 26, 2007

PRAYER

The prayer was offered by Senator Carlson.

ROLL CALL

Pursuant to adjournment, the Legislature met at 9:00 a.m., Senator Fischer presiding.

The roll was called and all members were present except Senator Pedersen who was excused until he arrives.

CORRECTIONS FOR THE JOURNAL

The Journal for the seventieth day was approved.

RESOLUTIONS

LEGISLATIVE RESOLUTION 89. Introduced by Pahls, 31.

PURPOSE: To study how discarded televisions and their components could be recycled rather than discarded in landfills. With the advent of high definition televisions (HDTV), flat screen and flat panel display televisions, laser televisions, liquid crystal display (LCD) televisions, plasma display televisions, and any other types of television sets in production or soon to be developed or released, thousands of televisions that were developed and sold prior to the advent of the new televisions will be discarded in the next few years. The Natural Resources Committee shall determine if the state or local governments could facilitate recycling of older televisions. The committee may also study how the newer television sets and their components could be recycled when they are discarded or become obsolete.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Natural Resources Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

LEGISLATIVE RESOLUTION 90. Introduced by Pahls, 31.

PURPOSE: To direct the Transportation and Telecommunications Committee of the Legislature to study the requirements to license, register, purchase plates, verify proof of insurance, tax, and assess fees on motor vehicles. Under current law and rules it takes several days and several stops for a person who purchases a new or used motor vehicle, regardless of whether the purchaser has traded a vehicle in consideration of the purchase, to purchase, verify proof of insurance, license, register, purchase plates, and pay taxes and fees. Some states allow motor vehicle dealers to act as agents to allow one-stop shopping to purchase, verify proof of insurance, license, register, purchase plates, and pay taxes and fees on a motor vehicle.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

LEGISLATIVE RESOLUTION 91. Introduced by Pahls, 31.

PURPOSE: Though the Legislature has considered legislation to address the crime of identity theft, the purpose of this resolution is to determine if more can be done through legislation to effectively protect citizens from becoming victims of this crime.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Judiciary Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

REPORT OF REGISTERED LOBBYISTS

Following is a list of all lobbyists who have registered as of April 25, 2007, in accordance with Section 49-1481, Revised Statutes of Nebraska. Additional lobbyists who have registered will be filed weekly.

(Signed) Patrick J. O'Donnell
Clerk of the Legislature

Jaeschke, Ronda
Kinder Morgan, Inc.
(Withdrawn 04/24/2007)
SourceGas Distribution, LLC

Macholan, Jessica L.
Class I's United

McGovern, L. Denise
Grand Island Area Economic Development Corporation

Mize, William L. (Len)
Kinder Morgan, Inc.
(Withdrawn 04/24/2007)
SourceGas Distribution, LLC

O'Hara, Lindsay & Associates, Inc.
SourceGas Distribution, LLC

Reiman, Charlene
Kinder Morgan, Inc.
(Withdrawn 04/24/2007)
SourceGas Distribution, LLC

Roland, Gene
Kinder Morgan, Inc.
(Withdrawn 04/24/2007)
SourceGas Distribution, LLC

REPORTS

The following reports were received by the Legislature:

Agriculture, Department of

2005 Recommendations of the United States Public Health Service Food and Drug Administration Food Code

Investment Finance Authority

Drinking Water State Revolving Fund Revenue Bonds Series 2006 A, Quarterly Reports

MOTIONS - Approve Appointments

Senator Raikes moved the adoption of the Education Committee report for the confirmation of the following appointment(s) found on page 1256:

Nebraska Educational Telecommunications Commission

Kenneth Bird

Mandy Johnson

Dennis Miller Jr.

Robert Moline

Clay Smith

Senator Chambers requested a division of the question on the confirmation report.

The Chair sustained the division of the question.

The first division is as follows:

Senator Raikes moved the adoption of the Education Committee report for the confirmation of the following appointment(s) found on page 1256:

Nebraska Educational Telecommunications Commission

Kenneth Bird

Voting in the affirmative, 37:

Adams	Engel	Howard	McDonald	Pirsch
Aguilar	Erdman	Hudkins	McGill	Raikes
Ashford	Fischer	Janssen	Mines	Rogert
Burling	Flood	Johnson	Nantkes	Wallman
Carlson	Friend	Kopplin	Nelson	White
Chambers	Fulton	Kruse	Pahls	
Christensen	Gay	Langemeier	Pankonin	
Dierks	Hansen	Lathrop	Pedersen	

Voting in the negative, 0.

Present and not voting, 12:

Avery	Harms	Louden	Stuthman
Cornett	Heidemann	Preister	Synowiecki
Dubas	Karpisek	Schimek	Wightman

The appointment was confirmed with 37 ayes, 0 nays, and 12 present and not voting.

SENATOR LANGEMEIER PRESIDING

The second division is as follows:

Senator Raikes moved the adoption of the Education Committee report for the confirmation of the following appointment(s) found on page 1256:

Nebraska Educational Telecommunications Commission
 Mandy Johnson
 Dennis Miller Jr.
 Robert Moline
 Clay Smith

Voting in the affirmative, 39:

Adams	Engel	Howard	McDonald	Pirsch
Aguilar	Erdman	Hudkins	McGill	Raikes
Ashford	Fischer	Janssen	Mines	Rogert
Burling	Flood	Johnson	Nantkes	Stuthman
Carlson	Friend	Kopplin	Nelson	Wallman
Chambers	Fulton	Kruse	Pahls	White
Christensen	Gay	Langemeier	Pankonin	Wightman
Dierks	Hansen	Louden	Pedersen	

Voting in the negative, 0.

Present and not voting, 10:

Avery	Dubas	Heidemann	Lathrop	Schimek
Cornett	Harms	Karpisek	Preister	Synowiecki

The appointments were confirmed with 39 ayes, 0 nays, and 10 present and not voting.

COMMITTEE REPORTS

Business and Labor

LEGISLATIVE BILL 339. Placed on General File - Com AM1125.
 AM1125

1 1. Strike the original sections and insert the following
 2 sections:
 3 Section 1. Section 25-213, Reissue Revised Statutes of
 4 Nebraska, is amended to read:
 5 25-213 Except as provided in sections 76-288 to 76-298,
 6 if a person entitled to bring any action mentioned in ~~this chapter,~~
 7 Chapter 25, the Political Subdivisions Tort Claims Act, the
 8 Nebraska Hospital-Medical Liability Act, the State Contract Claims
 9 Act, ~~or the State Tort Claims Act, or the State Miscellaneous~~
 10 Claims Act, except for a penalty or forfeiture, for the recovery
 11 of the title or possession of lands, tenements, or hereditaments,
 12 or for the foreclosure of mortgages thereon, is, at the time
 13 the cause of action accrued, within the age of twenty years, a
 14 person with a mental disorder, or imprisoned, every such person
 15 shall be entitled to bring such action within the respective times
 16 limited by this chapter after such disability is removed. For
 17 the recovery of the title or possession of lands, tenements, or

18 hereditaments or for the foreclosure of mortgages thereon, every
 19 such person shall be entitled to bring such action within twenty
 20 years from the accrual thereof but in no case longer than ten years
 21 after the termination of such disability. Absence from the state,
 22 death, or other disability shall not operate to extend the period
 23 within which actions in rem are to be commenced by and against a
 1 nonresident or his or her representative.

2 Sec. 2. Section 81-8,294, Reissue Revised Statutes of
 3 Nebraska, is amended to read:

4 81-8,294 Sections 81-8,294 to 81-8,301 and section 3 of
 5 this act shall be known and may be cited as the State Miscellaneous
 6 Claims Act.

7 Sec. 3. Except (1) as provided in section 25-213, (2)
 8 for claims described in subdivision (4) of section 81-8,297, (3)
 9 for claims described in subdivision (5) of section 81-8, 297, and
 10 (4) for claims relating to expiration of state warrants, every
 11 miscellaneous claim permitted under the State Miscellaneous Claims
 12 Act shall be forever barred unless the claim is filed with the Risk
 13 Manager within two years after the time the claim accrued.

14 Sec. 4. Original sections 25-213 and 81-8,294, Reissue
 15 Revised Statutes of Nebraska, are repealed.

LEGISLATIVE BILL 88. Placed on General File - Com AM993.
 AM993

- 1 1. On page 2, after line 19 insert:
- 2 "\$302,204.16 for Claim Number 2007-01594, against the
- 3 Attorney General's Office, pay to Blackwell, Sanders, Peper, and
- 4 Martin, LLP, 1620 Dodge Street, Suite 2100, Omaha, NE 68102, out of
- 5 the General Fund."; and after line 22 insert:
- 6 "\$830.35 for Claim Number 2005-00295, against the
- 7 Nebraska Health and Human Services System, pay to Millicent Myres,
- 8 6114 North 79th Avenue, Omaha, NE 68134, out of the General Fund.
- 9 \$15,880.00 for Claim Number 2007-01517, against the
- 10 Department of Revenue, pay to G & D Appel, LLC, and Cory Locke,
- 11 Attorney, 100 North 34th Street, Suite E, Norfolk, NE 68701, out of
- 12 the General Fund.".
- 13 2. On page 3, lines 3 and 4, strike "1,307,817.39" and
- 14 insert "1,626,731.90".

(Signed) Abbie Cornett, Chairperson

Agriculture

LEGISLATIVE BILL 516. Placed on General File - Com AM1132.
 AM1132

- 1 1. Strike the original sections and insert the following
- 2 sections:
- 3 Section 1. The Legislature finds that the ruling of the
- 4 United States District Court for the District of Nebraska in Jones

5 v. Gale, 405 F. Supp. 2d 1066, D. Neb. 2005, and subsequent rulings
6 on appeal affirming such ruling holding Article XII, section 8, of
7 the Constitution of Nebraska to be invalid, enjoined, or limited in
8 application has significant implications for the future structure,
9 development, and progress of agricultural production in Nebraska.

10 Sec. 2. (1)(a) It is the intent of the Legislature to
11 support and facilitate a study by the Agriculture Committee of
12 the Legislature to identify policy instruments available to the
13 Legislature and the people of Nebraska, including as appropriate,
14 but not necessarily requiring or limited to, modification of
15 Article XII, section 8, of the Constitution of Nebraska, in order
16 to foster and enhance legal, social, and economic conditions in
17 Nebraska consistent with and which advance those state interests
18 that exist in the structure, development, and progress of
19 agricultural production.

20 (b) Within the limits of funds appropriated for such
21 purpose, the Executive Board of the Legislative Council may, in
22 coordination and cooperation with the Agriculture Committee of
23 the Legislature, commission experts in the fields of agricultural
1 economics, agricultural law, commerce clause jurisprudence, and
2 other areas of study and practice to provide assistance, specific
3 research or reports, or presentations in order to assist the
4 Agriculture Committee of the Legislature in carrying out the intent
5 of the Legislature under this section.

6 Sec. 3. (1) It is the intent of the Legislature, that
7 the Attorney General perform, acquire, and otherwise cause to be
8 made available such research as may be appropriate to inform and
9 assist the Agriculture Committee of the Legislature in identifying
10 policy instruments available to the Legislature and the people of
11 Nebraska, including as appropriate, but not necessarily requiring
12 or limited to, modification of Article XII, section 8, of the
13 Constitution of Nebraska, in order to foster and enhance legal,
14 social, and economic conditions in Nebraska consistent with and
15 which advance those state interests that exist in the structure,
16 development, and progress of agricultural production in Nebraska.

17 (2) The Attorney General may contract with experts in the
18 fields of agricultural economics, agricultural law, commerce clause
19 jurisprudence, and other areas of study and practice to assist
20 the Attorney General in carrying out the intent of the Legislature
21 under this section.

22 Sec. 4. Since an emergency exists, this act takes effect
23 when passed and approved according to law.

(Signed) Philip Erdman, Chairperson

BILL ON FIRST READING

The following bill was read for the first time by title:

LEGISLATIVE BILL 588A. Introduced by Cornett, 45.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 588, One Hundredth Legislature, First Session, 2007.

RESOLUTIONS

LEGISLATIVE RESOLUTION 92. Introduced by Heidemann, 1.

WHEREAS, Eric Post of Troop 337, Syracuse, Nebraska; Trenton Phillips and Christopher Blecha of Troop 387, Humboldt, Nebraska; Daniel Wright of Troop 325, Peru, Nebraska; and Colton Shenefelt of Troop 321, Auburn, Nebraska, have completed the requirements for the rank of Eagle Scout in the Boy Scouts of America; and

WHEREAS, to earn the rank of Eagle Scout, the highest advancement of rank in scouting, a Boy Scout must fulfill requirements in the areas of leadership, service, and outdoor skills. Although many options are available to demonstrate proficiency in these areas, a number of specific skills are required to advance through the ranks of Tenderfoot, Second Class, First Class, Star, Life, and Eagle. Throughout their scouting experience, Eric, Trenton, Christopher, Daniel, and Colton have learned, been tested on, and been recognized for various scouting skills; and

WHEREAS, to achieve the rank of Eagle Scout, a Boy Scout is required to earn 21 merit badges, 12 of which are in required areas, and complete a community service project approved by the troop and the scout council; and

WHEREAS, only a small percentage of the boys who join the Boy Scouts of America achieve the rank of Eagle Scout; and

WHEREAS, Eric Post, Trenton Phillips, Christopher Blecha, Daniel Wright, and Colton Shenefelt will receive the rank of Eagle Scout, and, through their hard work and perseverance, will join other high achievers who are Eagle Scouts, such as astronauts, political and industry leaders, artists, scientists, and athletes.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Eric Post, Trenton Phillips, Christopher Blecha, Daniel Wright, and Colton Shenefelt on achieving the rank of Eagle Scout.

2. That a copy of this resolution be sent to Eric Post, Trenton Phillips, Christopher Blecha, Daniel Wright, and Colton Shenefelt.

Laid over.

LEGISLATIVE RESOLUTION 93. Introduced by Erdman, 47.

PURPOSE: To examine implications for the future structure, development, and progress of agricultural production in Nebraska arising from the ruling of the United States Court of Appeals for the Eighth Circuit in *Jones v. Gale*, No. 06-1308, holding Article XII, section 8, of the Constitution of

Nebraska, to be invalid and enjoined. The study shall seek to identify policy instruments available to the Legislature and the people of Nebraska, including, as appropriate, but not necessarily limited to or requiring, modification of Article XII, section 8, of the Constitution of Nebraska, in order to foster and enhance legal, social, and economic conditions in Nebraska consistent with and which advance state interests and policy objectives relevant to the structure, development, and progress of agricultural production in Nebraska.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Agriculture Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

ATTORNEY GENERAL'S OPINION

Opinion 07010

DATE: April 26, 2007

SUBJECT: Constitutionality of AM 826 to LB 658 Relating to the Reestablishment of Class I School Districts

REQUESTED BY: Senator Ron Raikes
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
Dale A. Comer, Assistant Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested our formal opinion on the constitutionality of legislation that would reestablish the former Class I school districts in Nebraska. In your opinion request letter, you suggest that legislation which applies only to the former Class I districts would create a "closed class," in violation of the Nebraska Constitution. From discussions with your staff, we understand that you wish us to limit our analysis as to whether certain provisions of AM 826 to LB 658, an amendment introduced by Senator Dierks, create a closed class. Our response to your inquiry is set forth below.

I. BACKGROUND

On June 3, 2005, the Nebraska Legislature passed Legislative Bill 126 over the Governor's veto. Among other provisions, LB 126 required the State Committee for the Reorganization of School Districts ("State Committee") to issue orders, on or before December 1, 2005, dissolving all Class I school

districts and attaching the territory of each Class I school district to one or more Class II, III, IV, and VI school districts. The effective date for such dissolution orders was June 15, 2006. LB 126 also required the State Committee, on or before December 1, 2005, to issue orders reclassifying each Class VI school district into a new Class II or Class III school district, also effective June 15, 2006.

In response to the passage of LB 126, a group of Nebraska citizens organized a referendum petition effort to repeal LB 126 in its entirety. The referendum petitions to repeal LB 126 were circulated for signature across the state, and were submitted to the Nebraska Secretary of State in September 2005. After the petition signature verification process, the Secretary of State determined that there were a sufficient number of valid signatures to place the referendum repealing LB 126 on the general election ballot in November 2006. However, the Secretary of State also determined that the referendum effort did not obtain sufficient signatures to suspend the operation of LB 126 pending the 2006 general election. On June 15, 2006, pursuant to the orders of the State Committee, Class I school districts were dissolved into their respective K-12 districts.

On November 7, 2006, the voters of Nebraska voted to repeal LB 126.¹

II. AMENDATORY LANGUAGE AND THE CLASSIFICATIONS IT CREATES

The pertinent provisions of AM 826 provide:

Sec. 1. On the effective date of this act, the Class I, II, III, IV, V, and VI school districts which were organized as such immediately before December 1, 2005, shall be reorganized according to the boundaries on file with the State Department of Education on November 30, 2005.

Sec. 2. Section 1 of this act does not apply to any school district which was reorganized by means other than Laws 2005, LB 126, so long as the reorganization order was entered on or before November 30, 2005, notwithstanding the effective date of boundary changes of any such order.

Stated alternatively, sections 1 and 2 of AM 826 would require every Class I, II, III, IV, V, and VI school district which existed as a Class I, II, III, IV, V and VI school district immediately before December 1, 2005, to be reorganized according to the boundaries "on file"² with the Nebraska Department of Education ("NDE") on November 30, 2005. However, the reorganization mandate in section 1 does not apply to school districts reorganized by means other than LB 126, as long as the reorganization orders were entered into on or before November 30, 2005. It appears then that at least three statutory classifications are created by this language:

Classification 1: All school districts in the state in existence

immediately prior to December 1, 2005, except those schools districts reorganized prior to November 30, 2005, by some means other than LB 126;

Classification 2: Those school districts in the state in existence immediately prior to December 1, 2005, which were reorganized prior to November 30, 2005, by some means other than LB 126; and

Classification 3: Those school districts in the state in existence immediately prior to December 1, 2005, which were reorganized by means other than LB 126, but pursuant to reorganization orders entered after November 30, 2005.

According to data we received from the NDE, there are school districts which fall within each of the three classifications established by AM 826.

III. ANALYSIS

A. Article III, § 18 of the Nebraska Constitution

The relevant provision of the Nebraska Constitution is art. III, § 18, which provides in pertinent part:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

* * *

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever In all other cases where a general law can be made applicable, no special law shall be enacted.

A legislative act that applies only to particular individuals or things of a class is special legislation. *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844 (1991). A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. *Id.* at 709, 467 N.W.2d at 845; *State v. Popco, Inc.*, 247 Neb. 440, 443, 528 N.W.2d 281, 283 (1995). It seems to us that there is a strong argument that each statutory class of school districts created by sections 1 and 2 of AM 826 represents a permanently closed class.

In support of our conclusion, we rely on *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970). In *Tiemann*, the Court addressed the constitutionality of LB 1293, a 1969 act which directed cities of the first class with populations of more than 13,000 residents located in counties having a population of more than 33,000 inhabitants, according to the 1960 federal census, to establish a municipal court. The Supreme Court found that

under the 1960 census, only two of the 22 first class cities in Nebraska, Scottsbluff and Grand Island, met the population requirement in the bill. Because LB 1293 "classif[ied] cities for legislative purposes in such a way that no other city of the first class may be ever added to the class designated," the Supreme Court held that LB 1293 constituted special legislation. Tiemann at 263, 175 N.W.2d at 79.

The Tiemann Court further stated, quoting *State ex rel. Conkling v. Kelso*, 92 Neb. 628, 632, 139 N.W. 226, 227-228 (1912):

The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development is special and a violation of the clause of the Constitution above quoted. It follows that the limitation in the act to all county seats which had existed for 10 successive years at the time of the passage of the act and not permitting the rule to be applied to other counties is equivalent to the naming of the county seats of that class and is therefore void.

AM 826 creates a situation analogous to the situation in *Tiemann*, where the applicability of the legislation involving the establishment of municipal courts was limited by the population requirements tied to a census produced years earlier. In *Tiemann*, the practical effect was that the legislation applied to only two cities out of twenty-two, and froze out the remaining twenty. In the present case, while drafted to give the appearance of inclusiveness, AM 826 does just the opposite. Under AM 826, the practical effect is that the legislation applies only to those school districts which existed on November 30, 2005.

In determining whether a class is closed, the Nebraska Supreme Court is not limited to the face of the legislation, but may consider the act's application. *Haman* at 717, 467 N.W.2d at 849. If the prospect that others will fall under the act is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment. *Id.* at 718, 467 N.W.2d at 849. Applying those standards, it appears to us that only a finite number of school districts fall within each statutory class set out above. No other school district can be added to the classifications in the amendment, or come under its operation because of the specified time, "November 30, 2005," set out in the amendment. As a result, we believe that it can be effectively argued that AM 826 creates permanently closed statutory classes in violation of art. III, § 18. Our conclusion in that regard is consistent with previous opinions of this office where we have considered the constitutionality of legislation containing classifications based upon specified times. See, e.g., *Op. Att'y Gen. No. 01017* (April 19, 2001) (Legislation which extended ethanol credits to certain facilities "existing on or before December 31, 2000" constituted a closed class in contravention of art. III, § 18 of the Nebraska Constitution); *Op. Att'y Gen. No. 98003* (January 9, 1998) (Bill which

granted supplemental retirement benefits only to retirees who retired prior to a certain date was special legislation); Op. Att'y Gen. No. 97026 (April 29, 1997) (Bill which granted supplemental pension benefits only to retirees having twenty or more years of service as of the effective date of the act was special legislation).

B. Additional arguments

Proponents of AM 826 have advanced a number of arguments for the proposition that the amendment is constitutional. We will discuss those various arguments briefly.

First, it has been suggested that AM 826 does not create a permanently closed class because all school districts recreated by the amendment are subject to dissolution under existing statutes, or because the "class" of school districts at issue is subject to increase under a variety of other statutory provisions, e.g., Neb. Rev. Stat. §§ 79-403, 79-499, etc. This office has consistently argued throughout the course of the Class I litigation that recreation of Class I school districts was possible under the previous statutory framework, should LB 126 be repealed. However, the question in this instance is not whether other statutes currently in effect by virtue of the repeal of LB 126 will allow Class I districts to be dissolved or allow more Class I districts to be recreated. The question is whether, under AM 826, the number of school districts within each statutory class can be increased.³ Under the amendment, the answer to that latter question is "no," because each classification created by AM 826 is limited by a date certain—November 30, 2005.

It has also been suggested that AM 826 does not create any classifications, it merely creates political subdivisions and specifies their boundaries, which the Legislature has unquestioned authority to do.

The Legislature's power, as it relates to the common schools in Nebraska, is found in art. VII, § 1 of the Nebraska Constitution, which states:

The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.

In construing that constitutional provision, the Nebraska Supreme Court stated:

This provision of the Constitution leaves all matters pertaining to schools and school districts, their creation, dissolution, government, and control with the Legislature. In all such matters the State is supreme.

Farrell v. School Dist. No. 54, Lincoln County, 164 Neb. 853, 858, 84 N.W.2d 126, 131 (1957) (emphasis added). Therefore, we have argued that school districts are entirely creatures of statute, and can be created or abolished by the Legislature as it wishes.

However, AM 826 does more than simply create school districts or specify their boundaries, as is the case with the Nebraska statutes pertaining to counties. See Neb. Rev. Stat. §§ 22-101 through 22-108 (1997, Cum. Supp. 2006). Instead, as discussed in detail above, AM 826 creates classifications among school districts, and treats one group of districts differently than another. For example, under that legislation, certain school districts in existence on November 30, 2005, which were affected by LB 126 could exceed particular budget limits, while other school districts could not. Therefore, we believe that those classifications in AM 826 are subject to the constitutional provisions relating to special legislation.

Finally, proponents of AM 826 rely on Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121 (1967), for the argument that creation of school districts falls under the special legislation provisions of art. XII, § 1 of the Nebraska Constitution, rather than the special legislation provisions of art. III, § 18. The proponents offer that argument because art. XII, § 1 contains an exception for corporations organized for "charitable, educational, penal or reformatory purposes."

The pertinent portions of art. XII, § 1 of the Nebraska Constitution provide as follows:

The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, * * *. No corporations shall be created by special law, nor their charters be extended, changed or amended, except those corporations organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state.

(Emphasis added). The Frye case involved a taxpayer's challenge to the constitutionality of a statute creating educational service units in Nebraska. The plaintiff claimed that the bill creating those units, which were educational in purpose and which supported school districts, created corporations by an unconstitutional special law. The court ultimately rejected that claim, and held that educational service units fit within the exception created in art. XII, § 1 by the language emphasized above. In its discussion of that issue, the court stated, "[p]laintiffs' interpretation would prohibit the legislative formation of school districts, which are corporations under our law." Frye at 82, 152 N.W.2d at 128. The proponents of AM 826 point to Frye and the specified constitutional language, and argue that the amendment merely creates school districts, and therefore, it cannot constitute special legislation under art. XII, § 1. Those proponents also seem to argue, on the basis of Frye, that art. III, § 18 of the Nebraska Constitution does not apply to school districts, and that they are governed solely by art.

XII, § 1.

We find the proponents' arguments based upon the Frye case unpersuasive. First of all, the legislation at issue in that case provided, in part:

Sec. 1. In order to provide supplementary educational services to local school districts, there are hereby established nineteen educational service units. The official name of such units shall be Educational Service Unit No. ___ of the State of Nebraska, the individual number thereof to be determined as provided in section 2 of this act.

Sec. 2. The educational services units established by section 1 of this act shall be as follows:

- (1) The counties of Cedar, Dixon, Dakota, Wayne, Knox, and Thurston;
- (2) The counties of Cuming, Burt, Dodge, and Saunders;
- (3) The counties of Washington, Douglas, Sarpy, and Cass;

* * *

1965 Neb. Laws LB 301, §§ 1, 2. Obviously, that statutory language from 1965 is much different than the language at issue in AM 826, because it only creates educational service units and specifies their boundaries. In contrast, as discussed previously, AM 826 goes beyond the mere creation of school districts, and establishes classifications of those districts which are treated differently in the legislation. Therefore, we do not believe that the rationale from the Frye case applies to AM 826. Moreover, art. III, § 18 of the Nebraska Constitution provides that "[t]he Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Providing for the management of Public Schools." That latter language certainly does not support the notion that legislation affecting school districts is not governed by art. III, § 18. In fact, many of the provisions of AM 826 could be fairly characterized as "providing for the management of public schools," e.g., Section 13 of the amendment which pertains to contracts rights of certificated employees.

IV. CONCLUSION

There are no Nebraska cases which deal with the precise facts and issues presented by your opinion request. Therefore, as is often the case with this type of inquiry, our "opinion" is really our best estimate of what Nebraska courts would do with the questions under consideration. In that regard, we believe that the better analysis in this instance is that AM 826 involves a closed class in contravention of art. III, § 18 of the Nebraska Constitution. However, we also cannot say, with absolute certainty, that our courts might not agree with some of the arguments presented by the proponents of AM 826, particularly those arguments based upon art. XII, § 1 of the Nebraska

Constitution.

¹ For purposes of this opinion, a detailed analysis of the state court litigation which sought to declare portions of LB 126 unconstitutional is unnecessary. However, in *Pony Lake School District 30 v. State Committee for the Reorganization of School Districts*, 271 Neb. 173, 710 N.W.2d 609 (2006), cert. denied, 126 S. Ct. 2058 (May 15, 2006), the Nebraska Supreme Court upheld the constitutionality of LB 126 in the face of multiple constitutional challenges to that legislation by its opponents. There is also a federal case on appeal in the Eighth Circuit Court of Appeals that may have some effect on any proposed legislation relating to the reestablishment of Class I school districts. In *Nolles, et al. v. State Committee, et al.*, No. 06-4093NE, a different set of plaintiffs filed an action in the federal district court in Nebraska seeking a declaration that the issuance of dissolution orders under LB 126 violated the plaintiffs' constitutional rights and that those orders are null and void for that reason. The federal district court held that plaintiffs' claims were precluded by the earlier state court litigation, and were without merit. If the district court's conclusion is overturned by the Eighth Circuit, the orders of the State Committee may be rendered null and void, thus possibly recreating Class I districts as they existed on November 30, 2005. The *Nolles* case is currently set for oral argument in the Eighth Circuit on May 17, 2007.

² We note that the county clerks are responsible for maintaining the official records of school district boundaries, not the NDE. See Neb. Rev. Stat. § 79-490 (2003).

³ In that regard, the Nebraska Supreme Court stated in *Haman* that "[i]n deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation." *Haman* at 717, 467 N.W.2d at 849 (emphasis added).

Sincerely,
 JON BRUNING
 Attorney General
 (Signed) Dale A. Comer
 Assistant Attorney General
 Chief, Legal Services Bureau
 (Signed) Leslie S. Donley
 Assistant Attorney General

c: Patrick J. O'Donnell
 Clerk of the Legislature
 05-502-21

MOTION - Suspend Rules

Senator Flood renewed his motion, found on page 1270, to suspend Rule 8, Section 5, to permit Final Reading of LB 701 and LB 701A.

The Flood motion to suspend the rules prevailed with 39 ayes, 2 nays, and 8 present and not voting.

BILLS ON FINAL READING

Dispense With Reading at Large

Pursuant to Rule 6, Section 8, the Legislature approved the dispensing of the reading at large of LB 701 with 41 ayes, 3 nays, and 5 present and not voting.

The following bill was put upon final passage:

LEGISLATIVE BILL 701. With Emergency.

A BILL FOR AN ACT relating to natural resources; to amend sections 2-3231, 46-601.01, 46-609, 46-644, 46-702, 46-707, 46-1212, and 66-1345.02, Reissue Revised Statutes of Nebraska, and sections 2-945.01, 2-958.02, 2-3202, 2-3225, 13-808, 13-2530, 46-229.04, 46-602, 46-715, 61-210, 66-1345, 66-1345.01, and 77-3442, Revised Statutes Cumulative Supplement, 2006; to create the Riparian Vegetation Management Task Force; to provide and change powers and duties; to provide for grants for vegetation management programs; to provide for bonds for ground water management; to authorize an occupation tax and an additional property tax levy; to change and eliminate provisions relating to irrigation and regulation of water and water wells; to define and redefine terms; to create a fund; to change excise taxes on certain crops and distribution of the proceeds of such taxes; to provide for transfers of funds; to harmonize provisions; to provide severability; to repeal the original sections; and to declare an emergency.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass with the emergency clause attached?'"

Voting in the affirmative, 43:

Adams	Engel	Heidemann	Louden	Pirsch
Aguilar	Erdman	Howard	McDonald	Raikes
Ashford	Fischer	Hudkins	McGill	Rogert
Avery	Flood	Janssen	Mines	Schimek
Burling	Friend	Johnson	Nantkes	Stuthman
Carlson	Fulton	Karpisek	Nelson	White
Christensen	Gay	Kopplin	Pahls	Wightman
Cornett	Hansen	Kruse	Pankonin	
Dierks	Harms	Langemeier	Pedersen	

Voting in the negative, 0.

Present and not voting, 6:

Chambers	Lathrop	Synowiecki
Dubas	Preister	Wallman

A constitutional two-thirds majority having voted in the affirmative, the bill was declared passed with the emergency clause and the title agreed to.

The following bill was read and put upon final passage:

LEGISLATIVE BILL 701A. With Emergency.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 701, One Hundredth Legislature, First Session, 2007; and to declare an emergency.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass with the emergency clause attached?'"

Voting in the affirmative, 44:

Adams	Engel	Heidemann	Lathrop	Pedersen
Aguilar	Erdman	Howard	Louden	Pirsch
Ashford	Fischer	Hudkins	McDonald	Raikes
Avery	Flood	Janssen	McGill	Rogert
Burling	Friend	Johnson	Mines	Schimek
Carlson	Fulton	Karpisek	Nantkes	Stuthman
Christensen	Gay	Kopplin	Nelson	White
Cornett	Hansen	Kruse	Pahls	Wightman
Dierks	Harms	Langemeier	Pankonin	

Voting in the negative, 0.

Present and not voting, 5:

Chambers	Dubas	Preister	Synowiecki	Wallman
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A constitutional two-thirds majority having voted in the affirmative, the bill was declared passed with the emergency clause and the title agreed to.

MOTION - Override Veto on LB 415

Senator Harms renewed his motion, found on page 1297, that LB 415 becomes law notwithstanding the objections of the Governor.

SPEAKER FLOOD PRESIDING

Pending.

SPEAKER SIGNED

While the Legislature was in session and capable of transacting business, the Speaker signed the following: LBs 701 and 701A.

MOTION - Override Veto on LB 415

Senator Harms renewed his motion, found on page 1297 and considered in this day's Journal, that LB 415 becomes law notwithstanding the objections of the Governor.

Senator Erdman moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 31 ayes, 4 nays, and 14 not voting.

Senator Harms moved for a call of the house. The motion prevailed with 35 ayes, 0 nays, and 14 not voting.

Senator Harms requested a roll call vote, in reverse order, on his motion to override the Governor's veto.

Whereupon the President stated: "The question shall be, 'Shall the bill pass notwithstanding the objections of the Governor?' "

Voting in the affirmative, 33:

Adams	Dubas	Harms	Lathrop	Raikes
Aguilar	Engel	Heidemann	Louden	Schimek
Ashford	Fischer	Howard	McDonald	Synowiecki
Avery	Flood	Janssen	McGill	White
Carlson	Fulton	Johnson	Nantkes	Wightman
Christensen	Gay	Kopplin	Pankonin	
Dierks	Hansen	Kruse	Preister	

Voting in the negative, 7:

Burling	Erdman	Karpisek	Wallman
Chambers	Friend	Langemeier	

Present and not voting, 8:

Hudkins	Nelson	Pedersen	Rogert
Mines	Pahls	Pirsch	Stuthman

Excused and not voting, 1:

Cornett

Having received a constitutional three-fifths majority voting in the

affirmative, the bill passed notwithstanding the objections of the Governor.

The Chair declared the call raised.

MOTION - Override Veto on LB 415A

Senator Harms renewed his motion, found on page 1297, that LB 415A becomes law notwithstanding the objections of the Governor.

Whereupon the President stated: "The question shall be, 'Shall the bill pass notwithstanding the objections of the Governor?' "

Voting in the affirmative, 35:

Adams	Engel	Heidemann	Louden	Preister
Aguilar	Fischer	Howard	McDonald	Raikes
Ashford	Flood	Janssen	McGill	Rogert
Avery	Fulton	Johnson	Nantkes	Schimek
Carlson	Gay	Kopplin	Pankonin	Synowiecki
Dierks	Hansen	Kruse	Pedersen	White
Dubas	Harms	Lathrop	Pirsch	Wightman

Voting in the negative, 6:

Burling	Erdman	Langemeier
Chambers	Karpisek	Wallman

Present and not voting, 7:

Christensen	Hudkins	Nelson	Stuthman
Friend	Mines	Pahls	

Excused and not voting, 1:

Cornett

Having received a constitutional three-fifths majority voting in the affirmative, the bill passed notwithstanding the objections of the Governor.

COMMUNICATION

April 26, 2007

The Honorable John Gale
Secretary of State
2300 State Capitol Building
Lincoln, NE 68509

Dear Mr. Secretary:

Pursuant to the provisions of 84-503, R.R.S., we are forwarding LB 415 and LB 415A with a certificate attached thereto signed by the President of the Legislature certifying the passage of LB 415 and LB 415A, notwithstanding the objections of the Governor.

Sincerely,
(Signed) Patrick J. O'Donnell
Clerk of the Legislature

PJO:jk
Enc.

CERTIFICATE

Legislative Bill 415 and LB 415A, having been returned by the Governor with his objections thereto, and after reconsideration having passed the Legislature by the constitutional majority, have become law this 26th day of April 2007.

(Signed) Michael Flood
President of the Legislature

SENATOR FRIEND PRESIDING**SELECT FILE**

LEGISLATIVE BILL 219. Senator Dierks offered the following amendment:

AM1135

- 1 1. Insert the following new section:
- 2 Sec. 3. Since an emergency exists, this act takes effect
- 3 when passed and approved according to law.
- 4 2. On page 2, line 7, strike the new matter and insert
- 5 "on or before July 15 for 2007 and on or before June 1 for all
- 6 other years".

The Dierks amendment was adopted with 28 ayes, 0 nays, 19 present and not voting, and 2 excused and not voting.

Advanced to E & R for engrossment.

LEGISLATIVE BILL 471. ER8078, found on page 1271, was adopted.

Advanced to E & R for engrossment.

LEGISLATIVE BILL 289. ER8077, found on page 1271, was adopted.

Advanced to E & R for engrossment.

LEGISLATIVE BILL 144. Advanced to E & R for engrossment.

LEGISLATIVE BILL 188. Advanced to E & R for engrossment.

LEGISLATIVE BILL 208. Advanced to E & R for engrossment.

GENERAL FILE

LEGISLATIVE BILL 629. Title read. Considered.

Committee AM987, found on page 1212, was considered.

Senator Dierks renewed his amendment, AM1053, found on page 1212, to the committee amendment.

The Dierks amendment was adopted with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

The committee amendment, as amended, was adopted with 37 ayes, 0 nays, 9 present and not voting, and 3 excused and not voting.

Senator Dierks withdrew his amendment, AM824, found on page 961.

Advanced to E & R for review with 36 ayes, 0 nays, 10 present and not voting, and 3 excused and not voting.

PRESENTED TO THE GOVERNOR

Presented to the Governor on April 26, 2007, at 11:07 a.m. were the following: LBs 701e and 701Ae.

(Signed) Jamie Kruse
Clerk of the Legislature's Office

COMMITTEE REPORTS Enrollment and Review

Correctly Engrossed

The following bills were correctly engrossed: LBs 73, 73A, 368, and 674.

ST9027

Enrollment and Review Change to LB 368

The following changes, required to be reported for publication in the Journal, have been made:

1. In the Erdman amendment, AM1065:
 - a. On page 4, line 9, "an" has been inserted before "entity" and "a" has been inserted before "trust"; and in line 10 "a" has been inserted before "governmental";
 - b. On page 5, line 4, "an" has been struck;
 - c. On page 22, line 8, an underscored comma has been inserted after "business"; in line 9 ", except that" has been inserted after "members"; and in line 10 "except" has been struck;
 - d. On page 25, line 27, "be" has been inserted after "to";
 - e. On page 26, line 1, "meetings" has been struck and "meeting" inserted;
 - f. On page 27, line 17, "26" has been struck and "56" inserted;
 - g. On page 29, lines 4 and 11, "member" has been struck and "members" inserted; and in line 21 "42" has been struck and "41" inserted;
 - h. On page 42, line 2, "shall" has been inserted after "and";
 - i. On page 46, line 19, "judiciously" has been struck and "judicially" inserted;
 - j. On page 47, line 25, "is" has been struck and "are" inserted;
 - k. On page 50, line 1, "in" has been inserted after "deliver";
 - l. On page 51, line 6, "shall" has been inserted after "association"; in line 7 "Shall discharge" has been struck and "Discharge" inserted; in line 21 "subdivision" has been struck and "subsection" inserted; and in line 22 "subsection" has been struck and "section" inserted;
 - m. On page 68, line 1, "To give notice" has been struck and "Notice" inserted;
 - n. On page 70, line 16, "a" has been struck;
 - o. On page 73, line 19, "as a result of the conversion" has been struck; and
 - p. On page 78, line 11, "and" has been inserted after "act".
2. On page 1, line 6, "to change taxation provisions as prescribed; to redefine terms; to harmonize provisions;" has been inserted after the semicolon.

ST9025

Enrollment and Review Change to LB 674

The following changes, required to be reported for publication in the Journal, have been made:

1. In the Mines amendment, AM1045, on page 8, line 14, "assign" has been struck and "assignee" inserted; and in line 19 "effective date of this act" has been struck and "operative date of this section" inserted.
2. On page 1, the matter beginning with "labor" in line 1 through line 3 and all amendments thereto have been struck and "consumer protection; to adopt the Credit Report Protection Act; to prohibit certain uses of social

security numbers; to provide a penalty; and to provide operative dates." inserted.

(Signed) Amanda McGill, Chairperson

RESOLUTION

LEGISLATIVE RESOLUTION 94. Introduced by Kopplin, 3.

PURPOSE: To examine the issues relating to the rapid urbanization of the Papillion Creek Watershed. Current research and measurements of urban growth have found that:

(1) On an annual basis, in the Papillion Watershed, three square miles of farm ground are converted to urban uses;

(2) County and regional planning authorities have determined that the entire watershed will be built out by 2040; and

(3) Engineering studies in the watershed have shown an increase of flood flow of twenty-five percent, jeopardizing over 750 homes and businesses in the watershed.

The issues to be addressed by this study shall include the review of the existing governmental collaborations in the watershed that seek to coordinate flood control, water quality, preservation of vulnerable ecosystems, development of wildlife habitats, and the costs of such efforts. Specifically, the study shall review the use of bonding and other financial mechanisms that would reduce the long-term cost and liability associated with the impact of urban growth on the taxpayers in the affected areas.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Natural Resources Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall convene a meeting of the appropriate representatives from each city and county in the Papillion Creek Watershed to discuss current collaboration efforts and agreements and methods for future coordination and collaboration and any potential legislation that may be necessary.

3. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislature.

Referred to the Executive Board.

AMENDMENT - Print in Journal

Senators Engel and Raikes filed the following amendment to LB 658: AM1046

(Amendments to E & R amendments, ER8064)

1 1. Insert the following new section:

2 Sec. 13. Section 79-234, Reissue Revised Statutes of

3 Nebraska, is amended to read:

4 79-234 (1) An enrollment option program is hereby
5 established to enable any kindergarten through twelfth grade
6 Nebraska student to attend a school in a Nebraska public school
7 district in which the student does not reside subject to the
8 limitations prescribed in section 79-238. The option shall be
9 available only once to each student prior to graduation unless (a)
10 the student relocates in a different resident school district, (b)
11 the option school district merges with another district, or (c) the
12 option school district is a Class I district. The option student
13 shall be given the option to attend school in another district at
14 the time of relocation or merger, upon completion of the grades
15 offered at the Class I district immediately preceding the merger if
16 the original option school district was a Class I district that
17 merged with another district, or upon completion of the grades
18 offered at the Class I district if the option school district is a
19 Class I district that has not merged with another district.

20 (2) The program shall not apply to (a) any student
21 who resides in a Class I district which has not affiliated and
22 which contracts or has contracted in either or both of the two
1 prior school years with another district or districts in such
2 student's grade level pursuant to section 79-598 or (b) any student
3 who resides in a district which has entered into an annexation
4 agreement pursuant to section 79-473, except that such student may
5 transfer to another district which accepts option students.

6 2. Amend the repealer, renumber the remaining sections,
7 and correct internal references accordingly.

UNANIMOUS CONSENT - Add Cointroducer

Senator Preister asked unanimous consent to add his name as cointroducer to LB 367. No objections. So ordered.

VISITORS

Visitors to the Chamber were Senator Heidemann's son, Bryan Heidemann; 21 eleventh- and twelfth-grade students and teachers from Ralston; 7 students and sponsor from Western Nebraska Community College, Scottsbluff; 51 fourth-grade students from Sacred Heart Elementary, Norfolk; Mark Masterton from Scotts Bluff County; 18 fourth-grade students, teacher, and sponsors from Fullerton; 60 fourth-grade students from Central City; Aidan Conway; and 88 fourth-grade students, teachers, and sponsors from Grace Abbott Elementary, Omaha.

The Doctor of the Day was Dr. Mike Myers from Lincoln.

ADJOURNMENT

At 12:08 p.m., on a motion by Speaker Flood, the Legislature adjourned until 10:00 a.m., Tuesday, May 1, 2007.

Patrick J. O'Donnell
Clerk of the Legislature