

June 10, 2020



NEBRASKA
APPLESEED
STAND UP FOR JUSTICE

This letter serves as a response to questions asked about the unilateral use and spending of Coronavirus Relief Funds (CRF) by the Governor’s office in response to COVID-19. As you know, due to the COVID-19 crisis, Congress passed the CARES Act, including CRF, to support states and localities in addressing urgent, pandemic-related needs. In May, Governor Ricketts announced his plans to determine funding priorities and spend CRF.

We fully appreciate the urgency and needs in addressing the coronavirus and its impacts, particularly in the areas of housing, food, unemployment, worker protection, and other basic needs. But, the Nebraska Constitution specifically dictates the duties and obligations of our branches of government, and it ensures separation of powers so that one branch may not encroach on the role and prerogatives of another.¹

In regards to the CRF from the CARES Act, it is our conclusion that the Legislature did not lawfully appropriate these funds. Thus, Governor Ricketts’ actions have exceeded his authority under the Nebraska Constitution and the Legislature must formally appropriate these funds for use.

Coronavirus relief funding and LB 294 (2019)

Pursuant to the CARES Act, Nebraska received \$1.25B in CRF, with \$166M going to Douglas County. On May 28, Governor Ricketts outlined his main categories for CRF priorities, including \$330M for small businesses, \$180M for state and local governments, and holding \$427M in reserve.

The Governor’s justification for such spending seems to be that the general appropriation bill, LB 294 (2019), appropriates CRF through its catch-all language aimed towards future, unknown and unreceived federal funds (“Any Federal Funds, not otherwise appropriated, any additional Federal Funds made available to the credit of the State Treasurer...are hereby appropriated to the expending agency designated by the federal government or, if none is designated, to such expending agency as may be designated by the Governor”).² In other words, the Governor claims

¹ *Smithberger v. Banning*, 129 Neb. 651 (1935).

² See *Legislative Bill 294*, § 257, 2019. “The receipts for FY2019-20 and FY2020-21 inuring to the several Federal Funds, together with any amounts held in account by the State Treasurer on June 30, 2019, are hereby credited to each of the funds respectively. Expenditure of Federal Funds appropriated in this act shall not be limited to the amount shown. *Any Federal Funds, not otherwise appropriated*, any additional Federal Funds made available to the credit of the State Treasurer, and any amounts on hand in any such Federal Funds on June 30, 2019, *are hereby appropriated to the expending agency designated by the federal government or, if none is designated, to such expending agency as may be designated by the Governor.*” (emphasis added). Note that the use of this exact language does not appear to be new, and has been used in the general appropriation bill by the Nebraska Legislature since at least 1991. Moreover, this specific language does not appear to have been used by any other state in

he can spend CRF because the funds were appropriated to him through this broad, general language under LB 294. This position is in conflict with Nebraska’s separation of powers doctrine and established precedent.

Separation of powers and appropriations

The Nebraska Legislature is empowered to make appropriations for the expenses of government.³ Indeed, the Legislature has “absolute power” over appropriations.⁴ “No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation and upon an account specifying each item. *No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law*, and on the presentation of a warrant issued as the Legislature may direct....”⁵ The Legislature may not delegate its authority to make appropriations decisions without setting rules or standards under which to do so, and it may not delegate appropriations authority for a future act of Congress.⁶

The Nebraska Supreme Court long ago determined that the meaning of the word appropriate is to, “set apart from the public revenue a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other.”⁷ This definition identified by the Nebraska Supreme Court is consistent with its analysis of our state constitution’s requirement that all appropriation of public funds by the Legislature be specific, meaning “a particular, a definite, a limited, a precise appropriation.”⁸

In order for an appropriation to be valid, it is clear that the nature of the appropriated funds, whether they are derived out of administrative fees or purely from taxes, are subject to the specific appropriation requirement, as long as the funds enter the state’s treasury and become part of the state’s funds.⁹ It is also clear that this constitutional provision requires every appropriation subject to this requirement to include both the purpose intended for such an appropriation, and an actual dollar amount in order to pass constitutional muster.¹⁰

The aforementioned attempted appropriation in LB 294 does not meet these constitutional standards. It does not contain a particular, precise, definite amount and does not specify any clear purpose for the expenditure of funds. As such, it is very likely that the appropriation in LB 294, as applied to the Governor’s expenditure of CRF, is an unconstitutional delegation of power prohibited by the Nebraska Constitution. It therefore does not and cannot represent a valid appropriation of CRF to the executive branch.

appropriating federal funds. The general appropriation of any unassigned federal funds to the Nebraska Governor to be designated to whatever agency he so chooses also does not appear to have ever been challenged in court.

³ Neb. Const. art. III, § 22.

⁴ *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 499-500 (1970).

⁵ Neb. Const. art. III, § 25 (emphasis added).

⁶ *Smithberger v. Banning*, 129 Neb. 651 (1935).

⁷ *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 94-95 (1896).

⁸ *State ex rel. Clinee v. Wallichs*, 16 Neb. 679 (1884).

⁹ *Bollen v. Price*, 129 Neb. 342, 348 (1935).

¹⁰ *Bollen v. Price*, 129 Neb. 342, 348 (1935).

The American Recovery and Reinvestment Act and CARES

The management of the CRF by Governor Ricketts stands in stark contrast to similar federal relief dollars from the American Recovery and Reinvestment Act (ARRA) of 2009. In response to the Great Recession, the ARRA provided \$52 million to Nebraska in State Fiscal Stabilization Funds for “public safety and other government services.”¹¹ The ARRA seemingly directed these funds to the governors of the states, by indicating each state would receive its Fiscal Stabilization Fund through “grants to the Governors of each state.”¹²

Nevertheless, the Nebraska Legislature separately and specifically appropriated the Fiscal Stabilization Funds from the ARRA, and did not leave them to the Governor’s discretion to designate to an expending agency.¹³ This legislative appropriation occurred even though the 2009 Nebraska appropriations bill included the same language in LB 294 now being used to argue that CRF have already been appropriated for the Governor’s use.¹⁴ In contrast to the ARRA, the CARES Act more directly provides relief funds to the state rather than the Governor (funding is given “to States, Tribal Governments, and units of local government” for “necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19”).¹⁵

The Emergency Management Act does not impact the requirements for appropriation

In addition, the Nebraska Emergency Management Act does not change the requirements for a legislative appropriation during a state of emergency. Neb. Rev. Stat. § 81-829.58 outlines the way the state may accept federal funds for emergency management. Although statute provides the Governor may accept federal funds for emergency management, such funds should be “remitted to the State Treasurer for credit to a separate and distinct fund.”¹⁶ Once placed in a separate and distinct fund, these funds are subject to the typical appropriation process described in the Nebraska Constitution and statutes.

The Legislature must appropriate coronavirus relief funds

It is very doubtful that LB 294 contains the constitutional requirements to make it a lawful appropriation, and thus the Governor lacks the authority to unilaterally utilize and spend CRF. It is therefore the Legislature’s duty and obligation to appropriate such funds before they can be utilized.

¹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Tit. XIV (2009) [hereinafter ARRA].

¹² *Id.* at 14001(e).

¹³ *See id.* at §174 (appropriating \$35 million of “General Fiscal Stabilization funds” for FY2009-10 and \$17 million for FY2010-11).

¹⁴ *Legislative Bill 315*, § 277 (2009).

¹⁵ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 5001(a), 134 Stat. 281 (2020).

¹⁶ *See* Neb. Rev. Stat. § 81-829.58. Note, two exceptions are outlined in statute to this requirement of remittance to a separate and distinct fund. The first exception, “unless otherwise specifically provided in the act of Congress,” does not apply because CARES expressly provides CRF funds to states and localities, not the Governor. *See* FN 15. Even if the second exception applies (“or as otherwise allowed and provided by state law”), it would require CRF funds be deposited in the Cash Reserve Fund pursuant to Neb. Rev. Stat. § 84-612(3), as federal funds for an undesignated general government purpose, making them subject to the normal appropriation process.

Sincerely,

NEBRASKA APPLESEED