

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

W. DON NELSON AND
JON H. OBERG,

Plaintiffs,

v.

NEBRASKA ENVIRONMENTAL
TRUST BOARD,

Defendant.

Case No.: _____

COMPLAINT

Plaintiffs allege as follows:

Parties and Venue

1. Plaintiffs W. Don Nelson and Jon Oberg are citizens and taxpayers of the State of Nebraska, residing in Lancaster County, Nebraska.

2. The Nebraska Environmental Trust Board (hereinafter "Board") is an entity of the executive branch of the State of Nebraska, situated in Lincoln, Nebraska, responsible for administering the Nebraska Environmental Trust (hereinafter, "Trust"), funded primarily from the Nebraska Lottery to conserve, enhance and restore natural environments in the state. Neb. Const., Art. III, § 24(3)(a)(ii); Nebraska Environmental Trust Act, Neb. Rev. Stat. §§ 81-15,167 *et seq.*

3. The Trust Board is comprised of fourteen members: five state agency heads and nine citizens appointed by the governor. Neb. Rev. Stat. § 81-15,170. Current Board Members are Jeff Kanger; Jim Hellbusch; John Orr; Felix B. Davidson; Paul Dunn; Robert Krohn; Rod Christen; Quentin Bowen; Sherry Vinton; Jim Douglas,

Director, Nebraska Game and Parks Commission; Steve Wellman, Director, Nebraska Department of Agriculture; Jim Macy, Director, Nebraska Department of Energy and Environment; Jesse Bradley, Acting Director, Nebraska Department of Natural Resources; and Dr. Gary Anthone, Director, Division of Public Health, Nebraska Department of Health and Human Services.

Grant Process under the Nebraska Environmental Trust Act

4. The Nebraska Environmental Trust Act establishes the Nebraska Environmental Trust Fund and the Nebraska Environmental Endowment Fund, from which the Trust Board is responsible for making annual grants to carry out the environmental purposes of the Act. Neb. Rev. Stat. §§ 81-15,174; 81-15,174.01, 81-15,175(1).

5. Applicants for annual Trust grants submit applications to the Board, and the Act prescribes the required method for the Board's evaluation of applications for grants: projects must meet statutory eligibility requirements and are ranked based on defined criteria to identify the most environmentally beneficial projects. Neb. Rev. Stat. §§ 81-15,175; 81-15,176.

6. The Board's Grants Committee makes initial determinations of eligibility of projects, ranks them according to their environmental benefits, and recommends funding levels for proposed grants. Board Regulations require the Grants Committee to report its recommendations to the Board at a public meeting at which the Board may adopt or revise the report to formulate its proposed list of grants. Once the Board's proposed list is developed, a public hearing is held on the proposed list. After the hearing,

the Board may revise the proposed list. Finally, the Board takes action by voting on the projects on the proposed list to determine the projects to be awarded Trust grants.

Board's 2020 Service Station Project Award

7. At the Board's February 4, 2020, quarterly meeting, the Grants Committee presented its report ranking projects and proposing funding levels for awards to 77 projects. After the Grant Committee presentation, Board Member Christen moved to deny funding to five projects that had been recommended for funding by the Grants Committee. Three of the projects proposed to be de-funded were sponsored by Ducks Unlimited, Inc.: a Platte River Watershed Conservation project that had been ranked 7th by the committee, a project to restore wetlands in the North Platte River valley ranked 23rd, and an Eastern Rainwater Basin environmental and habitat improvement project ranked 28th. A project that been ranked 30th, proposed by the Nebraska Land Trust to protect Bighorn Sheep and other wildlife habitat on a Pine Ridge ranch, and a saline wetlands project of the City of Lincoln Parks and Recreation Department, ranked 36th, were also proposed to be denied funding under the motion.

8. Mr. Christen's motion further proposed shifting funding from the five projects described above to Application # 20-137 (hereinafter "Service Station Project"), submitted by the Nebraska Department of Energy and Environment (hereinafter "NDEE") and Green Plains, Inc., a large ethanol producer; this project had been ranked 78th and was not recommended for funding by the Grants Committee.

9. The Service Station Project proposed granting Trust funds to pay half the purchase price and expense of buying ethanol pumps and storage tanks and installing

them in privately-owned, retail service stations, regardless of whether the service station business's own financial resources allowed it to purchase and install ethanol pumps and tanks at its facilities without Trust grant funding.

10. The motion to recommend shifting funding to the Service Station Project was seconded and after brief discussion, debate was cut off by a motion to call the question. The vote on the motion was seven in favor, two opposed and two abstaining.

11. Mr. Macy, Director of NDEE, stated he abstained from voting on the motion because NDEE was an applicant for the Service Station Project grant. Minutes of the February 4, 2020 meeting erroneously state that Mr. Macy voted in favor of the Service Station Project motion, which would have resulted in eight votes—a majority of the members of the Board; the minutes also state that Mr. Macy abstained from voting on the motion.

12. At its June 11, 2020, meeting, the Trust Board held its public hearing on the proposed grant list as it had been modified at the February 4 meeting; the June 11 meeting was held by videoconference and telephone because of the corona virus pandemic. Several members of the public objected to shifting funds from higher-ranked projects to the Service Station Project, but the Board did not move to revise the proposed list or vote on revising the proposed list after the public hearing.

13. Immediately following the public hearing at the June 11, 2020 meeting the board voted on grants for 2020; ballots setting forth the proposed grant list and recommendations for funding, including the shift of funding to the Service Station Project, had been distributed to the Board prior to the meeting..

14. Ballots stated that board members could vote “no” or abstain on the recommendation to fund or not fund any individual application; the ballot stated that by signing the ballot, the board member accepted all recommendations for funding grants except for those on which the Board member voted “no” or abstained.

15. Board members were instructed to send ballots electronically to the Trust staff during the meeting, but due to technological problems in transmitting votes, some board members had to call the staff by telephone and have staff members fill out their respective ballots.

16. Twelve Board members participated in the June 11 meeting and submitted ballots, which were tabulated during the meeting by Trust staff. After tabulation, staff announced that all grant recommendations had “passed.” Results of the voting were not otherwise disclosed at the June 11, 2020 meeting, and although staff stated that the results would be reflected in the minutes of the meeting, the minutes state only that all grant recommendations “passed.”

17. The Board members’ completed ballots voting on the proposed grant list disclose that on the question of whether to approve the recommendation to fund the Service Station Project, seven members voted to approve (i.e., they did not abstain or vote no on the project), two voted “no”, and three abstained.

Propriety of Enjoining Unauthorized Expenditure of State Funds

18. Defendant Board’s expenditure of state funds by disbursing funds for grants that were not approved and are not authorized by the Nebraska Environmental Trust Act

and other provisions of law would result in irreparable harm to plaintiffs as Nebraska resident taxpayers and to other taxpayers of the state.

19. Plaintiffs have no adequate remedy at law to prevent Defendant Board's unauthorized expenditure of funds in violation of the Nebraska Environmental Trust Act and other provisions of law.

**FIRST CAUSE OF ACTION
VIOLATIONS OF NEBRASKA OPEN MEETINGS ACT
TRUST BOARD MEETING OF FEBRUARY 4, 2020**

Paragraphs 1-19 are re-alleged as if fully set forth at this point.

20. The Trust Board is the governing body of a state agency or other body required to comply with the Nebraska Open Meetings Act, and its meeting of February 4, 2020, was a public meeting subject to the Act. Neb. Rev. Stat. § 84-1409.

21. The Trust Board was required to keep accurate minutes of the February 4, 2020 meeting showing the substance of discussions and reflecting actions taken on motions, stating whether and how each member present voted. Neb. Rev. Stat. § 84-1413.

22. The minutes of the February 4, 2020, Board meeting erroneously and misleadingly state that Mr. Macy voted "yes" on the motion to shift funding to the Service Station Project, besides indicating that he abstained. At the following Board meeting of June 11, 2020, the Board made other corrections to the minutes of its February 4 meeting, but failed to correct the erroneous record stating that Mr. Macy voted in favor of the motion, or to state the reason for his abstention, and approved the minutes of the February 4 meeting with the erroneous record of the votes on that motion.

23. By indicating that eight of its members voted in favor of the motion, the Board misled the public by indicating that a majority of the fourteen-member Board voted in favor of the motion, and that the motion had passed; in fact, only seven members of the Board voted in favor and the motion failed.

24. The Trust Board failed to comply with the Open Meetings Act by failing to keep minutes stating accurately how each member voted on the motion to shift funding to the Service Station Project, and failing to state the reason for Mr. Macy's abstention on the vote, and the vote is therefore voidable under the Nebraska Open Meetings Act.

**SECOND CAUSE OF ACTION
FAILURE TO OBTAIN MAJORITY APPROVAL
AUTHORIZING EXPENDITURE OF STATE FUNDS
TRUST BOARD MEETING OF FEBRUARY 4, 2020**

Paragraphs 1-24 are re-alleged as if fully set forth at this point.

25. Neb. Rev. Stat. §81-15,173 (1) gives the Board the power and duty to "Adopt bylaws to govern the proceedings of the board. . . ."

26. Pursuant to the Nebraska Environmental Trust Act, the board has adopted Trust Bylaws, Art. III, Sec. 3, which states: "**A simple majority of the members of the Board** shall constitute a quorum and **shall be required to take action and make determinations** (Emphasis added)."

27. The Trust Board consists of 14 members, and a simple majority of the members requires eight members.

28. At the Board's February 4, 2020, meeting, the vote on Mr. Christen's motion to shift funding from higher-ranked projects to the Service Station Project was

seven “yes,” two “no,” and two abstaining; seven members’ affirmative votes is fewer than a majority of the members of the Trust Board required to take action and make determinations, so the motion failed to pass.

29. The Trust’s purported vote at the February 4, 2020 meeting shifting recommended funding to the 78th-ranked Service Station Project was therefore invalid and void, and expenditure of state funds on the Service Station Project is not authorized by the Nebraska Environmental Trust Act.

**THIRD CAUSE OF ACTION
VIOLATION OF NEBRASKA OPEN MEETINGS ACT
TRUST BOARD MEETING OF JUNE 11, 2020**

Paragraphs 1-29 are re-alleged as if fully set forth at this point.

30. The Trust Board meeting of June 11, 2020, was a public meeting subject to the requirements of the Nebraska Open Meetings Act.

31. The Nebraska Open Meetings Act requires that any action taken on a motion requires a public roll call or viva voce vote of the public body in open session, and the record of the meeting must state how each member voted, or if they were absent or did not vote on the motion; election of leadership within the body is the only vote permitted to be by secret ballot. Neb. Rev. Stat. § 84-1413.

32. The Trust Board’s secret ballot vote on grant recommendations and its failure to publicly disclose the vote of each Board member cast at its June 11, 2020 meeting on the proposed projects violated the Open Meetings Act; accordingly, the June 11, 2020 vote of the Board on 2020 grants is void.

**FOURTH CAUSE OF ACTION
FAILURE TO OBTAIN MAJORITY APPROVAL
AUTHORIZING EXPENDITURE OF STATE FUNDS
TRUST BOARD MEETING OF JUNE 11, 2020**

Paragraphs 1-32 are re-alleged as if fully set forth at this point.

33. At the Trust Board meeting on June 11, 2020, twelve Board members completed secret ballots on which they voted on the Board recommendations for 2020 grant funding.

34. On the recommendation to fund the Service Station Project, seven Trust Board members neither voted “no” nor abstained, thereby voting to accept the recommendation to fund the Service Station Project grant; two members voted “no” on funding the Service Station Project grant, and three abstained from voting on the Service Station Project.

35. Under the, Trust Bylaws, Art. III, Sec. 3, a simple majority of the Trust Board members was required in order to take action on or make a determination to fund the Service Station Project grant.

36. A simple majority of the 14 members of the Board requires eight votes in favor to take action or make a determination.

37. Because fewer than a simple majority of the Board voted to approve the grant for the Service Station Project, a grant for that project was not authorized under the Nebraska Environmental Trust Act, and state funds may not legally be expended to fund the Service Station Project.

**SIXTH CAUSE OF ACTION
EXPENDITURE OF STATE FUNDS
FOR PRIVATE BENEFICIARIES THAT CAN AFFORD TO PAY COSTS OF THOSE
BENEFITS WITHOUT ASSISTANCE**

Paragraphs 1-37 are re-alleged as if fully set forth at this point.

38. The Nebraska Environmental Trust Act establishes mandatory criteria for eligibility of projects for grant assistance from the Trust, including:

(c) **The grants shall not pay for projects which provide primarily private benefits**

(d) **The grants shall not pay for projects which have direct beneficiaries who could afford the costs of the benefits without experiencing serious financial hardship**

Neb. Rev. Stat. §81-15,176(2) (emphasis added).

39. Trust Board Regulations clarify and implement these criteria in Title 137, Chapter 5:

0.1.04 The fund shall not pay for private benefits or provide assistance to projects or portions of projects whose benefits are primarily private in nature. Compensation for contributions made to a project, such as land or land rights, shall not constitute payment for private benefits.

0.1.06 The fund shall not pay for projects to the extent such projects have direct beneficiaries who could afford the costs of the benefits without experiencing serious financial hardship. For purposes of this section, “direct beneficiaries” shall not be deemed to include a person who receives incidental benefits from a project which primarily benefits the general public.

(Emphasis added).

40. The Service Station Project would expend State funds to directly benefit privately-owned retail service stations by paying to acquire and install ethanol pumps and tanks for their use in their profit-making businesses. The Service Station Project proposes

to subsidize these private enterprises with state funding without consideration of any service station's ability to afford those costs on its own without suffering significant financial hardship.

41. The Service Station Project's proposed expenditure of state funds to benefit these private businesses regardless of whether they have adequate resources to pay the costs of the benefits themselves without serious financial hardship violates the Nebraska Environmental Trust Act and its implementing regulations.

WHEREFORE,

Plaintiffs W. Don Nelson and Jon H. Oberg pray as follows:

1. For an order declaring the Trust Board violated the Nebraska Open Meetings Act, Neb. Rev. Stat. § 84-1413, by inaccurately recording the results of the vote on the motion to shift proposed funding to the Service Station Project grant at the Trust Board meeting of February 4, 2020, creating the misleading impression that a majority of eight Board members had approved the motion;

2. For an order declaring void the purported shift of proposed funding to the Service Station Project grant at the Trust Board meeting of February 4, 2020, because of failure to obtain approval of at least a simple majority of the members of the Board;

3. For an order declaring void the awards of the Trust's 2020 grants at the Board meeting of June 11, 2020, for any and all of the following reasons:

- a. Invalidity of the purported Trust Board approval of the motion shifting funding from higher-ranked grants to the Service Station Project grant, for reasons set forth in Paragraph 2 of the prayer;

- b. Voting by secret ballot on grants rather than conducting a roll call or viva voce vote, and failing to disclose and record members' votes as required by the Nebraska Open Meetings Act, Neb. Rev. Stat. § 84-1413;

4. For an order declaring void the purported approval of the Service Station Project grant at the Board meeting of June 11, 2020, for any and all of the following reasons:

- a. Invalidity of the purported Trust Board approval of shifting recommended funding from higher-ranked grants to the Service Station Project grant, for reasons set forth in Paragraph 2 of the prayer;
- b. Invalidity of the purported awards of 2020 grants at the Board's June 11, 2020 meeting, for the reasons set forth in Paragraph 3 of the prayer;
- c. Failure to obtain approval of at least a simple majority of the members of the Trust Board for the Service Station Project grant.
- d. Violation of the eligibility criterion in the Nebraska Environmental Trust Act, Neb. Rev. Stat. § §81-15,176(2)(c), and implementing regulations that prohibit expending grant monies to pay for private benefits;
- e. Violation of the eligibility criterion in the Nebraska Environmental Trust Act, Neb. Rev. Stat. § §81-15,176(2)(d), and implementing regulations that prohibit expending grant monies to pay for projects to the extent that the direct beneficiaries of the project are able to afford the costs of the benefits without experiencing serious financial hardship;

5. For permanent injunctive relief prohibiting expenditure of Trust funds in payment for the Service Station Project, for the reasons set forth in Paragraphs 2-4 of the prayer;

6. Awarding reasonable attorneys' fees and costs to Plaintiffs in accordance with the Nebraska Open Meetings Act, Neb. Rev. Stat. §1414(3).

7. For such other legal and equitable relief as the court deems appropriate in the premises.

Dated: September 30, 2020.

W. DON NELSON and JON OBERG,
Plaintiffs

By: /s/ Rodney M. Confer
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PRAECIPE

TO THE CLERK OF THE DISTRICT COURT:

Please issue summons for service by Plaintiffs' Attorney on the Nebraska Attorney General's Office, 2115 State Capitol, Lincoln, NE 68509 by Certified Mail, Return Receipt requested.

/s/ Rodney M. Confer
Rodney M. Confer