By Russ Pankonin

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Last week's trial on the constitutionality of the occupation tax created in LB 701 proved anti-climatical.

Already behind in his schedule for the day, Judge Robert R. Otte asked both sides if they had any new information on the case for him.

Attorneys for the two sides offered little comment so the judge told them to make any remaining arguments in final briefs. In about five minutes, the trial was over.

Final briefs are due by the end of the year, after which Otte will consider the case.

Only the judge has any idea of how long it will take to reach a decision.

People on both sides of the case hope his decision will come early in 2010.

The occupation tax was created for the Republican River Basin as part of LB 701. The bill, sponsored by 44th District Sen. Mark Christensen of Imperial, passed in 2007.

The bill also contained a provision allowing for an additional 10-cent property tax levy in the basin to pay for compact compliance efforts.

A McCook-based group, called Friends of the River, challenged the constitutionality of the property tax.

A district court ruled the property tax portion of LB 710 was closed-class legislation only available in the basin. Thereby, it was declared unconstitutional.

In an appeal to the Nebraska Supreme Court, the justices said the property tax represented a local tax collected for a state purpose–compact compliance.

On that basis, the justices said the property tax was unconstitutional. The high court did not address the issue of closed class legislation.

After the Supreme Court made their ruling in February, Friends of the River challenged the occupation tax on the same two grounds as before.

Regardless of how Judge Otte rules, the matter will likely end up back in the Nebraska Supreme Court on appeal.

NRDs Counting On

Occupation Tax

Natural resource districts in the basin still believe the occupation tax will stand the test of being a local tax for a state purpose.

However, it could still be classified as a closed class, making it unconstitutional.

Christensen said one of his goals going into this year's 60-day Legislative session centers on getting the occupation tax fixed so that it is no longer closed-class legislation.

After a recent ag forum attended by senators, Christensen said there's growing momentum among senators to fix the occupation tax to insure it's not a closed class.

He plans to introduce legislation that will do just that, by crafting language to avoid a closed-class situation.

He said senators don't seem to mind the Republican basin getting the occupation tax back, but they don't necessarily want it for their own NRDs.

Christensen said he's looking at language that would allow an occupation tax if a majority of NRDs in a river basin require mandatory, regulatory metering on irrigation water use.

Tax for a State Purpose?

One thing that could derail the occupation tax would be a court ruling saying the occupation tax is nothing more than a local tax for a state purpose.

Some contend the occupation tax is the same as a property tax levy while others say it is not because it only affects irrigated acres.

If that happens, the NRDs' hopes for some type of funding mechanism for compact compliance activities could be dashed.

The basin NRDs are already looking at a variety of measures, including augmentation, targeted retirement and the leasing of surface water.

These could help avoid severe regulatory measures when a water-short year occurs.

The Nebraska Department of Natural Resources is requiring the basin NRDs to choose what kind of regulatory option they would implement in a water-short year to insure compliance.

While DNR said the regulatory measures only come into play as a last resort, the NRDs want to do whatever possible to avoid those measures.

Funding from an occupation tax would provide money to pay for compliance efforts.

Decision Pending On

Property Tax

The basin NRDs and taxpayers in the basin are still waiting for a decision on how to repay the property tax declared unconstitutional.

The tax was collected one year and county treasurers continue to hold the money.

No state statutes exist on how the taxes should be repaid, nor who is entitled to the repayment.

The basin NRDs filed suit against patrons who requested their property taxes back in an effort to get some direction from the courts.

The three suits were merged into one but the judge handling the case has yet to rule on what direction the NRDs should take.