

### **By Russ Pankonin**

*The Imperial Republican*

Eighteen months after a district court ruled the occupation tax in LB 701 was constitutional, the Nebraska Supreme Court affirmed that ruling in an opinion released Friday.

In March 2010, Lancaster County District Court Judge Robert Otte ruled the occupation tax created in LB 701 was constitutional.

Within days, plaintiffs in the case appealed the ruling. The Nebraska Supreme Court took the appeal directly, without it going through the Court of Appeals.

The landowner plaintiffs in the case claimed the occupation tax in LB 701 was unconstitutional because it was:

- A property tax for state purposes;
- A tax paid by basin taxpayers that unfairly benefitted other taxpayers in the state, since they claimed compliance efforts in the basin are a state responsibility; and was
- Special or closed class legislation.

#### Tax for State Purpose

LB 701, passed by the Legislature in 2007, gave natural resource districts (NRDs) in the Republican River Basin the authority to assess an occupation tax of up to \$10 per-irrigated-acre.

The proceeds are to be used to pay for activities to keep Nebraska in compact compliance with Kansas over Republican Basin water use.

The high court agreed with the district court that the occupation tax in LB 701 was an excise tax, not a property tax.

The Supreme Court said property taxes are based on the value of the land being taxed while an excise tax does not take property values into consideration.

They noted the occupation tax in LB 701 was not associated with land values but rather on the “activity of irrigation.”

As a result, they concluded it was not a property tax for state purposes.

#### Unfair Benefit to Others

In looking at unfair benefit, the high court noted the Legislature is prohibited from releasing either people or property from contributing a proportionate share of tax.

The landowners claimed the entire state benefits from compact compliance with Kansas. By having the occupation tax paid only by Republican Basin irrigators, plaintiffs said it imposed a disproportionate share on them.

The court said that while the state may benefit, the irrigators paying the tax derive a direct benefit from compact compliance projects paid for with occupation taxes.

With irrigators receiving benefit from the occupation taxes they remit, the court said the benefit gained by the state does not create unfair benefit.

“The landowners did not meet their burden of establishing that the occupation tax” created an unfair benefit, which would violate the constitution, the Supreme Court said in the opinion.

#### Special or Closed Class

In May 2008, Lancaster District Court Judge Paul Merritt, Jr., ruled the special 10-cent property tax levy authority in LB 701 was unconstitutional.

Merritt said the law authorizing the levy targeted only the Republican River Basin.

As a result, he said this represented a special class of legislation, or a closed class that others

couldn't join, making that portion of the law unconstitutional.

Merritt said LB 701 property tax levy was only applicable to “a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that includes one or more irrigation districts within the compact basin.”

Merritt ruled it was “not reasonably probable” that the state would enter into such a compact in the future as described in the bill.

While it's theoretically possible, he said it's not probable. As a result, he said this represented special legislation for a closed class, making it unconstitutional.

This decision was appealed to the Supreme Court in 2008. In their 2009 opinion, they did not address whether it was a closed class or not. Instead, they said the property tax levy was a tax for a state purpose—compact compliance.

In this latest appeal, landowner plaintiffs claimed LB 701 created two distinct classes: property owners inside the basin subject to occupation tax and property owners outside the basin who are exempt from the occupation tax.

Flat out, the Supreme Court said the class of property owners outside the basin “is not a closed class.”

The landowners argued it was highly improbable that Nebraska would enter into another multi-state compact like the one affecting the Republican Basin.

However, the Supreme Court disagreed.

Because of the complex nature of water policy and interstate water management, the court said they could not declare that it would be improbable for Nebraska and its neighbors to use compacts in the future to manage river flow.

They added the authority in LB 701 to issue bonds for compliance activities and levy an occupation tax to pay for those bonds is not a “special favor” to NRDs in the basin.

### Local Reaction to Decision

Jasper Fanning, manager of the Upper Republican NRD, said it was “the decision we've always expected” in the end.

He said this gives the NRDs in the basin a firm mandate to use the occupation tax to fund compliance projects.

“It definitely solidifies our ability to fund projects to comply (with the compact),” he said.

The URNRD has been collecting the occupation tax for the past three years. Proceeds from the tax played a key role in funding the purchase of 4,000 acres in Dundy County which will be developed into a river flow augmentation project.

Senator Mark Christensen of Imperial, who originally introduced LB 701 and pushed for its passage in 2007, said he's “very pleased with the outcome.”

Christensen was also key in the passage of LB 862 at the end of the 2010 session.

The language passed in LB 862 opened up the use of an occupation tax to any natural resources district (NRD) in the state, provided they met certain conditions.

This language opened up the class to insure the occupation tax could still be used if the one created in LB 701 didn't survive the constitutional challenge.