

LB 701: Is it an Answer to Nebraska's Republican River Problems?

By Katherine Kalisek-Vogel

For the past half century, Nebraska has faced significant problems managing its water resources in the Republican River Basin. Beginning with the Republican River Compact of 1943, Nebraska, Kansas and Colorado have attempted to equitably divide basin waters to provide stable water resources for agricultural, industrial and domestic purposes in each state.

Today, however, Nebraska is using more than its allotted share under the compact resulting in Kansas receiving less water than it is entitled to. In hopes of preventing litigation with Kansas, Nebraska enacted Legislative Bill 701, designed to alleviate Nebraska's Republican River water shortage by allowing Republican basin Natural Resources Districts (NRDs) to purchase or lease water rights from basin water users thereby ensuring additional water reaches Kansas.

Signed into law on May 1, 2007, LB 701 grants Republican River NRDs permission to lease or acquire surface water and groundwater rights using bonds issued to outside investors. In order to fund repayment of the bonds, NRDs can levy property taxes, up to 10 cents per \$100 dollars of property valuation, and place fees on irrigated acres in the form of an occupation tax, up to \$10 per acre.

Many believe LB 701 is a great answer to Nebraska's compact problems. Nebraska needs to find a way to ensure that Kansas receives its allotted amount of the Republican waters pursuant to the compact and purchasing and leasing water rights so more water stays within the main stream of the Republican River appears, on its face, to be a good solution to the problem. Kansas gets water and Nebraska water users get paid not to use their water rights.

However, Nebraska water users are paid with money raised through property taxes and the Nebraska Constitution forbids the state to levy a property tax for state purposes. This raises the question whether, by granting Republican River NRDs the authority to levy a property tax in order to comply with the compact, the state is in fact levying a property tax to achieve a state goal in violation of the Nebraska Constitution.

The constitutionality of the property tax levy LB 701 adds to Nebraska Revised Statute § 2-3225 turns on Article IIIIV, section 1A, of the Nebraska Constitution: "The state shall be prohibited from levying a property tax for state purposes."

Known as the "Duis Amendment," it was adopted in 1954 and amended to its current reading in 1966, after Nebraska adopted a state sales and income tax. By keeping the state out of the realm of property taxation, state interests and functions cannot not be financed by means of state-levied property taxes. The state must continue to administer its traditional functions and it cannot avoid

or circumvent the Duis Amendment by converting the traditional state functions into local functions supported by property taxes. In sum, the state must finance its functions at the state level using funds raised through means other than a property tax.

In interpreting the Duis Amendment, the Nebraska Supreme Court has held that simply because the state is not directly levying the property tax, that does not remove the tax from the Duis Amendment limitation. For instance, certain property taxes imposed by local political subdivisions may be considered state levies for the purpose of this limitation.

If the Court were to hold otherwise, and construe the constitutional amendment to prohibit only a direct statewide property tax levied by the state itself, it would eviscerate the amendment. The state could avoid the limitation by requiring political subdivisions to levy property taxes and then turn the proceeds over to the state. Additionally, the state cannot avoid or circumvent this constitutional mandate by converting the traditional state functions into local functions supported by property taxes.

In the current context, Nebraska cannot require local Republican River NRDs to impose a property tax in order to achieve a state goal of compliance with the Republican River Compact. Therefore, the inquiry focuses on whether the new property tax is designed not to achieve a local NRD purpose but has in fact been enacted by the Nebraska legislature to achieve the state goal of Republican River Compact compliance through a property tax that the state could not constitutionally levy under its own taxing authority.

It is first important to note that while NRDs have always had the authority to levy property taxes under Nebraska Revised Statute § 2-3225, LB 701 expanded this power by allowing the Republican River NRDs to place a property tax on all taxable property within each NRD. LB 701 states that property tax will allow the NRDs to implement its duties and obligations and resolve local water conflicts under the Nebraska Ground Water Management and Protection Act (LB 962).

However, given the fact that only those NRDs with jurisdiction “Including a river subject to an interstate compact among three or more states” are given the new taxing authority, resolution of local water issues, such as the implementation of LB 962, seems to be a narrow view of LB 701, especially when the timing of the bill’s enactment is viewed in the context of the compact, Nebraska’s increasing consumptive water use, and the rising conflict with Kansas.

If the authority granted to Republican River NRDs can be linked to compact compliance, there is a persuasive argument that such compliance is a “state purpose” prohibited by the Duis Amendment. Perhaps the most substantial element of the state purpose argument is the fact that the bonding and taxing authority granted in LB 701 extends only to the NRDs affected by the compact. This factor alone is significant evidence that compact compliance, a state goal, is in fact the primary goal of the property tax authorized in LB 701.

In addition to the fact that only Republican River NRDs are given the new taxing authority, the unambiguous language of the taxing statute excluding the new property taxes from use in

operating the district provides additional persuasive evidence that the property tax is not designed to achieve a local purpose but rather a state purpose, specifically compact compliance.

The original taxing authority of each NRD – the taxing authority that existed prior to LB 701 – is to be used for the operation of the NRD. In contrast, the new property taxing authority LB 701 grants to the Republican River NRDs is explicitly excluded from use for the operation of the district. The implication from this exclusion is that property taxes raised to repay bonds used to purchase or lease water rights are not taxes that are used for the operation of the district but rather are taxes that are to be used for a bigger purpose, namely state compliance with the Republican River Compact.

In sum, the plain language of the statute authorizing NRDs to levy new property taxes provides a strong argument that the new taxing authority violates the Duis Amendment.

First, only those NRDs whose jurisdiction includes the Republican River Basin are granted the new taxing authority and second, the new tax is expressly excluded for use for the operation of the local Natural Resources District. This language makes a persuasive argument that the Nebraska legislature has enacted LB 701 in order to allow a local NRD to levy a property tax to achieve a state purpose – compliance with the Republican River Compact – in violation of the Nebraska Constitution.

While Nebraska must find a way to comply with its Republican River Compact obligations, the legislature must create a constitutional solution to Nebraska's Republican River problems.

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