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Friends of the River group wins challenge against LB701

By LORI POTTER , Hub Staff Writer

KEARNEY - A Lancaster County District Court judge has agreed with nine Republican Basin landowners that a special property tax authorized in LB701 for three natural resources districts is unconstitutional.

Today's (Tuesday's) ruling by Judge Paul D. Merritt Jr. agreed with one of the plaintiffs' three arguments, which is enough for the plaintiffs to prevail.

"If we won any one of the three (arguments), we were successful," said plaintiffs' attorney Rodney Confer.

"The ruling means that the property tax authorized by LB701 is unconstitutional and they have been enjoined from collecting the property tax," Confer told the Hub. He's part of the legal team from Knudsen, Berkheimer, Richardson & Endacott LLP in Lincoln that represents the "Friends of the River" group.

Passed in 2007, LB701 authorized the Upper, Middle and Lower Republican NRDs to issue bonds to pay three irrigation districts \$8.5 million for 19,500 acre-feet of surface water used last summer to enhance river flows to Kansas and help Nebraska comply with the Republican River Compact.

The plan was to pay the bond debt using a special property tax levy of up to 10 cents per \$100 valuation, occupation tax of up to \$10 per irrigated acre or combination of both, as authorized by LB701.

However, the bonds couldn't be issued with a pending lawsuit.

Legislation passed earlier this year authorized a loan to the NRDs from state cash reserves to pay the past-due debt to the surface water irrigators. The loan will be repaid when the lawsuit is resolved.

"We have a loan from the state right now," said Lower Republican NRD Managers Mike Clements of Alma. "The question is, will they let us issue bonds to pay off that loan?"

The winning argument for the plaintiffs was that LB701 creates a "closed class" of NRDs entitled to the bill's taxing authority.

The levy authority applies to a district with jurisdiction that includes a river subject to an interstate compact among three or more states and one or more irrigation districts within the basin. "It's undisputed that, at this time, only the NRDs fall within this classification," Merritt wrote.

For the classification created by LB701 to increase, there would have to be another district fitting the same description. "While theoretically entering into such an interstate compact is possible, the realities are that the happening of such an event are highly improbable," Merritt concluded, so the classification is unconstitutional.

A different argument against the levy - that property taxes can't be collected for a state responsibility, interstate compact compliance - had received more attention. Merritt decided the LB701 property taxes aren't unconstitutional under that argument.

His ruling lists quotes from NRD managers, Nebraska Department of Natural Resources officials and state legislators about the NRDs' shared responsibility for compact compliance work.

"Although such a solution may represent a local solution working on a state problem, it serves a substantial local purpose by allowing the population of the Republican River Basin to actively participate in what needs to be done to allow it to share in the benefits of the compact," Merritt wrote. He added that the tax levy option can be used to meet agricultural goals while at the same time assisting the state with compact compliance.

"The court finds that the controlling and predominant purpose of the challenged property tax levy authorized by LB701 is to meet local purposes."

The third argument by plaintiffs was that the levy results in a commutation of taxes for Nebraskans who don't own real property in the Republican Basin.

Merritt cited a Nebraska Supreme Court ruling that a commutation violates the constitution when tax funds raised in one district are diverted to the benefit of another district. He said the LB701 levy can be used to raise funds to benefit the Republican Basin in several ways, is not solely beneficial to the state and doesn't violate the constitution.

Confer said he was most surprised that Merritt didn't agree with the argument that LB701 allows property taxes to be levied locally for the primary benefit of the state.

He said the bottom line for his clients was to not have to pay the property tax, "and we accomplished that." The second goal was acknowledgement that the compact is a state obligation, so funding for compliance shouldn't come only from the Republican Basin.

Confer and defense attorney Don Blankenau of Blackwell Sanders LLP of Lincoln, who represents the three NRDs, said Merritt's ruling probably won't be the last word on the issues.

In a press release, Nebraska Attorney General Jon Bruning said the ruling will be appealed. Attorneys for both sides had said all along they'd likely appeal any ruling against their side.

Confer said that the plaintiffs probably won't oppose efforts by the defense to bypass the Court of Appeals and seek a ruling directly from the Nebraska Supreme Court. In October, the Supreme Court declined to take original jurisdiction of the case.

The defense will focus on reversing Merritt's "closed class" ruling. Confer said the plaintiffs may use an appeal to argue that Merritt should have agreed with them on the other two arguments.

"Generally speaking, we expect it (a Supreme Court ruling) could be another year or even longer," he said, adding that it's hoped the importance of the issues involved will help expedite the case.

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