

1-1-2012

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Gregory Cowan, Court Report, Kiplinger v. Neb. Dep't of Nat. Resources, 803 N.W.2d 28 (Neb. 2011), 15 U. Denv. Water L. Rev. 557 (2012).

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NEBRASKA

Kiplinger v. Neb. Dep't of Nat. Resources, 803 N.W.2d 28 (Neb. 2011) (holding that an occupation tax levied on irrigators in a natural resource district to provide funding for stream flow enhancements in the Republican River was not a property tax, special legislation creating a closed class of taxpayers, or commutation of taxes; all of which are prohibited under Nebraska's constitution).

Appellant landowners ("Landowners"), who reside and pay taxes on irrigated agricultural lands within a Republican River Natural Resource Conservation District ("NRD"), appealed a Lancaster County District Court ("district court") decision upholding the constitutionality of an occupation tax authorized by the Nebraska state legislature. The legislature enacted L.B. 701 ("bill") to bring Nebraska into compliance with the Republican River Compact ("Compact"). The bill authorized the three Republican NRDs (Upper, Middle, and Lower) to issue river-flow enhancement bonds, the proceeds of which could only be used for specific projects inside a district, such as the acquisition of water rights, acquiring control over canals and other waterworks, vegetation management, and augmenting river flows.

As originally enacted, the bill envisioned three funding mechanisms: (i) state and federal sources; (ii) an occupation tax; or (iii) a property tax levy. However, in *Garey v. Neb. Dept. of Nat. Res.*, 277 Neb. 149 (2009), the Nebraska Supreme Court upheld a district court ruling that struck down a property tax levy as "special legislation" in violation of Nebraska's constitution. In its holding, the court made explicit that the remaining two provisions of the bill—an occupation tax and authorization to pursue state and federal grants—were not impacted by the decision.

In 2007, the Republican NRDs voted to levy the occupation tax authorized in the bill on landowners who irrigated lands within the NRDs. In 2008, Landowners appealed to their respective NRDs, seeking a cessation of the occupation tax. The NRDs rejected Landowners' appeal and Landowners sought declaratory and injunctive relief in district court, claiming that the occupation tax was unconstitutional.

The district court held that, unlike a property tax assessed against the value of real property (which is unconstitutional in Nebraska), the occupation tax authorized in the bill was a form of excise tax levied on the activity of irrigation. Moreover, because funds from the occupation tax would stay within the Republican NRDs, the district court held it was not a commutation of taxes. Finally, the district court held that Landowners failed to prove that the statute created a closed class that would forever limit the scope of the statute's authority to Landowners' respective NRDs. Landowners appealed the district court's ruling to the Nebraska Supreme Court ("Court"). The Court considered four issues on appeal.

The first issue the Court considered was whether the doctrine of *res judicata* barred Landowners from pursuing litigation. The Court held the doctrine of *res judicata*, which bars the relitigation of a claim previously

litigated, was inapplicable to the claim brought by Landowners. The Court reasoned that Landowners in the current action were not in privity with the litigants in *Garey*, and refused to adopt the doctrine of virtual representation when defining privity.

Next, the Court considered Landowners' three constitutional claims. The first constitutional issue Landowners presented was whether the occupation tax was, in effect, a property tax. Under Nebraska law, a property tax is a tax assessed against the value of property. The Court held that because the occupation tax attached to the activity of irrigation, and not to the value of the land, the occupation tax was instead a form of excise tax (a constitutional tax imposed upon the performance of an activity).

The second constitutional issue Landowners presented was whether the occupation tax was, in effect, special legislation. A legislative act is "special legislation" if, among other things, it creates a permanently closed class. Here, Landowners claimed that the occupation tax created a closed class by limiting the application of the tax to only those landowners in the Republican NRDs. The Court held the occupation tax attempted to maintain compliance with a complex interstate agreement that serves a State purpose. The Court further held the language of the bill authorizing the occupation tax, while limited in application to irrigators in the Republican NRDs, did not explicitly restrict its applicability to the Republican NRDs, and that future circumstances may require its use in other areas of the State.

Finally, the Court considered whether the occupation tax was a commutation of taxes. The Nebraska Constitution contains a provision prohibiting the commutation of taxes and preventing the Legislature from enacting legislation that exempts certain citizens from paying a disproportionate share of a tax. Here, Landowners argued that by limiting application of the tax to irrigators in the Republican NRDs, they were paying a tax from which the entire state benefited. The Court held that because all taxpayers benefit from the occupation tax because the tax is aimed at maintaining the State's compliance with the Compact, and because the occupation tax's overall contribution toward Compact compliance is unknown, Landowners failed to satisfy the burden of proving that the occupation tax violated the prohibition against commutation.

The Court accordingly affirmed the district court's holding upholding the constitutionality of the occupation tax authorized by the bill.

Gregory Cowan