

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

ANGUS GAREY, TOM KIPLINGER, CLAUDE )  
CAPPEL, ROBERT AMBROSEK, ROBERT )  
ANDERSON, LARRY DURNER, KENNY )  
FRASIER, DAN FUNK and STEVE WHIPPLE, )

Case Number CI 07-4610

Plaintiffs, )

v. )

NEBRASKA DEPARTMENT OF NATURAL )  
RESOURCES; BRIAN DUNNIGAN, in his )  
official capacity as ACTING DIRECTOR of the )  
Nebraska Department of Natural Resources; )  
UPPER REPUBLICAN NATURAL )  
RESOURCES DISTRICT; LOWER )  
REPUBLICAN NATURAL RESOURCES )  
DISTRICT; MIDDLE REPUBLICAN NATURAL )  
RESOURCES DISTRICT; SCOTT OLSON, )  
SCOTT HOGELAND and JERRY FRIES, In their )  
official capacities as Members of the Board of )  
Equalization of Dundy County, Nebraska; TONY )  
LUTZ, in his official capacity as County Clerk of )  
Dundy County, Nebraska; JOANNA NIBLACK, in )  
her official capacity as County Assessor of Dundy )  
County, Nebraska; PENNY DENNY, in her )  
official capacity as County Treasurer of Dundy )  
County, Nebraska; BRADFORD HOCK, )  
RONALD WERTZ and SCOTT McDONALD, in )  
their official capacities as Members of the Board of )  
Equalization of Hitchcock County, Nebraska; )  
MARGARET POLLMANN, in her official )  
capacity as County Clerk of Hitchcock County, )  
Nebraska; LINDA COOK, in her official capacity )  
as County Treasurer of Hitchcock County, )  
Nebraska; EARL MCNUTT, LEIGH HOYT and )

**ORDER**

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STEVE DOWNER, in their official capacities as )  
 Members of the Board of Equalization of Red )  
 Willow County, Nebraska; PAULETTA GERVER, )  
 in her official capacity as County Clerk of Red )  
 Willow County, Nebraska; SANDRA )  
 KOTSCHWAR, in her official capacity as County )  
 Assessor of Red Willow County, Nebraska; )  
 MARLEEN GARCIA, in her official capacity as )  
 County Treasurer of Red Willow County, )  
 Nebraska; ROBERT JACK, STEVEN HALL and )  
 KEVIN OWENS, in their official capacities as )  
 Members of the Board of Equalization of Frontier )  
 County, Nebraska; DARLA WALTHER, in her )  
 official capacity as County Clerk of Frontier )  
 County, Nebraska; REGINA ANDRIJESKI, in her )  
 official capacity as County Assessor of Frontier )  
 County, Nebraska; JUDY HOSICK, in her official )  
 capacity as County Treasurer of Frontier County, )  
 Nebraska; CLINTON OLMSTED, BILL LEWIS )  
 and DON TEGTMAN, in their official capacities )  
 as Members of the Board of Equalization of Furnas )  
 County, Nebraska; KENNIS McCLELLAND, in )  
 his official capacity as County Clerk of Furnas )  
 County, Nebraska; MELODY CRAWFORD, n her )  
 official capacity as County Assessor of Furnas )  
 County, Nebraska; SHERYL COX, in her official )  
 capacity as County Treasurer of Furnas County, )  
 Nebraska; ROBERT LUEKING, DOUGLAS )  
 HORWART, PATTY REBMAN, RUBY )  
 HARDIN, KENNETH BANTAM, LONNY )  
 HANNA and RODNEY METZGER, in their )  
 official capacities as Members of the Board of )  
 Equalization of Harlan County, Nebraska; )  
 SHIRLEY BAILEY, in her official capacity as )  
 County Clerk of Harlan County, Nebraska; DIANE )  
 GROTFELD, in her official capacity as County )  
 Treasurer of Harlan County, Nebraska; RUTH )  
 SORENSEN, in her official capacity as Nebraska )  
 State Property Tax Administrator, )  
 )  
 Defendants. )

This matter is before the court on the plaintiffs' first amended complaint for declaratory judgment and injunctive relief and the defendants' various answers. A trial was held on stipulated facts. The matter was argued and taken under advisement.

## FACTS<sup>1</sup>

The plaintiffs Ambrosek and Frasier are residents and taxpayers of the Upper Republican Natural Resources District and of the State of Nebraska and own real estate in the Upper Republican Natural Resources District. In September 2007, the Upper Republican Natural Resources District adopted a mill levy authorized by Legislative Bill 701, 100th Legislature, First Session (LB 701), which is intended to result in taxation of the real estate owned by the plaintiffs Ambrosek and Frasier.

The plaintiffs Cappel, Durner, Funk, Garey and Kiplinger are residents and taxpayers of the Middle Republican Natural Resources District and of the State of Nebraska and own real estate in the Middle Republican Natural Resources District. On September 11, 2007, the Middle Republican Natural Resources District adopted a mill levy authorized by LB 701, which is intended to result in taxation of the real estate owned by the plaintiffs Cappel, Durner, Funk, Garey and Kiplinger.

The plaintiffs Anderson and Whipple are residents and taxpayers of the Lower Republican Natural Resources District and of the State of Nebraska and own real estate in the Lower Republican Natural Resources District. On September 13, 2007, the Lower Republican Natural Resources District adopted a mill levy authorized by LB 701, which is intended to result in taxation of the real estate owned by the plaintiffs Anderson and Whipple.

The defendant Nebraska Department of Natural Resources (the department) is an Administrative Department of the State of Nebraska and has jurisdiction over all matters pertaining to water rights for irrigation, power or other useful purposes, except as otherwise provided by law.<sup>2</sup> The defendant Brian Dunnigan is the Acting Director of the department and is the official within the State of Nebraska charged with the responsibility of

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<sup>1</sup> At trial, it was requested that the court take judicial notice of the June 11, 2007, *Final Report, The Economic Impact of Reduced Irrigation in the Republican River Basin* by Dr. Eric Thompson; an excerpt from the *2007 Republican River Compact Administrative Meeting Notebook* (August 14 & 15, 2007); and two en.wikipedia.org websites and one dnr.ne.gov website. The request was opposed. The court does not take judicial notice of the foregoing.

<sup>2</sup> NEB. REV. STAT. § 61-206(1) (Supp. 2007).

administering the Republican River Compact of 1943 (the Compact)<sup>3</sup> on behalf of the State of Nebraska in accordance with Article IX of the Compact.

The defendants the Upper Republican Natural Resources District, the Middle Republican Natural Resources District and the Lower Republican Natural Resources District (collectively referred to as the NRDs) are each political subdivisions of the State of Nebraska, with one of their purposes being the regulation of ground water within their separate districts. The defendant Upper Republican Natural Resources District consists of Chase, Dundy and Perkins Counties, in Nebraska; the defendant Middle Republican Natural Resources District consists of portions of Frontier and Lincoln Counties and all of Hayes, Hitchcock and Red Willow Counties in Nebraska; and the defendant Lower Republican Natural Resources District consists of portions of Webster and Nuckolls Counties and all of Furnas, Harlan and Franklin Counties in Nebraska.

The defendant Sorenson is the Nebraska State Property Tax Administrator, has assumed county assessment functions for both Harland and Hitchcock Counties and is charged under Nebraska law with the responsibilities of imposing and collecting property taxes in Hitchcock County that are levied by the Middle Republican Natural Resources District and property taxes in Harlan County that are levied by the Lower Republican Natural Resources District. The remaining individual defendants represent those persons charged under Nebraska law with the responsibilities of imposing and collecting property taxes in Dundy County levied by the Upper Republican Natural Resources District; with imposing and collecting property taxes in Hitchcock, Red Willow and Frontier Counties levied by the Middle Republican Natural Resources District; and with imposing and collecting property taxes in Furnas and Harlan Counties levied by the Lower Republican Natural Resources District.

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<sup>3</sup> 2A NEB. APPX. § 1-106 (Reissue 1995). A map of the Republican River Basin, as it existed on April 15, 2003, is marked Attachment A, attached hereto and incorporated herein by reference. *Second Report of the Special Master*, April 15, 2003 (Appendix C1).

The states of Colorado, Kansas and Nebraska and the United States are party signatories to the Compact. The primary purposes of the Compact are to

. . . provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters with the Basin is for beneficial consumptive use; and to promote joint action by the states and the United States in the efficient use of water and the control of destructive floods.<sup>4</sup>

Under the terms of the Compact, each signatory state is allotted an annual number of "acre-feet"<sup>5</sup> of water for "beneficial consumption."<sup>6</sup> The specific allocations and the sources of those allocations are provided for in Article IV - Colorado receives 11% of the annual water allotment, Kansas receives 40% and Nebraska receives 49%.<sup>7</sup> In effect, by entering into the Compact, Nebraska agreed to limit its consumption of water from the Republican Rive Basin to ensure that downstream Kansas would receive its allotted share of the water.<sup>8</sup>

In 1998, Kansas was allowed to file a bill of complaint with the United States Supreme Court alleging that Colorado and Nebraska were violating the Compact by using

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<sup>4</sup> 2A NEB. APPX. § 1-106 (Reissue 1995), Article I.

<sup>5</sup> "Acre-foot" is defined in the Compact as "the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,56) cubic feet." 2A NEB. APPX. § 1-106 (Reissue 1995), Article II.

<sup>6</sup> "Beneficial consumption" is defined by the Compact "to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area." *Id.*

<sup>7</sup> Colorado is allotted 54,100 acre-feet of water and the entire water supply of the Frenchman Creek and Red Willow Creek drainage basins in Colorado; Kansas is allotted 190,300 acre-feet of water, plus 138,000 acre-feet of otherwise unallocated water supplies from a specified portion of the main stem of the Republican River at a designated point and upstream basins and the entire water supply originating in the Republican River Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line; and Nebraska is allotted 234,500 acre-feet of water, plus 132,000 acre-feet of otherwise unallocated water from various designated sources. *Id.*, Article IV.

<sup>8</sup> The Compact regulates the consumption of water, surface water and ground water, that would be discharged into the stream flow of the Republican River Basin.

more than their allotted share of the water supply.<sup>9</sup> The three states entered into a settlement of the litigation that resulted, in general, in a dismissal of all claims arising prior to December 15, 2002, and set up a method for administering the use of Compact water supply in the future. Among other things the settlement established a procedure for measuring water usage using a computer model; allowed the use of allocated water anywhere in a state in normal years and, in Nebraska, anywhere upstream of Guide Rock in dry years; and provided that water imported into the Republican River Basin from another river basin can be considered as a credit against a state's computed beneficial consumptive uses.

In 2006 and 2007, the department leased or purchased surface water rights from the Bostwick Irrigation District for the purpose of assisting the state in meeting its obligations under the Compact.

On May 1, 2007, the Governor of the State of Nebraska signed LB 701 into law.<sup>10</sup> Insofar as relevant to this case, LB 701 granted the NRDs the power and authority to levy real property taxes for the lease or purchase of surface water use rights, the purchase or lease of canals and other works, vegetation management or the augmentation of river flows. The applicable section of LB 701 amended NEB. REV. STAT. § 2-3225 (Supp. 2007) by adding (1)(d) to § 2-3225 and amending (2) of § 2-3225.<sup>11</sup> Section 2-3225(1)(d) and (2), as amended, provide as follows:

(d) In addition to the power and authority granted in subdivisions (a) through (c) of this subsection, a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin may annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district for the payment of principal and

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<sup>9</sup> Although Kansas's complaint was brought against both Colorado and Nebraska, Kansas complained that the use of groundwater wells "ha[s] resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River and ha[s] deprived the State of Kansas of its full entitlement under the Compact."

<sup>10</sup> LB 701 contained an emergency clause and, as a result, became effective on May 1, 2007.

<sup>11</sup> LB 701, Sec. 11.

interest on bonds and refunding bonds issued pursuant to section 2-3226.01.<sup>[12]</sup> Such levy is not includable in the computation of other limitations upon the district's tax levy.

(2) The proceeds of the tax levies authorized in subdivisions (1)(a) through (c) of this section shall be used, together with any other funds which the district may receive from any source, for the operation of the district. When adopted by the board, the tax levies authorized in subdivisions (1)(a) through (d) of this section shall be certified by the secretary to the county clerk of each county which in whole or in part is included within the district. Such levy shall be handled by the counties in the same manner as other levies, and proceeds shall be remitted to the district treasurer. Such levy shall not be considered a part of the general county levy and shall not be considered in connection with any limitation on levies of such counties.

According to a May 1, 2007, press release from the Office of Nebraska Governor Dave Heineman, the passage of LB 701 created a cash fund which, among other things, could "be used to help the state continue to comply with interstate compacts and agreements." The press release also provided the assessment of the department's director that "LB 701 provides both the state and Nebraska's Natural Resources Districts with the valuable tools needed to help meet our interstate responsibilities . . . ." In addition, the press release noted that LB 701 provided \$3 million to allow the department "to negotiate a one-year lease of surface water rights in the Bostwick Irrigation District to help the state comply with the Republican River Basin Interstate Compact."

In June 2007, the NRDs entered into an Interlocal Cooperation Agreement creating the Republican River Basin Coalition (the RRBC). The purpose of the RRBC is to

. . . provide the authority, resources, services, studies, and facilities needed for the representation of the Parties [(i.e., the NRDs)] in proceedings before all agencies, tribunals, courts, and any administrative, legislative, executive, or judicial bodies concerning or affecting the NRDs' actions, decisions, and policies to regulate/manage water to ensure the State of Nebraska remains in compliance with [the Compact]. The RRBC shall specifically act within the authorities granted by LB 701 . . . .

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<sup>12</sup> NEB. REV. STAT. § 2-3226.01 (Supp. 2007) allows the board of a district to issue negotiable bonds and refunding bonds of the district and entitled river-flow enhancement bonds, the proceeds of which, generally, can be used for the purchase or lease of water rights, the purchase or lease of canals and other works, vegetation management or the augmentation of river flows. NEB. REV. STAT. § 2-3226.04 (Supp. 2007).

Since its inception, the RRBC has entered into agreements to lease water in an effort to insure that Nebraska meets its obligations under the Compact.

In June 2007, the RRBC entered into a Memorandum of Agreement with the Frenchman Cambridge Irrigation District (the Frenchman Cambridge District), wherein the RRBC agreed to pay \$7,785,000.00 for the right to lease up to 26,000 acre-feet of storage and natural flow water available to the Frenchman Cambridge District for beneficial use from Harry Strunk Lake for the 2007 Irrigation Season. Also in June 2007, the RRBC entered into a Memorandum of Agreement with the Frenchman Valley Irrigation District (the Frenchman District), wherein the RRBC agreed to pay \$640,000.00 to lease the Frenchman District's water supply for the remainder of calendar year 2007. Finally, in June 2007, the RRBC entered into a Memorandum of Agreement with Riverside Irrigation Company, Inc. (Riverside), wherein RRBC agreed to lease Riverside's water supply for the remainder of 2007 for \$126,000.00. Each agreement provides that payment is to be made within 60 days of RRBC selling bonds to cover the payment or 180 days of the execution of the agreement, whichever occurs earlier.

On September 13, 2007, letters on behalf of the plaintiffs were sent to each of the NRDs formally requesting that the NRDs “. . . vote not to levy any property taxes . . . sanctioned by the Nebraska legislature in LB 701, as a means of meeting Nebraska's commitment to comply with the Republican River Compact.” As noted at the outset, in September the NRDs each adopted property tax levies authorized by LB 701.

In their first amended complaint, the plaintiffs seek a declaratory judgment and injunctive relief. In a nutshell, the plaintiffs claim that the property tax levy authorized by LB 701 is unconstitutional and unenforceable. The plaintiffs claim that LB 701 represents a property tax levy for state purposes, in violation of NEB. CONST. art. VIII, § 1A; results in a commutation of taxes in violation of NEB. CONST. art. VIII, § 4; and constitutes special legislation, in violation of NEB. CONST. art. III, § 18. The defendants disagree.

## BURDEN OF PROOF

As the Nebraska Supreme Court stated in *In re Applications A-16027, et al.*:

The applicable law concerning statutory construction when the constitutionality of a statute has been attacked is well established. First, a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. [Citation omitted.] Further, the party claiming a statute to be unconstitutional has the burden of establishing its unconstitutionality. [Citations omitted.] The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. [Citations omitted.] . . .<sup>13</sup>

As a corollary to the presumption of the constitutionality of a statute and that all reasonable doubt must be resolved in favor of a statute's constitutionality, the Nebraska Supreme Court has stated that a court is "obligated to endeavor to interpret [a] statute in a manner consistent with the Constitution."<sup>14</sup>

Notwithstanding that a substantial burden of proof is placed on a person challenging the constitutionality of a statute, it must be kept in mind that "[t]he Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly."<sup>15</sup>

## DISCUSSION

**1. Is the Property Tax Levy Permitted by LB 701 a Violation of NEB. CONST. art. VIII, § 1A?:** The Nebraska Constitution provides that "[t]he state shall be prohibited from levying a property tax for state purposes"<sup>16</sup> (Article VIII, § 1A). In discussing this provision, the Nebraska Supreme Court has stated:

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<sup>13</sup> 242 Neb. 315, 326-327, 495 N.W.2d 23, 30 (1993).

<sup>14</sup> *In re Application A-16642*, 236 Neb. 671, 680, 463 N.W.2d 591, 599 (1990) (citations omitted).

<sup>15</sup> *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 252, 411 N.W.2d 35, 45 (1987) (citation omitted).

<sup>16</sup> NEB. CONST. art. VIII, § 1A

. . . [W]hen Article VIII, section 1A, of the Constitution of Nebraska, was adopted in its original and amended form, its purpose was to require the state, after the adoption of sales and income taxes, to leave the property-tax field. No state interest or function could then be financed by means of property taxes, but all traditional state interests and functions must be financed by means other than property taxes.<sup>17</sup>

The Nebraska Supreme Court more recently reaffirmed this determination, stating that

. . . [t]he purpose of [Article VIII, § 1A] was to require the state, after the adoption of sales and income taxes, to leave the realm of property taxation. [Citation omitted.] Inherent in the adoption of this section was the idea that the State would continue to carry out its traditional functions and finance them by means other than a property tax. The State cannot, however, avoid or circumvent this constitutional mandate by converting the traditional state functions into local functions supported by property taxes.<sup>18</sup>

Recognizing, however, that state and local purposes can be commingled, the Nebraska Supreme Court has held that “the critical issue of the use of property tax levies . . . turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes.”<sup>19</sup> Addressing the issue of state versus local purposes, the Nebraska Supreme Court has stated:

The mere fact that a state-authorized tax supports a governmental purpose does not render it a tax for state rather than local purposes. [Citation omitted.] Even given some commingling of state and local purposes, a statute that requires a political subdivision to levy a property tax does not contravene article VIII, § 1A, so long as the tax is levied for substantially local purposes.<sup>20</sup>

The Nebraska Supreme Court has also held that the fact that a tax is for a governmental purpose does not automatically make it for a state purpose rather than for a local purpose.<sup>21</sup>

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<sup>17</sup> *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 606, 244 N.W.2d 183, 186 (1976) (*Tallon II*).

<sup>18</sup> *Swanson v. State Dep't. of Educ.*, 249 Neb. 466, 476, 544 N.W.2d 333, 340 (1996).

<sup>19</sup> *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 210, 219 N.W.2d 454, 460 (1974) (*Tallon I*).

<sup>20</sup> *Swanson*, 249 Neb. at 478, 544 N.W.2d at 341.

<sup>21</sup> *R-R Realty Co. v. Metropolitan Utilities Dist.*, 184 Neb. 237, 240, 166 N.W.2d 746, 748 (1969).

As noted previously, the property tax levy at issue in this case was provided for in § 11 of LB 701 and is found at NEB. REV. STAT. § 2-3225(1)(d) (Supp. 2007). In relevant part, it provides as follows:

(d) In addition to the power and authority granted in subdivisions (a) through (c) of this subsection, *a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin may annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district for the payment of principal and interest on bonds and refunding bonds issued pursuant to section 2-3226.01.*

. . . .

(Emphasis added.)

At the outset, the court reiterates that the Compact was signed by the State of Nebraska and that the Final Settlement Stipulation resolving the litigation initiated by the State of Kansas in 1998 was also signed by the State of Nebraska. Neither the department nor the NRDs were parties to or signatories of those documents. It is those documents that create the state's obligations with respect to the use, or misuse, of its water allotment under the Compact. That the Legislature recognized this state obligation when it passed LB 701 is evident from a review of the legislative history.<sup>22</sup>

The Principal Introducer of LB 701 was Senator Christensen. In addressing the reasons for the bill and the purposes to be accomplished by the bill, Sen. Christensen, in his Introducer's Statement of Intent, stated that the bill "[p]rovide[s] a way to guarantee that Nebraska stays in compliance with the Republican River Basin Compact Agreement with Kansas on an annual basis . . . [and] . . . is designed to address the water problem in the Republican River Basin."<sup>23</sup> There were numerous references to the state meeting its

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<sup>22</sup> While the court agrees with the defendants that review of or reliance on legislative history is limited in looking at statutory construction, it also is mindful that the issue before it requires an assessment of whether the challenged property tax levy was enacted for state purposes or for substantially local purposes and a review of the legislative history is helpful in trying to make that determination.

<sup>23</sup> Exhibit 7, page 13.

obligation to comply with the Compact during a hearing on LB 701 before the Natural Resources Committee. For example:

Dan Smith (Manager of the Middle Republican NRD): This legislation, with the ability to enact that \$10 fee, would allow us to raise almost all of the funds needed [to lease surface water to make available to Kansas], with the funds proposed for DNR. We have the opportunity to purchase water from four different irrigation districts and help Nebraska achieve its first year of compliance since the settlement was approved. This new authority to generate funds from bonds for a variety of groundwater management activities and some actions that will be relevant to compact compliance . . .<sup>24</sup>

Mike Clements (Manager of the Lower Republican NRD): There is no simple fix for the issues facing the Republican Basin. LB 701 does, however, provide additional tools that can be coupled with our existing controls that can be used to help us work towards compact compliance.<sup>25</sup>

Jasper Fanning (Manager of the Upper Republican NRD): But at the end of the day, we have a plan that we feel can get us and keep us in compliance with this compact so that we can continue to irrigate in the basin.<sup>26</sup> . . . But at the end of the day, we need enough total funds available to pay the cost that it's going to take to keep us in compliance so that we can minimize the economic impact of the compact on the basin.<sup>27</sup>

Ann Bleed (Director of the department): I believe that passage of this bill will be extremely helpful in allowing the state and the natural resources districts to do what is necessary to comply with the Republican River Compact.<sup>28</sup> . . . The bill, in providing authority for the natural resources districts to issue bonds, fees, or property tax levies, will provide valuable and, I believe, necessary tools to natural resources districts so that they can fairly share responsibility for compact compliance.<sup>29</sup> . . . I think it is fair to say at this

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<sup>24</sup> *Id.*, page 100.

<sup>25</sup> *Id.*, page 112.

<sup>26</sup> *Id.* page 118.

<sup>27</sup> *Id.*, page 120.

<sup>28</sup> *Id.*, page 136.

<sup>29</sup> *Id.*

point in the process that compliance is the primary concern, provides the urgency, and may be the central issue for those in the state or outside of the Republican River Basin.<sup>30</sup>

Similar sentiments were expressed during floor debate on LB 701. For example:

Sen. Christensen: LB 701 is a bill that is very needed in the Republican River district to solve the water issues of the Republican in attempts to comply with Kansas in their compact dated 1943.<sup>31</sup>

Sen. Carlson: . . . [LB 701] is a bill attempting to deal with the difficult challenges concerning water in the Republican Basin and our compact with Kansas.<sup>32</sup>

Sen. Loudon: . . . [LB 701] was strictly focused and drafted so that we could do some work, try to solve the problems that are going on with the Republican River area, NRDs, and what we can do to bring Nebraska in compliance with Kansas and on some of our surface water issues doing down the Republican River.<sup>33</sup> . . . I think we have to focus on what we're trying to get done in the Republican River Basin. We're trying to come in compliance. If we don't come in compliance, I think it's been stated enough on the floor that there will be some serious consequences and it will cost us way more money than what we're trying to talk about this afternoon.<sup>34</sup>

Sen. Avery: . . . [Compliance with the Compact] is a state problem. It is not a problem for the Republican River Basin.<sup>35</sup>

Sen. Burling: And as already been brought out a few years ago, we had a five-state compact called the low-level radioactive compact, where Nebraska signed a contract to build a facility in Boyd County, Nebraska. We backed out on that. The court eventually said, Nebraska, you owe the rest of the states in the compact \$145 million, wrote a check out of the General Fund. Never even considered assessing anybody in Boyd County for a part of that bill. And it

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, page 183.

<sup>32</sup> *Id.*, page 198.

<sup>33</sup> *Id.*, page 212.

<sup>34</sup> *Id.*, page 293.

<sup>35</sup> *Id.*, page 218.

can be argued that the state did not cause the problem that we're talking about in the Republican River Valley. But I think the state is responsible for fulfilling the obligations of the contract. The entire state, has already been stated, benefits from irrigation.<sup>36</sup>

Conversely, comments made during the hearing before the Natural Resources Committee and during floor debate on LB 701 demonstrate an awareness that LB 701 was also intended to address the water problems of the Republican River Basin. For example:

Mike Clements (Manager of the Lower Republican NRD): The state has asked the Republican Basin to step up to the plate and be responsible for our water usage. LB 701 gives us the authority and the tools to do just that. The . . . levy authority ha[s] the potential to generate much-needed additional revenue to allow the basin or individual NRDs to pay off bonds, to lease surface water, manage vegetation, and augment river flows.<sup>37</sup>

Jasper Fanning (Manager of the Upper Republican NRD): . . . [T]he local folks in the Republican Basin have also stepped up to the plate. We have not heard very much, if any, from irrigators who think paying a \$10 per acre fee is something that they would just assume we not do. When they look at purchasing surface water to stay in compliance, irrigators by and large support that. . . . We're putting together a comprehensive plan that can keep us in compliance. And there's a significant local contribution.<sup>38</sup>

Sen. Christensen: LB 701 is a . . . allows the basin basically to take control of their own destiny.<sup>39</sup> . . . But I offer to you, look at the benefits to the [S]tate of Nebraska, the benefits to southwest Nebraska, that placing LB 701 into law will do for you. It allows the local control to make the decisions to bring the district into compliance.<sup>40</sup> . . . I've been in favor of a permanent buyout, but these are going to be local decisions.<sup>41</sup> . . . This is a local solution, working on a state problem. The state signed the compact, the state settled the agreement, but you're seeing the Republican River Basin take a huge step,

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<sup>36</sup> *Id.*, page 306.

<sup>37</sup> *Id.*, page 111.

<sup>38</sup> *Id.*, page 120.

<sup>39</sup> *Id.*, page 183.

<sup>40</sup> *Id.*, page 195.

<sup>41</sup> *Id.*, page 196.

talking on a lot of responsibility to meet the obligations of this 1943 compact.<sup>42</sup>  
. . . I'm going to continue to urge your support on this bill, because we need  
to put the control of the basin in the hands of the people of the basin . . .<sup>43</sup>

Sen. Carlson: The overall purpose of LB 701 is to allow the creation of a structure that will give authority to the three basin NRDs, the natural resource districts, to take the steps necessary to be compliant with Kansas on the Republican River Compact. It is also the goal of LB 701 to move the basin into a sustainable position, so we are in compliance year by year for future generations of basin residents. We believe it's necessary for the NRDs to have authority in two areas: first of all bonding authority for the buying of surface and ground water rights, and secondly, the taxing authority to repay the bonds.<sup>44</sup> . . . Under the authority of LB 701, the taxpayers of the Republican Basin, who represent less than 2 percent of the total number of taxpayers in Nebraska, would pay 72 percent of the requirement on an ongoing basis. I mention this to prove a point, that the people of the Republican Basin seem willing to step up to the plate and go beyond expectations to help solve this difficult problem.<sup>45</sup>

Speaker Flood: But my hope is that by passing this bill, we mitigate the reduction in allocations so they can still raise a crop, so that local people can make decisions about what those allocations should be, while augmenting in-stream flows in the Republican River Basin and complying with the terms of the three-state compact.<sup>46</sup>

It is clear to the court that, strictly speaking, compliance with the Compact is the state's obligation. That is, the state is required to insure that Kansas receives its allotted annual number of acre-feet of water for beneficial use under the Compact. Insuring that there is compliance with the Compact can be done in a number of ways. A couple come immediately to mind. On the one hand, the state could try and insure compliance by initiating draconian measures that could include prohibiting or severely restricting the use

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<sup>42</sup> *Id.*, page 197.

<sup>43</sup> *Id.*, page 205.

<sup>44</sup> *Id.*, page 198.

<sup>45</sup> *Id.*, page 199.

<sup>46</sup> *Id.*, page 202.

of water in the Republican River Basin by those located in the Republican River Basin. Although such measures would in all likelihood result in compliance with the Compact, they would not be popular and would most likely not serve the best interests of those located within the Republican River Basin. On the other hand, the state could try to afford the population of the Republican River Basin, arguably the beneficiary of the Compact, options to eliminating or severally reducing its use of water. With the passage of LB 701, the state has elected the second option.

By permitting the NRDs the option to levy a tax that raises revenue to pay for bonds issued for the purchase or lease of water rights, the purchase or lease of canals or other works, vegetation management or the augmentation of river flows, the state has provided the population of the Republican River Basin with a mechanism to satisfy and protect its need for water, while at the same time allowing compliance with the state's obligations under the Compact. Although such a solution may, as noted by Sen. Christensen, 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.

In *Tallon I*, the Nebraska Supreme Court talked about a fabric "woven of many threads."<sup>47</sup> While the instant case is somewhat similar, it is distinguishable. In *Tallon I*, the Nebraska Supreme Court found that, under the facts of that case, it was "impossible to separate the threads which proclaim a state purpose from those which proclaim a local purpose and difficult to pick them out or identify them in the overall pattern."<sup>48</sup> Such is not the case in this case.

Under the Compact, the state is primarily, if not solely, concerned with insuring that Kansas receives its allotted annual number of acre-feet of water for beneficial use. The population of the Republican River Basin is concerned primarily with insuring that it has

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<sup>47</sup> 192 Neb. at 209, 219 N.W.2d at 459.

<sup>48</sup> *Id.*, 219 N.W.2d at 459.

access to an adequate water supply for its agricultural purposes and collaterally, if at all, with insuring that Kansas receives its allotted annual number of acre-feet of water for beneficial use. While the two purposes are interwoven, they are separate and distinct. Through LB 701, the population of the Republican River Basin can use the tax levy option, if it desires, to meet its agricultural goals, while, at the same time, assisting the state in complying with the Compact.

The court finds that the controlling and predominant purpose of the challenged property tax levy authorized by LB 701 is to meet local purposes. As such, the challenged property tax levy is not unconstitutional within the meaning of Article VIII, § 1A.

**2. Does the Property Tax Levy Allowed by LB 701 Result in a Commutation of Taxes in Violation of NEB. CONST. art. VIII, § 4?:** In relevant part, NEB. CONST. art. VIII, § 4 (Article VIII, § 4) provides as follows:

. . . [T]he Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, of the property therein, from their or its proportionate share of taxes to be levied for state purposes . . .

According to the plaintiffs, LB 701 authorizes taxation of only some Republican River Basin property owners to meet the state’s obligation under the Compact, which the plaintiffs believe should be shouldered by all of the citizens of the State of Nebraska, and, as a result, those citizens who do not own real property in the Republican River Basin are relieved from paying LB 701’s tax. In support of their argument, the plaintiff’s point to Sen. Carlson’s floor debate comment that, “[u]nder the authority of LB 701, the taxpayers of the Republican Basin, who represent less than 2 percent of the total number of taxpayers in Nebraska, would pay 72 percent of the requirement on an ongoing basis.”<sup>49</sup>

In discussing Article VIII, § 4, the Nebraska Supreme Court has stated that “[a] commutation occurs in violation of the Nebraska Constitution when tax funds raised in one

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<sup>49</sup> Exhibit 7, page 199.

district are diverted entirely to the benefit of another district.”<sup>50</sup> As an example, the Supreme Court continued: “Under the provisions of the Nebraska Constitution relating to equality in taxation, laws which impose unfair or unequal burdens of taxation upon one school district for the benefit of another qualify as commutations in violation of the Constitution.”<sup>51</sup> The Supreme Court concluded that “[s]o long as all taxpayers receive the benefit of the taxes they remit, the taxing district passes constitutional muster without offending the prohibition against commutation.”<sup>52</sup>

The property tax levy of LB 701 allows, as set out in the language of the Interlocal Cooperation Agreement entered into between the NRDs, the NRDs “to regulate/manage water to ensure that State of Nebraska remains in compliance with the Republican River Compact.” Although potentially allowing the state to remain in compliance with the Compact, the property tax levy is not solely beneficial to the state. The property tax levy is also beneficial to the population of the Republican River Basin by allowing for the purchase or lease of water rights, the purchase or lease of canals or other works, vegetation management or the augmentation of river flows.

The court finds that any funds which may be raised by the NRDs’ decisions to impose the property tax levy authorized by LB 701 will benefit the taxpayers of the Republican River Basin. As such, the property tax levy does not “divert taxes raised by one taxing district to the sole use and benefit of another district”<sup>53</sup> and is not, therefore, violative of Article VIII, § 4.

**3. Does the Property Tax Levy Permitted by LB 701 Constitute Special Legislation in Violation of NEB. CONST. art. III, § 18?:** In relevant part, NEB. CONST. art.

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<sup>50</sup> *Swanson v. State Dep’t. of Educ.*, 249 Neb. 466, 471, 544 N.W.2d 333, 337 (1996) (citation omitted).

<sup>51</sup> *Id.*, 544 N.W.2d at 338 (citation omitted).

<sup>52</sup> *Id.* at 474, 544 N.W.2d at 339 (citation omitted).

<sup>53</sup> *State ex rel. School Dist. v. Ellis*, 168 Neb. 166, 172, 95 N.W.2d 538, 542 (1959) (a “sound principle of taxation . . . prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a Legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district.”)

III, § 18 (Article III, § 18) provides that the “[t]he Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; . . . In all other cases where a general law can be made applicable, no special law shall be enacted.” In addressing Article III, § 18, the Nebraska Supreme Court has held that “[a] legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.”<sup>54</sup> The plaintiffs argue that LB 701 “creates a closed class of NRDs that are entitled to the bill’s property taxing authority.”

In discussing a closed class question, the Nebraska Supreme Court has stated that

‘[t]he rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of [Article III, § 18]. . . .’<sup>55</sup>

In addressing the districts permitted to levy the property tax being challenged by the plaintiffs, § 2-3225 (1)(d) grants the levy 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.”<sup>56</sup> It is undisputed that, at this time, only the NRDs fall within this classification.<sup>57</sup> The question is whether the classification is fixed (i.e., closed).

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<sup>54</sup> *Henry v. Rockey*, 246 Neb. 398, 404, 518 N.W.2d 658, 662 (1994) (citation omitted).

<sup>55</sup> *Hamon v. Marsh*, 237 Neb. 699, 716, 467 N.W.2d 836, 848 (1991) (quoting from *City of Scottsbluff v. Tiemann*, 285 Neb. 256, 262, 175 N.W.2d 74, 79 ((1970)).

<sup>56</sup> *See also*, NEB. REV. STAT. § 2-3226.01(1) (Supp. 2007) (“the board of a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin may issue negotiable bonds and refunding bonds of the district and entitled river-flow enhancement bonds”).

<sup>57</sup> At the hearing before the Natural Resources Commission, Jody Gittins testified that the property tax levy being challenged in this case “is restricted to those districts that are subject to an interstate compact consisting of three or more states, which at this time is the Republican River Basin only, and that have within their boundaries an irrigation district, which excludes Tri-Basin Natural Resource District since it has a public power and irrigation district.”

In reviewing a determination of whether a class is closed, the Nebraska Supreme Court has stated that a “court is not limited to the face of the legislation, but may consider the act’s application.”<sup>58</sup> It further went on to state:

. . . In deciding whether a statute legitimately classifies, [a] court must consider the actual probability that others will come under the act’s operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment.<sup>59</sup>

For the classification created by LB 701 to increase in number by future growth or development there will need to be a district with jurisdiction that includes a river subject to an interstate compact with two or more states and that also includes one or more irrigation districts within the compact river basin. The probability that others would join the classification created by LB 701 was an issue addressed during the hearing before the Natural Resources Commission. Mr. Cookson, special counsel for the Attorney General, addressing the closed class question, stated:

. . . [W]hile everyone has talked about this [LB 701] applies to the Republican River and in fact the three - the Lower, the Middle, and the Upper Republican - Natural Resource Districts are the only ones that currently qualify, this is, as written, an open class. All it takes is for the state to negotiate a compact with two other states over water in order for this provision to then apply . . . to have that apply to them. That’s potentially the South Platte, the North Platte, the Missouri River are all potential candidates. But to paraphrase Senator Wehrbein in a debate over the Southeastern Dairy Compact a couple of years ago, *no Legislature in its right mind would ever enter into a compact again in this day and age*. So I think, while it is an open class, I think *we’re confident it will be a Republican River that benefits from this*. . . .<sup>60</sup>

(Emphasis added.)

The potentially theoretical nature of the classification language of LB 701 was alluded to by at least one senator during floor debate on the bill:

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<sup>58</sup> *Hamon*, 237 Neb. at 717, 467 N.W.2d at 849 (citations omitted).

<sup>59</sup> *Id.* at 717-18, 467 N.W.2d at 849 (citation omitted).

<sup>60</sup> Exhibit 7, pages 163-64.

Sen. Loudon: And right now, this is mostly focused on the Republican River compact and mostly where you have three-state compact and it's the only three-state compact that we have. *And I'm sure there won't be anyone in the future that will want to enter into another three-state compact.* . . . So that was, I think, part of the focus has been to try and narrow it down so that at the present time this amendment and this LB 701 and everything directs most of the bonding authority and the authority that we're giving the NRDs at the time and the three NRDs in the Republican River project and agreement. . . . [W]e tried to narrow it down so it didn't affect a lot of areas in the state. There are portions of the bill that does, of course, affect other NRDs . . . [b]ut for the most part, this was strictly focused and drafted so that we could do some work, try to solve the problems that are going on with the Republican River area, NRDs, and what we can do to bring Nebraska in compliance with Kansas and on some of our surface water issues going down the Republican River.<sup>61</sup>

(Emphasis added.)

The court finds that it is not reasonably probable that, in the future, the state would enter into an interstate compact with two or more states involving a river and that the natural resource district with jurisdiction over the river would also include one or more irrigation districts within the river basis. While theoretically entering into such an interstate compact is possible, the realities are that the happening of such an event are highly improbable. As a result, the court finds that the classification that consists of “a river subject to an interstate compact among three or more states and that also includes one or more irrigation within the compact river basis” is unconstitutional in contravention of Article III, § 18 as special legislation.

#### CONCLUSION

For the reasons set forth herein, the court finds that that portion of LB 701 providing that “a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river may annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district for the payment of principal and interest on bonds and refunding bonds issued pursuant to section 6 of this act” should be, and it hereby

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<sup>61</sup> *Id.*, page 212.

is, declared unconstitutional. Section 34 of LB 701 provides that “[i]f any section of this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions. As a result, this ruling has no bearing on the remaining provisions of LB 701.

The court further finds that the defendants and their officers, agents, servants and employees and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, should be, and hereby are, enjoined from enforcing and/or implementing property tax levy granted by section 11(d) of LB 701 and found at NEB. REV. STAT. § 2-3225(1)(d) (Supp. 2007).

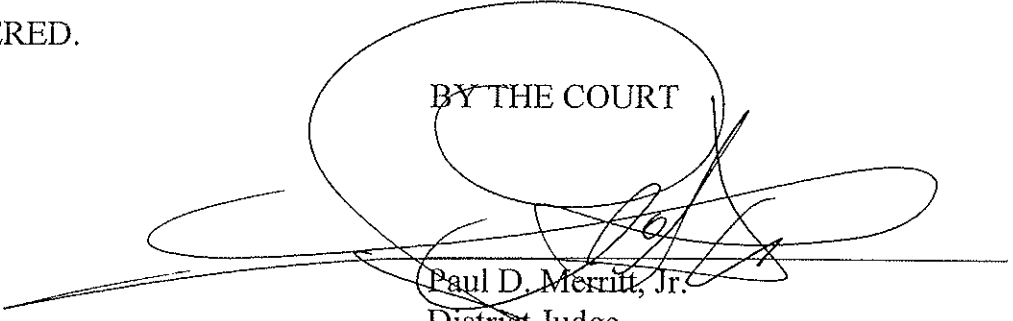
Each party should be, and hereby is, ordered to pay their or its attorney’s fees and costs incurred in this matter.

A copy of this order is sent to all counsel of record.

Dated May 19, 2008.

SO ORDERED.

BY THE COURT

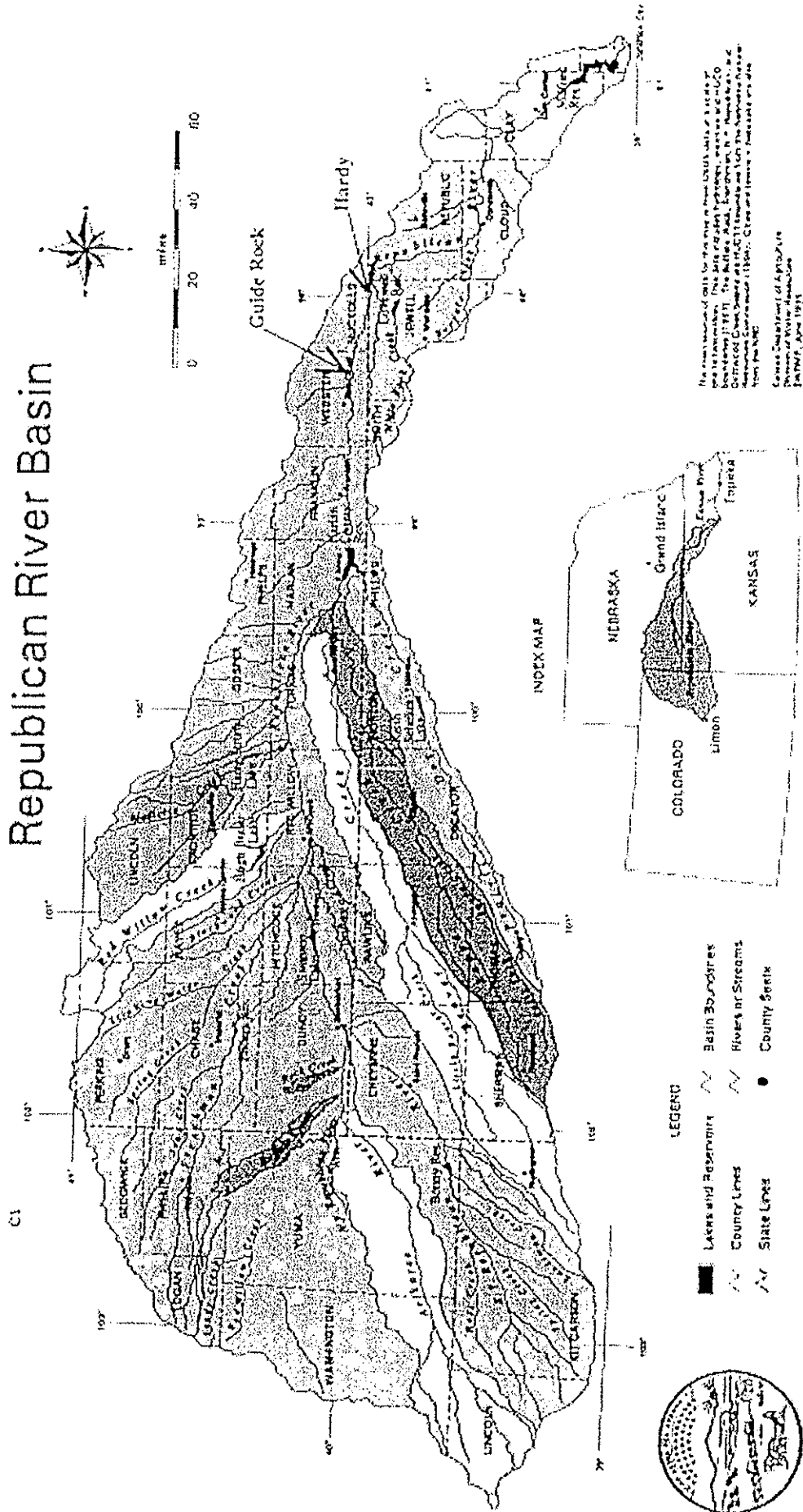


Paul D. Merrill, Jr.  
District Judge

c: Mr. Rodney M Confer  
Mr. Justin D Lavene  
Mr. Donald G Blankenau  
Mr. D.Eugene Garner  
Mr. Thomas P Patterson  
Mr. Bryan S McQuay  
Mr. Paul Wood  
Mr. Jon Schroeder  
Mr. James D. Owens

# ATTACHMENT A

## Republican River Basin



This map was prepared by the U.S. Geological Survey, Denver, Colorado, under the direction of the Chief Hydraulic Engineer, U.S. Geological Survey, Denver, Colorado, in cooperation with the Nebraska State Engineer, Lincoln, Nebraska, and the Colorado State Engineer, Denver, Colorado. The map is based on the U.S. Geological Survey Topographic Maps of the Basin, and the U.S. Geological Survey Hydrographic Survey of the Basin, and the U.S. Geological Survey Hydrographic Survey of the Basin, and the U.S. Geological Survey Hydrographic Survey of the Basin.

U.S. Geological Survey  
 Department of the Interior  
 Denver, Colorado