

**LEGISLATIVE BILL 701:
IS IT A CONSTITUTIONAL ANSWER TO
NEBRASKA’S REPUBLICAN RIVER PROBLEMS?**

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I. INTRODUCTION

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 attempted to equitably divide the waters of the Republican in order to provide stable water resources for agricultural, industrial and domestic purposes within each state. However, as the Republican River Basin continued to develop its economic and agricultural resources, conflict between Kansas and Nebraska arose as Nebraska began using more than its allocated amount under the Compact. Kansas ultimately filed suit against Nebraska and Colorado in 1999 for violating the terms of the Compact. While the states eventually resolved that conflict in 2001, today, Nebraska is once again failing to meet its Compact obligations and Kansas is once again threatening to sue.

In hopes of preventing such litigation, Nebraska enacted Legislative Bill 701 in May 2007. Legislative Bill 701 allows Republican River Natural Resources Districts to purchase or lease surface water or groundwater rights in the Republican River Basin, allowing for more water to remain in the River and find its way to Kansas. While Legislative Bill 701 may sound like a

practical solution to Nebraska's Republican River conflicts, it unfortunately is facing constitutionality challenges.

This paper addresses Nebraska's history of problems on the Republican River and why L.B. 701 is not a constitutional answer to those problems. Part II provides background information on the Republican River Basin, including the terms of the 1943 Republican River Compact and the subsequently 2001 Settlement Agreement. Part II continues by outlining Legislative Bill 701, a bill designed to achieve Compact compliance by reducing Nebraska's consumptive use of Republican River waters. The bill allows Republican River Basin NRDs the authority to purchase and lease water rights within the Republican River Basin with funds acquired through property taxes levied by the NRDs on residents of the Basin. In Part III, the constitutionality of the property taxes authorized by Legislative Bill 701 is analyzed under the Duis Amendment of the Nebraska Constitution which prohibits the state from levying a property tax for state purposes. Ultimately, the conclusion is reached that Legislative Bill 701 is unconstitutional. In allowing local NRDs to issue the property tax, the State of Nebraska is authorizing a property tax to achieve a state goal – namely, compliance with the Republican River Compact – in violation of the Duis Amendment. While Legislative Bill 701 may offer a practical solution to Nebraska's Republican River issues, the simple fact is that the property tax authorized under the bill is not constitutional.

II. THE REPUBLICAN RIVER BASIN

The Republican River Basin extends over three states providing not only valuable water resources for the notoriously dry Midwest plains, but also creating a host of conflicts between water users sharing the limited water resources. In order to analyze whether Legislative Bill 701 is a potential answer to these conflicts, it is important to grasp the history and development of the Basin's water resources as well as the conflicts between Kansas and Nebraska that stem from the 1943 Republican River Compact.

A. THE REPUBLICAN RIVER COMPACT OF 1943

The Republican River Basin is defined by the watershed of the Republican River and its tributaries that span three states – Colorado, Nebraska, and Kansas.¹ The main stream of the

¹ *Kansas v. Nebraska*, No. 126, at 6 (U.S.S.C. Jan. 26, 2000), available at <http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html> (first report of the special master) (hereinafter "Special Master's First Report"). *See also* *Kansas v. Nebraska*, 528 U.S. 1151 (2000) (No. 126, U.S. Oct. Term

Republican River is formed at the junction of two rivers that rise on the high plains of northeastern Colorado: the Arikaree River and the North Fork Republican River.² The North Fork Republican River flows east from Colorado straight into Nebraska while the Arikaree flows across the northwest corner of Kansas. The two rivers meet in Haigler, Nebraska.³ The South Fork, which also rises in Colorado and flows across the northwest corner of Kansas, meets the Republican at Benkelman, Nebraska.⁴ The Republican is dammed in two locations, in southeastern Harlan County, Nebraska, and at Guide Rock, Nebraska.⁵ Both of these dams provide water for irrigation districts in southwest and south-central Nebraska. Guide Rock is also the point where Kansas may divert all or any portion of its water allocation.⁶

Of the approximately 24,900 square-mile watershed that drains within the Basin, 7,700 squares miles are within Colorado (31 percent), 9,700 square mile are within Nebraska (39 percent), and 7,500 square miles are within Kansas (30 percent).⁷ The Republican River Basin also includes numerous federal projects, including nine reservoirs, five of which are located in Nebraska, and six irrigation districts operated by the Bureau of Reclamation and the Army Corps of Engineers.⁸

Prior to the enactment of the Republican River Compact in 1943, the majority of the Republican River Basin's water resources were undeveloped – available surface water was not fully appropriated at the time of ratification, groundwater wells in the basin numbered in the hundreds, and the irrigated acres within Nebraska's Republican River Basin totaled only 90,352 acres.⁹ Additionally, it was not until 1950, seven years after the Compact was signed, that the

1997) (receiving the first report of the special master discussing the interaction between groundwater and surface water).

² *Id.*

³ *Id.*

⁴ *Id.* at 7.

⁵ *Kansas v. Nebraska*, No. 126, at 6 (U.S.S.C. April 16, 2003), available at <http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html> (second report of the special master) (hereinafter "Special Master's Second Report"). *See also* *Kansas v. Nebraska*, 538 U.S. 720 (2003) (No. 126) (receiving the second report of the special master discussing the parties' final stipulation).

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.* at 7-8.

⁹ UNITED STATES BUREAU OF RECLAMATIONS, REPUBLICAN RIVER BASIN WATER MANAGEMENT STUDY, COLORADO, NEBRASKA, KANSAS: SPECIAL REPORT (Dept. of the Interior, 1989) (hereinafter "1985 Special Report"). *See also* Institute of Agriculture and Natural Resources, *The Groundwater Atlas of Nebraska* (2006) (maps showing Nebraska's groundwater and surface water levels).

five Nebraska reservoirs that currently enable the diversion and storage of a large quantity of surface water in the Basin were completed.¹⁰

An extended Basin-wide drought during the 1930s and a highly destructive flood in 1935 sparked the development of federally funded reservoirs and irrigation projects to enable “swollen spring flows to be retained in reservoirs for flood control in the spring and released for irrigation in the late summer and fall.”¹¹ To address these issues, the United States Army Corps of Engineers recommended the construction of Harlan County Dam in Nebraska, and the Bureau of Reclamation suggested Basin-wide irrigation projects.¹² However, before these projects could begin, Nebraska, Kansas and Colorado had to devise an agreement to allocate waters within the Republican River Basin between the three states. The states entered into negotiations concerning the Basin in 1940, and on May 26, 1943, the Republican River Compact was approved by Congress and signed by President Roosevelt.¹³

The Compact has eleven Articles designed primarily to allocate water resources between the states in order

[t]o provide for the most efficient use of the waters of 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 within the Basin is for the 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.¹⁴

¹⁰ Special Master’s Second Report, *supra* note 5, at 9-10.

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.* at 8. The three states had reached an initial agreement in 1941. However, during Congressional hearings, the Department of the Interior and the Federal Power Commission objected to the compact because it diminished federal privileges and rights within the Basin. While Congress went onto approve the Compact as proposed by the states, on April 2, 1942, President Roosevelt vetoed that approval solely for the reason that it “unduly restricted federal jurisdiction and authority over navigation and water projects within the Basin.” In response, Congress passed and the President approved a bill granting further compact negotiations with the inclusion of a federal representative. Those negotiations led to the three states agreeing to the terms of the revised Republican River Compact on December 31, 1942, which differed from the vetoed Compact only in the matters which had led to the veto. The apportionment of water between the states remained unchanged.

¹⁴ Republican River Compact, Pub. L. No. 7860, art. 1, 57 Stat. 86 (1943) (hereinafter “Republican River Compact”).

Article II of the Compact provides relevant definitions for the allocation of water between the states. However, rather than using the terms groundwater or surface water when discussing allocation, the Compact uses the term “Virgin Water Supply,” which it defines as “the water supply within the [Republican River] Basin undepleted by the activities of man.”¹⁵ The Compact allocates the “Virgin Water Supply” between the states for beneficial consumptive use, or “that use by which the water supply of the Basin is consumed through the activities of man, [including] water consumed by evaporation from any reservoir, canal ditch, or irrigated area.”¹⁶ The fact that the Compact fails to explicitly state whether it is groundwater, surface water or both that constitutes a state’s allocation under the Compact eventually leads to conflict between the states.¹⁷

Article III of the Compact sets forth the calculated virgin water supply originating in the main stream of the Republican River, and each of the sub-basins within the Basin upstream, from the lowest crossing of the River at the Nebraska-Kansas state line; in 1943, this amount was 478,900 acre-feet per year.¹⁸

In Article IV, the Compact allocates 54,100 acre-feet of water to Colorado (11 percent), 190,300 acre-feet to Kansas (40 percent), and 234,500 acre-feet to Nebraska (49 percent), but allows for future proportional adjustments.¹⁹ In addition to its Compact allotment, Kansas has the right to use any excess water that flows past the Republican’s furthest downstream crossing of Nebraska into Kansas.²⁰ While each state cannot adopt regulations that infringe upon the terms of the Compact, how a state uses its allocated amount is subject to state laws and regulations.²¹

¹⁵ *Id.* at art. II.

¹⁶ *Id.*

¹⁷ *See* section II.B.

¹⁸ *Id.*

¹⁹ *Id.* at art. IV. *See also* Nebraska Department of Natural Resources, *Summary of Republican River Compact Litigation Settlement*, June 2003, http://www.dnr.state.ne.us/Republican/RepRiverLitigation_Lg.pdf (outlining the 2001 Settlement Agreement between Nebraska, Kansas, and Colorado) (hereinafter “Summary of Settlement”). Note that the each states’ allotted amount of water under the terms of the Compact was not altered by the 2001 Settlement Agreement.

²⁰ *Id.*

²¹ *Id.* *See also* Aaron M. Popelka, *The Republican River Dispute: An Analysis of the Parties’ Compact Interpretation and Final Settlement Stipulation*, 83 NEB. L. REV. 596, 600 (2004) (discussing the Republican River Compact and whether consumptive groundwater use should be assessed against each states’ allotted amount of water under the terms of the Compact).

Finally, Article IX authorizes the creation of Republican River Compact Administration (“RRCA”).²² The RRCA is composed of an official from each of the three states and is charged with the responsibility of collecting data necessary for the administration of the public water supplies.²³ While some administrative procedures are outlined in Article IX, for the most part the Compact contains only broad principles and leaves the details of the administration of the Compact to the states.²⁴ The states are allowed to “adopt rules and regulations consistent with the provisions of [the] compact,” but any proposed regulations have to be met with unanimous consent of all three states.²⁵ Additionally, the Compact requires the United States Geological Survey, or whatever federal agency may succeed the functions and duties of that agency, to collaborate with the states so far as is necessary for the proper administration of the Compact.²⁶

B. CONFLICT IN THE BASIN – HOW THE PROBLEMS GOT STARTED

Immediately following the ratification of the Compact, all was well in the Basin. Federally funded reservoirs and irrigation projects were completed,²⁷ the Compact was functioning, and each state was receiving its full allocation of water under the Compact. However, starting in the early 1980s, tension between the states began to mount as the stream flow of the Republican River began to dwindle due to excessive groundwater pumping and surface water appropriations.²⁸ While the RRCA attempted to deal with the mounting problems, there were two elements that prevented the RRCA from resolving the issues. First, Nebraska did not have an integrated groundwater and surface water policy, which prevented Nebraska from effectively regulating the state’s water resources in the Basin which, as water resources developed, would become a vital factor in ensuring that Nebraska stayed within Compact compliance. Secondly, the Compact was unclear what constituted the “Virgin Water Supply,” groundwater, surface water or both.

As stated earlier, at the time that the Compact was ratified, water resources in the Republican River Basin had not yet been fully appropriated.²⁹ Additionally, all three states were

²² Republican River Compact, *supra* note 14, art. IX.

²³ *Id.* art. IX.

²⁴ Special Master’s Second Report, *supra* note 5, at 11 n. 29.

²⁵ Republican River Compact, *supra* note 14, art. IX.

²⁶ *Id.*

²⁷ 1985 Special Report, *supra* note 9.

²⁸ Republican River Compact Admin., 31st Ann. Rep. (1991); Republican River Compact Admin., 30th Ann. Rep. (1990).

²⁹ *See supra* note 8.

at various stages of regulating groundwater and surface water with none of them having integrated groundwater and surface water law. After of the Compact, Kansas and Colorado both took early legislative steps to regulate water in the Basin. Kansas adopted the Kansas Water Appropriation Act in 1945 that combined groundwater and surface water doctrines into a single statutory scheme.³⁰ Colorado integrated the administration of its groundwater and surface water rights in 1969.³¹

Nebraska was not so quick to regulate water within the Basin. The Department of Natural Resources (“DNR”) was not created until 1957 and then was only given authority to regulate surface water under a statutory prior appropriations doctrine.³² Nebraska’s groundwater users found their use restricted only in instances of short supply, and even then, the groundwater user only had reduce his or her use so as to share proportionately with other groundwater users.³³ Unlike surface water disputes, courts handled most disputes regarding groundwater rather than an administrative agency. It was not until 1975, when Nebraska passed the Groundwater Management Act, that the regulation of groundwater was placed in the hands of local Natural Resources Districts (“NRDs”).³⁴

During this same timeframe, agricultural and economic activities developed in the Republican River Basin resulting in each state appropriating more of its allocated water under the Compact. In Kansas and Colorado, where there was arguably greater water regulation, water use within the Basin could be limited to quantities allocated under the Compact. Nebraska, however, with its disjointed water law policies, was less equipped to manage its surface water and groundwater resources in a cohesive manner in order to stay within its water allocation under the Compact. As early as 1984 and 1985, Kansas believed that Nebraska needed to regulate its use in the Basin under the premise that groundwater and surface water were hydraulically

³⁰ Water Appropriation Act of 1945, ch. 390, 1945 Kans. See. Laws 665.

³¹ Colorado Department of Natural Resources, The Office of the State Engineer, <http://water.state.co.us/org/history.asp> (last visited Nov. 2, 2007).

³² NEB. REV. STAT. § 61-206 (2006).

³³ Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W.2d 304, 308 (1933) (holding that in times of groundwater shortage, a groundwater appropriation must reduce his or her use so as to share proportionately with other groundwater appropriators); Neb. Rev. Stat. § 46-701 (2006).

³⁴ L.B. 577, 84th Leg., 1st Sess., 1975 Neb. Laws 1145 (amended in 1981, 1986, and 1993). In 2006, the Legislature passed L.B. 108, which attempted to integrate water management systems under Nebraska Ground Water Management and Protection Act. The 2006 Act replaced the Groundwater Management Act and is presently codified at NEB. REV. STAT. §§ 46-701–46-754 (2006).

connected.³⁵ Kansas feared that while it was currently receiving its allocated amount, Nebraska would eventually be using more than it was allocated under the Compact leaving Kansas without water for the industrial, municipal, and agricultural purposes for which the water was currently being used.³⁶ While the Nebraska DNR published an opinion acknowledging groundwater and surface water interactions in 1985, in discussions with Kansas over the Basin, Nebraska continued to claim that groundwater and surface water were not connected in the Basin and refused to adopt the view that groundwater was implicated in the Compact.³⁷

It was not until 1996 that Nebraska's Legislature formally announced that "[h]ydrologically connect groundwater and surface water may need to be managed differently from unconnected groundwater and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated groundwater and surface water supplies."³⁸ However, by 1996, it was too late. Nebraska was already using more than its allotted amount of water under the Compact. The number of groundwater wells registered in Nebraska's Republican River Basin had risen to over 10,000 by 1995.³⁹ The number of irrigated acres in the same area grew from 90,320 acres in 1949 to 1,045,354 total acres in 1992.⁴⁰ This virtually unchecked groundwater use and a drought from 1988 to 1992, made it apparent that Nebraska had not only over-appropriated its waters in the Republican River Basin but was using more than its allocated amount. In 1990 and in 1991, Nebraska's water uses officially exceeded its allocated amount under the Compact.⁴¹

C. CONFLICT IN THE BASIN – KANSAS V. NEBRASKA⁴²

When Nebraska, Kansas and Colorado came together in the early 1990s to discuss water issues in the Basin, all three states agreed that the 1943 Compact regulates surface water stream

³⁵ Republican River Compact Admin., 25th Ann. Rep. 10 (1985).

³⁶ See Kansas Department of Agriculture, Interstate Water Issues, The Republican River Compact, http://www.ksda.gov/interstate_water_issues/?cid=847 (last visited Nov. 30, 2007) (outlining the importance of the Republican River within the State of Kansas). See also Kansas' Reply to Nebraska's Brief in Opposition and to Nebraska's Request for Oral Argument at *5, *Kansas v. Nebraska*, 1998 WL 34081084 (1998) (No. 126, U.S. Oct. Term 1997) (outlining the injuries Kansas has received as a result of receiving less than its allocated amount of water under the Compact).

³⁷ Republican River Compact Admin., 30th Ann. Rep. 1-15 (1990).

³⁸ L.B. 108, 94th Leg., 2d Reg. Sess., 1996 Neb. Laws 46 (codified as amended in chapters 2 and 46 of NEB. REV. STAT.).

³⁹ See Popelka, *supra* note 21, at 601 (citing Dep't of Water Res., State of Neb., 1995 Well Registration Database).

⁴⁰ 1985 Special Report, *supra* note 9, at 13 tbl. D-7 (1985).

⁴¹ Republican River Compact Admin., 31st Ann. Rep. 12-13 (1991); Republican River Compact Admin., 30th Ann. Rep. 18-19 (1990).

⁴² 538 U.S. 720 (2003) (approving the Final Settlement Stipulation).

flow in the Republican River Basin. However, since Compact does not explicitly use the terms groundwater or surface water,⁴³ at the heart of the Compact controversy was whether groundwater should be included in the calculations of consumptive use. Kansas took the position that the Compact regulates any groundwater use, whether from alluvial or table-land pumping, “to the extent that groundwater pumping depletes the stream flow forming the basis of the calculation of virgin water supply.”⁴⁴ Nebraska asserted that while the Compact regulates direct diversions of water from the Basin, it does not regulate indirectly diverted water from those streams through groundwater pumping even if such pumping reduces the surface flow.⁴⁵ Colorado took a completely different position, insisting that the Compact regulates the pumping of alluvial groundwater, but not non-alluvial groundwater from the Ogallala Aquifer.⁴⁶ Despite significant efforts that began in 1984, Kansas and Nebraska were unable to resolve the conflict.⁴⁷ Left with no other choice, Kansas filed a Motion to Leave to File a Bill of Complaint in the United States Supreme Court on January 19, 1999.⁴⁸

In its complaint, Kansas asserted that “[t]he State of Nebraska has breached its solemn obligation to abide by the [Republican River] Compact...by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, by the failure to protect surface flows from unauthorized appropriation by Nebraska users, and by other acts and omission.”⁴⁹ Furthermore, Kansas claimed that Nebraska’s use of ground wells had resulted in Nebraska appropriating more than its allotment under the Compact and, in the process, had deprived the State of Kansas of its full entitlement under the Compact.⁵⁰ In denying Kansas its full allocation under the Compact, Kansas groundwater and surface water users in the upper Republican River tributaries of Northwest Kansas and in the main stem of the Republican River saw a reduction in available water which placed at risk, agricultural, industrial and municipal water users.⁵¹ The massive Kansas Bostwick Irrigation District, the Milford

⁴³ Special Master’s First Report, *supra* note 1, at 22.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.*

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.* at 3. See *Kansas v. Nebraska*, 525 U.S. 1101 (1999) (granting Kansas’s motion to leave to file a of complaint).

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4. Note that while Kansas initially sought no relief from the State of Colorado, it was named as a defendant since it was a party to the Compact. *Id.* at n. 4.

⁵¹ See Kansas Department of Agriculture, *supra* note 36.

Reservoir, and downstream users on the Kansas River, were suffering since they were not receiving water required for the agricultural and recreational water uses.⁵²

Nebraska denied Kansas' allegations of overuse and asserted various defenses and counterclaims, predominantly, that the Compact does not regulate groundwater pumping and that Kansas failed to file a claim for which relief could be granted.⁵³ This became the fundamental issue of the lawsuit – whether, and to what extent, the Compact restricts groundwater pumping. Nebraska filed a Motion to Dismiss,⁵⁴ claiming that the Compact, by its plain and unambiguous terms, does not apportion or allocate consumption of groundwater, that the Supreme Court and the Compact states have previously held that the Compact is an agreement over rights to surface water, not groundwater, and that the parties had no intention to allocate groundwater under the Compact.⁵⁵ In order to resolve this question, the Supreme Court appointed Vincent McKusick Special Master to resolve whether the Republican River Compact restricted a compacting state's consumption of groundwater.⁵⁶

On January 28, 2000, the Special Master issued his First Report stating that the Republican River Compact restricts a compacting State's consumption of groundwater to the extent that such consumption depletes stream flow in the Republican River Basin.⁵⁷ However, many issues remained unresolved in the case. At the forefront was whether Nebraska overused its water allocation and if so, was Kansas entitled to any damages resulting from Nebraska's overuse. Additional rulings issued by the Special Master in May 2001, allowed the parties to enter into settlement negotiations rather than heading straight to litigation⁵⁸ and after a two-year process, the parties filed their Final Settlement Stipulation with Special Master who recommended the settlement for approval without reservations.⁵⁹

⁵² *Id.*

⁵³ Special Master's First Report, *supra* note 1, at 4. *See also* *Kansas v. Nebraska*, 530 U.S. 1272 (2000) (denying Nebraska's motion to dismiss and recommitting the case to the Special Master for further proceedings).

⁵⁴ *Kansas v. Nebraska*, 527 U.S. 1020 (1999) (granting Nebraska a leave to file a motion to dismiss solely on the issue of whether the Republican River Compact restricts a State's consumption of groundwater).

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* *See* *Kansas v. Nebraska* 528 U.S. 1001 (1999) (appointing Vincent McKusick special master over the conflict and referring Nebraska's Motion to Dismiss to the special master for consideration).

⁵⁷ *Id.* at 20. "Based upon the plain language [of the Compact], I find that the Compact unambiguously governs the entire natural stream flow of the Basin, which includes all groundwater that would be part of the stream flow in the Basin except for depletion by the activities of man such as pumping." *Id.* This ruling made it clear that both tableland and alluvial wells were to be counted if they deplete stream flow. *See* *Kansas v. Nebraska*, 530 U.S. 1272 (2000) (denying Nebraska's motion to dismiss).

⁵⁸ Special Master's Second Report, *supra* note 5, at 22.

⁵⁹ *Id.* at 74.

In the Settlement Agreement, the states concluded that all groundwater uses that are determined to deplete the stream flow of the Republican River will count towards a states' consumptive use.⁶⁰ The Agreement also provides: increased flexibility by measuring Compact compliance on a five-year running average, as opposed to annually, except in dry years when compliance is measure on a two or three year running average basis;⁶¹ it enacts a moratorium on the construction of new groundwater wells upstream of Guide Rock, the point at which the Republican River leaves Nebraska and enters Kansas;⁶² and provides mechanisms for future Compact administration by providing clarifications and water accounting improvements designed to help the RRCA in administrating the Compact.⁶³

While the 2001 Settlement Agreement allowed the states to avoid litigation, the Agreement itself did very little to address the central issue that the waters of Republican River Basin were simply over-appropriated.⁶⁴ While the moratorium on new wells was designed to stop increases in Basin water usage, there was no mandatory shut-off of any of the existing groundwater wells or cancellation of surface water rights.⁶⁵ As a result, just a year after the Settlement Agreement was signed, Nebraska exceeded its allotted amount of water under the Compact.⁶⁶ Every year since 2002, Nebraska used more water than it is allotted under the Compact.⁶⁷ Kansas, once again not received its full share of the Republican's waters, is again threatening Nebraska with a lawsuit for violating the terms of the Settlement Agreement.⁶⁸ With the hope of avoiding round two of extensive negotiations with Kansas over the Republican River, the Nebraska Legislature enacted Legislative Bill 701 ("L.B. 701").⁶⁹ Designed to

⁶⁰ *Id.* at 34.

⁶¹ *Id.* at 49–52 & 64–68.

⁶² *Id.* at 39–45.

⁶³ *Id.* at 68–70. See *Kansas v. Nebraska*, 540 U.S. 964 (2003) (final report of the special master received and filed).

⁶⁴ See L.B. 962, 98th Leg., 2nd Reg. Sess. (Neb. 2004). L.B. 962 is the end product of a 49 person task force created in 202 by Governor Mike Johanns to assess Nebraska's groundwater and surface water uses. The task force determined that all of the Republican River Basin NRDs were fully appropriated and identified parts of the Republican River Basin NRDs as over-appropriated. See also Nebraska Department of Natural Resources, *L.B. 962 Implementation*, June 2005, available at

http://www.dnr.ne.gov/LB962/PDF_Files/LB962Implementation_June05.pdf (providing an overview of L.B. 962).

⁶⁵ Special Master's Second Report, *supra* note 5, at 39.

⁶⁶ Nebraska Farm Bureau, *Republican River Basin Newsletter*, June 2007,

<http://www.nefb.org/archivej/uploads/FB%20News%20for%20Republican%20Basin%20June%202007.pdf> (citing the DNR's statistics of Nebraska's allocated amount of water under the Republican River Compact in comparison to Nebraska's actual consumptive use).

⁶⁷ *Id.*

⁶⁸ David Hendee, *Heinemann Asks That Kansas Hold Fire*, OMAHA WORLD HERALD, Sept. 25, 2007, at A1.

⁶⁹ Press Release, State of Nebraska Office of the Governor, Landmark Legislation Provides Funding to Address Water Challenges, (May 7, 2007) (available at <http://www.gov.state.ne.us/columns/2007/050707.html>).

increase the stream flow of the Republican River by reducing Nebraska's consumptive water use, L.B. 701 may be Nebraska's final hope of complying with the Republican River Compact.⁷⁰

D. LEGISLATIVE BILL 701

1. PROVISIONS OF LEGISLATIVE BILL 701

Legislative Bill 701 was introduced by Senator Mark Christensen of Imperial on January 17, 2007.⁷¹ Intended to “provide a way to guarantee Nebraska stays in compliance with the Republican River Basin Compact Agreement with Kansas on an annual basis,” L.B. 701 is primarily designed to address water issues in the Republican River Basin.⁷² The bill focuses solely on NRDs “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.”⁷³ In Nebraska, there are only three NRDs with such jurisdiction, the Upper Republican NRD, the Middle Republican NRD, and the Lower Republican NRD.⁷⁴ These three NRDs include within their jurisdiction the Republican River, a river subject to the Republican River Compact, which involves three or more states, Nebraska, Kansas, and Colorado. While L.B. 701 never cites Compact compliance as its goal, the fact it affects only those NRDs with jurisdiction of a river subject to the Republican River Compact implies that the bill was designed with the goal of Compact compliance.⁷⁵ Signed into law on May 1, 2007,⁷⁶ L.B. 701 has three key components.

First, the Republican River NRDs are given permission to lease or acquire surface water and groundwater rights using bonds issued to outside investors.⁷⁷ In order to fund the repayment of

⁷⁰ See Jon Bruning, *Republican River Compact Will Face Test This Fall After 7 Years of Drought*, NEBRASKA FARM JOURNAL, Oct. 2007 (outlining the steps Nebraska has taken in an attempt reduce its consumptive use).

⁷¹ L.B. 701, 100th Leg., 1st Reg. Sess. (Neb. 2007).

⁷² Nebraska Legislature Natural Resources Committee, *Introducer's Statement of Intent*, 100th Leg., 1st Reg. Sess. (Neb. 2007) (available at <http://uniweb.legislature.ne.gov/FloorDocs/Current/PDF/SI/LB701.pdf>); Press Release, State of Nebraska Office of the Governor, *Gov. Signs Landmark Water Legislation Into Law* (May 1, 2007) (available at http://www.gov.state.ne.us/news/2007_05/01_landmark.html). It should also be noted that L.B. 701 also includes some provisions that apply to the Platte River.

⁷³ L.B. 701, 100th Leg., 1st Reg. Sess., at § 6(1) (Neb. 2007) (codified at NEB. REV. STAT. § 2-3225(d) (2007)).

⁷⁴ Nebraska Association of Resources Districts, <http://www.nrdnet.org/> (last visited Nov. 30, 2007). See also *Garey v. Neb. Dep't of Natural Res.*, No. CI07-4610 (Neb. filed October 23, 2007) (naming the Nebraska DNR along with the Upper, Middle, and Lower Republican as defendants in a suit contesting the constitutionality of L.B. 701).

⁷⁵ Nebraska Farm Bureau, *Republican River Basin Newsletter*, Vol. 1, Issue 1 (June 2007), available at <http://www.nefb.org/archivej/uploads/FB%20News%20for%20Republican%20Basin%20June%202007.pdf>.

⁷⁶ L.B. 701, 100th Leg., 1st Reg. Sess. (Neb. 2007) (codified in various sections of Neb. Rev. Stat. §§ 2-3231, 2-945.01, 2-958.02, 2-3202, 2-3225, 13-808, 13-2530, 46-601.01, 46-229.04, 46-602, 46-609, 46-644, 46-702, 46-707, 46-715, 46-1212, 61-210, 66-1345, 66-1345.01, 66-1345.02, 77-3442).

⁷⁷ NEB. REV. STAT. § 2-3225(1)(d) (2007); NEB. REV. STAT. § 2-3226.01 (2007).

the bonds, NRDs are allowed to levy property taxes, up to ten cents per hundred-dollar value, and place fees on irrigated acres in the form of an occupation tax, up to ten dollars per acre.⁷⁸ The Republican River NRDs have agreed to a funding formula for the repayment of each bond that makes the Upper Republican responsible for 44 percent, the Middle Republican responsible for 30 percent, and the Lower Republican responsible for 26 percent of the repayment of each bond.⁷⁹ It is left to each individual NRD to then determine how it will split the repayment obligation between property taxes and occupation taxes.⁸⁰ The taxes would be paid during the next property tax cycle beginning in January 2008.⁸¹

Secondly, L.B. 701 authorizes funds for vegetation management in addition to the creation of a thirteen-member Riparian Vegetation Task Force.⁸² The purpose of the Task Force is to develop and prioritize vegetation management goals for the state and analyze the costs of vegetation removal or treatment options along rivers and streams with the goal of decreasing the amount of water consumed by non-native and invasive plants that have developed along river banks in Nebraska.⁸³ The bill authorizes two-million dollars solely for vegetation management programs in the Republican and Platte River Basins.⁸⁴

Thirdly, L.B. 701 establishes a Water Resource Cash Fund to which the Nebraska legislature appropriated \$2.7 million in general funds per year.⁸⁵ The purpose of the Fund is to provide financial assistance to river basins that are considered over-appropriated or subject to an interstate compact and to aid those NRDs in reducing the consumptive use of water in order to meet statutory or compact requirements.⁸⁶

2. LEGISLATIVE BILL 701 IN ACTION

⁷⁸ NEB. REV. STAT. § 2-3225(1)(d).

⁷⁹ Nebraska Farm Bureau, Republican River Basin Newsletter, Vol. 1, Issue 2 (Oct. 2007), available at <http://www.nefb.org/archivej/uploads/FB%20News%20for%20Republican%20Basin%20October%202007.pdf>; *NRDs Selling Bonds*, MCCOOK GAZETTE, June 3, 2007, at 1; Nate Jenkins, *Republican River Farmers in Lurch with Water Lawsuit*, LINCOLN JOURNAL STAR, Oct. 30, 2007, <http://www.journalstar.com/articles/2007/10/31/news/nebraska/doc47277f26e6fff031716535.txt>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² L.B. 701, 100th Leg., 1st Reg. Sess. (Neb. 2007) (codified at NEB. REV. STAT. §§ 2-967–2-978). The Task Force will consist of representatives of the governor, state agencies, NRDs, state forester, university, Nebraska Weed Control Association, surface water projects in over and fully appropriated basins, and a riparian landowner from each of the state's Congressional districts. *Id.*

⁸³ NEB. REV. STAT. § 2-968 (2007).

⁸⁴ L.B. 701, 100th Leg., 1st Reg. Sess., at § 4 (Neb. 2007) (codified at NEB. REV. STAT. § 2-958.02 (2007)).

⁸⁵ L.B. 701, 100th Leg., 1st Reg. Sess., at § 25(5)(a) (Neb. 2007) (codified at NEB. REV. STAT. § 61-218 (2007)).

⁸⁶ *Id.*

L.B. 701 focuses on purchasing or leasing water rights and removing vegetation from the banks and streambed of the Republican River.⁸⁷ In authorizing Republican River NRDs to take these actions, the state expects to see a reduction in Nebraska's consumptive water use in the Basin. A lower consumptive use will result in an increase in the stream flow volume of the Republican River. An increased flow results in more water of the Republican River reaching Kansas. Nebraska needs more water to reach Kansas in order to bring Nebraska into compliance with its obligations under the Republican River Compact.⁸⁸

While L.B. 701 provides for the purchase of surface water or groundwater rights, at the current time NRDs appear to be focused on the leasing of surface water rights. Since the bill's enactment on May 1, 2007, Republican River NRDs have already leased 36,000 acre-feet of surface water that will remain in the Republican River rather than be used by surface water appropriators in 2008.⁸⁹ The NRDs paid the surface water users a total of \$9.7 million to keep the water in the River.⁹⁰

Why are the Republican River NRDs focused on surface water and not groundwater? New studies indicate that groundwater irrigation may only be responsible for ten to fifteen percent of the water shortage in the Basin.⁹¹ Studies conducted by Professor James Koelliker at Kansas State University show that farms that are more than ten miles from a stream cause less than point-two percent of the water depletions.⁹² Additionally, changing the amount of water pumped

⁸⁷ See *supra* section II.A.1.

⁸⁸ See Nebraska Department of Natural Resources, Republican River Basin Compact Tables, available at http://www.dnr.ne.gov/Republican/2003_04_RRC_SummaryTables.pdf (charts indicating each state's allocation and consumptive use during 2003-2004).

⁸⁹ See *supra* note 79.

⁹⁰ *Id.* Note that the bond payoff period is set up over four years, but the NRDs hope to save \$1 million in interest and eradicate the debt in one year. The money to service the bonds would come from a combination of property taxes and a new occupation tax of up to \$10 per acre that owners of irrigated land must pay. The property tax will be levied against all NRD residents, not just the irrigations. The cost will be about \$47 for a \$100,000 home. See also Lorri Sughroue, *Irrigators Will Be Paid*, MCCOOK GAZETTE, Nov. 2, 2007 (available at <http://www.mccookgazette.com/story/1288430.html>). While surface water users have leased or sold their 2008 surface water rights, they have yet to be paid for two reasons. First, the property and occupation taxes will be assessed and paid in the tax season starting in 2008. Secondly, a lawsuit has been filed contesting the constitutionality of L.B. 701 halting the issuance of the bond.

⁹¹ See Steve Smith, *Irrigators and Stream Depletion: Not Guilty*, MCCOOK GAZETTE, September 14, 2007, at 8 (highlighting the effects of conservation measures and technology advances within the Republican River Basin) (citing S.L. Hutchinson, J.K. Koelliker and A.K. Knapp, *Development of Water-Coefficients for the Fully-Watered Tall-Grass Prairie*, TRANSACTIONS OF THE AMERICAN SOCIETY OF AGRICULTURAL ENGINEERS (in press) (available at <http://tinjurl.com/y2x8av>).

⁹² S.L. Hutchinson, J.K. Koelliker and A.K. Knapp, *Development of Water-Coefficients for the Fully-Watered Tall-Grass Prairie*, TRANSACTIONS OF THE AMERICAN SOCIETY OF AGRICULTURAL ENGINEERS (in press) (available at <http://tinjurl.com/y2x8av>).

on an annual basis has arguably no immediate effect on the stream flow and studies show that doubling or halving the pumping rate on wells more than two miles from the stream will have no significant effect on the stream flow in the next decade.⁹³ According to Professor Koelliker's simulation, shutting off all wells within two miles of the Republican River mainstream will result in only twenty-three percent of that well water reaching the Republican River.⁹⁴ The other seventy-seven percent never gets to the stream.⁹⁵ Plus, it may take up to seven years before the entire twenty-three percent actually makes it to the stream.⁹⁶ If these studies are correct, the fastest way Nebraska can reduce its consumptive use is not by shutting off groundwater pumps, but rather reducing surface water appropriations.

III. ANALYSIS

Many believe that L.B. 701 is a great answer to Nebraska's Republican River 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 surface 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 surface 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.⁹⁷ This raises the question whether, by granting Republican River NRDs the authority to levy a property tax in order to comply with the Republican River Compact, the state is in fact levying a property tax to achieve a state goal in violation of the Nebraska Constitution.⁹⁸

A. IS LEGISLATIVE BILL 701 CONSTITUTIONAL?

One of the key provisions of L.B. 701 is its amendment of Nebraska Revised Statute § 2-3225 (2007). Nebraska Revised Statute § 2-3225 authorizes each NRD to levy property taxes on land within the jurisdiction of each NRD.⁹⁹ L.B. 701 effectively broadens this power for Republican River NRDs. Under section six of the bill, an NRD with "jurisdiction that includes a

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ NEB. CONST. art. VIII-1A.

⁹⁸ Nine residents of the Upper, Lower, and Middle Republican NRDs, who call their group "Friends of the River," have filed suit attacking the constitutionality of L.B. 701. *Garey v. Neb. Dep't of Natural Res.*, No. CI07-4610 (Neb. filed Oct. 3, 2007).

⁹⁹ See Nebraska Association of Resources Districts, Map of Nebraska's NRDs, http://www.nrdnet.org/nrd_guide/find_nrd.html (last visited Nov. 20, 2007).

river subject to an interstate compact among three or more states that also includes one or more irrigation districts within the compact river basin” is given the power to issue “negotiable bonds and refunding bonds” and “river-flow enhancement bonds.”¹⁰⁰

Under section nine of the bill, the proceeds from the bonds acquired by the Republican River NRDs through section six can only be used to acquire ground water rights, surface water rights, or surface water storage rights,¹⁰¹ to pay for the acquisition of “canals and other works,”¹⁰² or for vegetation management.¹⁰³ The NRDs can repay the bond debt in one of three ways: (a) appropriations from the state or federal governments for qualified projects; (b) an “occupation tax” on irrigated land within the district created under section ten of the bill; or (c) a property tax levy added to Nebraska Revised Statute § 2-3225(d) by L.B. 701 that is applicable to all taxable property within the district.¹⁰⁴ This means that if the Upper Republican NRD should decide to issue a bond and use the proceeds to purchase water rights within its jurisdiction, it could then levy a property tax on all taxable property within the Upper Republican NRD to pay for the bond – a tax that the NRD did not have the power to levy prior to L.B. 701’s passage.

While any of the three revenue sources may be used by a Republican River NRD to repay the debt created by issuing bonds, no single source must be used. So, while an NRD is not required to impose the property tax, if it chooses to impose such property tax, the money must be used to pay the debt on the bonds issued to purchase or lease water rights.¹⁰⁵ Since L.B. 701’s enactment in May, Republican River NRDs have already leased nine million dollars worth of surface water rights in the Basin and plan to impose both the property tax and occupation tax on residents within each NRD.¹⁰⁶ Therefore, whether NRDs can constitutionally place a property

¹⁰⁰ L.B. 701, 100th Leg., 1st Reg. Sess., at § 6(1) (Neb. 2007) (codified at NEB. REV. STAT. § 2-3225(d) (2007)).

¹⁰¹ L.B. 701, 100th Leg., 1st Reg. Sess., at § 9 (Neb. 2007) (codified at NEB. REV. STAT. § 2-3226.04 (2007)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ NEB. REV. STAT. § 2-3225(d) states: “[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.”

¹⁰⁵ See *supra* section I.D.1.

¹⁰⁶ Over 100 farmers with water rights near the Republican River were suppose to be paid a total of \$9 million in early November for sending water to Kansas that would have otherwise been used to irrigate their crops. A lawsuit filed challenging the constitution of L.B. 701 prevent Ameritas, the company picked to provide the bonds to the NRDs until the issue is resolved in courts. Nate Jenkins, *Republican River Farmers in Lurch with Water Lawsuit*,

tax in order to pay for water rights within the Republican River Basin is a question that is quickly going to need an answer.

1. THE “DUIS AMENDMENT”

The constitutionality of the property tax levy L.B. 701 adds to Nebraska Revised State § 2-3225 turns on Article IIIV, section 1A, of the Nebraska Constitution: “The state shall be prohibited from levying a property tax for state purposes.”¹⁰⁷ Known as the “Duis Amendment,” it was adopted in 1954, and amended to its current reading in 1966, after Nebraska had adopted a state sales and income tax. By keeping the state out of the realm of property taxation, “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.”¹⁰⁸ While the state must continue to administer its traditional functions, it “cannot avoid or circumvent the constitutional mandate by converting the traditional state functions into local functions supported by property taxes.”¹⁰⁹ In sum, the state must maintain its functions at the state level using funds raised through means other than a property tax.

The Duis Amendment contains two elements that must be satisfied before a property tax is considered unconstitutional: first, the *state* must levy the property tax and second, the property tax must be levied for *state purposes*.

While the first element requires that the *state* not levy the property tax, 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. In *State of Nebraska ex rel. Western Nebraska Technical Community College Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974) (*Tallon I*), the Court held that certain property taxes imposed by *local* political subdivisions may be considered *state* levies for the purpose of this limitation.¹¹⁰ If the Court were to hold otherwise, and construe the constitutional amendment to prohibit only a *direct*

LINCOLN JOURNAL STAR, Oct. 30, 2007,

<http://www.journalstar.com/articles/2007/10/31/news/nebraska/doc47277f26e6fff031716535.txt>.

¹⁰⁷ In contrast to the property tax created in section six of LB 701, section ten’s “occupational tax,” a ten-dollar per acre charge on all irrigated land within the district that is promoted as a user fee imposed “upon the activity of irrigation of agricultural lands,” may or may not come within the “state purpose” constitutional limitation highlighted in the text. This issue, while an important consideration, is outside the scope of this analysis.

¹⁰⁸ *State of Neb. ex rel. Western Technical Cmty Coll. Area v. Tallon*, 196 Neb. 603, 606, 244 N.W.2d 183, 186 (1976) (*Tallon II*); *Swanson v. State Dep’t of Educ.*, 249 Neb. 466, 476, 544 N.W.2d 333, 340 (1996).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

statewide property tax levied by the State itself, it would eviscerate the amendment.¹¹¹ The state could avoid the limitation by requiring political subdivisions to levy property taxes and then turn the proceeds over to the state.¹¹²

As for the second element, the Nebraska Supreme Court stated in *Swanson v. State Dept. of Education*, 249 Neb. 466 (1996), that the state cannot “avoid or circumvent this constitutional mandate by converting the traditional state functions into local functions supported by property taxes.”¹¹³ Despite any legislative subterfuge, “where the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local governmental unit.”¹¹⁴ In other words, the state cannot avoid the Duis Amendment simply by authorizing its political subdivisions to levy a tax for a state purpose. Of course, a tax levied by the state, rather than a local tax, provides the best evidence that the state has levied a property tax for a state purpose, but the Nebraska Supreme Court has made clear that this constitutional limitation cannot be sidestepped to allow the state to achieve indirectly through a local political subdivision what it cannot achieve directly. Placed into 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. This places the focus of the inquiry on whether levying taxes to repay bonds used to purchase or lease water rights is a “state purpose.”

2. DOES LEGISLATIVE BILL 701 ACHIEVE A STATE OR LOCAL PURPOSE?

L.B. 701 grants Republican River NRDs and not the State of Nebraska additional property taxing authority. Thus, on its face, L.B. 701 does not appear to violate the Duis Amendment. However, the Nebraska Supreme Court has routinely held that the state cannot try to bypass the Duis Amendment by granting local political subdivisions the authority to levy a property tax to achieve a state purpose; the state cannot achieve though indirect means that which it cannot achieve directly. Therefore, the relevant inquiry is whether the property tax authority granted to the local Republican River NRDs in Nebraska Revised Statute § 2-3225 is being used to fulfill a state purpose. The Nebraska Supreme Court stated in *Swanson* that when state and local purposes are intermingled in a statute, the crucial issue is whether “the controlling

¹¹¹ *Tallon I*, 192 Neb. at 212, 219 N.W.2d at 460.

¹¹² *Id.*

¹¹³ *Swanson*, 249 Neb. at 476, 544 N.W.2d at 340.

¹¹⁴ *Id.* at 447-8, 341 (citing *Tallon I*, 192 Neb. at 212, 219 N.W.2d at 460).

and predominant purposes are state purposes or local purposes...there is no sure test by which state purposes may be distinguished from local.”¹¹⁵ Since there is no firm test, there are two issues that any court analyzing L.B. 701 will have to address. First, is compliance with an interstate water compact a state purpose or goal? Second, does the language of L.B. 701 indicate that the purpose of the local taxing authority granted to the NRDs is designed to achieve a state or a local purpose?

i. COMPACT COMPLIANCE – A STATE PURPOSE

The property taxing authority authorized by L.B. 701 appears to be directed at helping Nebraska achieve compliance with the Republican River Compact. However, even if Compact compliance is the underlying goal of the new property tax, the first question is whether Compact compliance is a state purpose.

Achieving compliance with an interstate compact seems to clearly be a state purpose based upon the general nature of compacts. Interstate water compacts are essentially a water contract between *states* entered into through *state* legislation.¹¹⁶ Since interstate compacts increase the power of the states while reducing federal power, compacts require congressional approval.¹¹⁷ Once a compact gains federal approval, it has the full force and supremacy as federal law which allows a federal court to enforce the terms of the compact, preventing states from ignoring their compact duties.¹¹⁸

Also indicative of the fact that it is a state’s and not a local NRD’s responsibility to comply with interstate water compacts is the fact that in *Texas v. New Mexico*, the U.S. Supreme Court emphasized that compacts are state obligations by stating that in litigation involving interstate water compacts, the state is the proper plaintiff.¹¹⁹ Additionally, the United States

¹¹⁵ *Swanson v. State of Neb.*, 192 Neb. 201, 210, 219 N.W.2d 454, 460 (1996) (“This court must consider each case as it arises and draw the line of demarcation.”).

¹¹⁶ *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

¹¹⁷ See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, . . .”).

¹¹⁸ See *Culyer v. Adams*, 449 U.S. 433, 438 (1981) (congressional consent “transforms an interstate compact . . . into a law of the United States”); *Texas v. New Mexico*, 482 U.S. at 128 (allowing prospective equitable relief as well as a legal remedy for past breaches). See Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management In The Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006) (discussing interstate compact law in general and in the Great Lakes region specifically).

¹¹⁹ *Id.* at 132 n. 7. The Court states that the enforcement of a compact is of such general public interest that the State is a proper plaintiff. *Id.* In the *Texas* case, Texas had suggested that monetary damages might find its way into the general coffers of the state rather than benefit those who were injured through the deprivation of water. However, since the enforcement of compacts are in the public interest, a State is be free to spend any monetary damages recovered in an action for breach of the compact in any manner benefit the public interest

Supreme Court has held that nothing in the nature of compacts prevents a state from asking for damages for a failure to perform as well as ordering future performance.¹²⁰ Since Nebraska has been out of Compact compliance since 2001, if Kansas were to file a lawsuit in 2008 for failure to comply with the Compact, Nebraska could be faced with the past damages for denying Kansas its allotted amount of water in addition to future damages if it appears unlikely that Nebraska will be able to reach Compact compliance. If the Supreme Court were to determine that Nebraska has breached its Compact obligations, it could order the *state*, not individual NRDs, to pay damages either in water or in money depending upon whether there is any water available or if equity demands that monetary damages be paid.¹²¹

The nature of interstate water compacts and prior precedent from the United States Supreme Court make it relatively clear that compliance with the Republican River Compact should be viewed as a state goal or purpose. Additionally, the specific language of the Republican River Compact speaks to only obligations of each state and required approval by each state's legislature prior to its enactment. Under Article IX of the Compact, states were given the responsibility "to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies."¹²² This language may allow the state to have the Compact administered by a specific state agency, however, ultimately it is the state that is will be held accountable for Compact compliance.¹²³ Furthermore, NRDs were not even in existence at the time that Nebraska entered into the Republican River Compact in 1943, therefore Nebraska's obligations arising under the Compact could not obligate the non-existent NRDs. Nebraska also had the opportunity to place some Compact responsibility on NRDs in the 2001 Settlement Agreement. However, there is no mention of NRDs in the final stipulation and only state governors and attorney generals, not those charged with regulating water within the state, signed the Agreement.¹²⁴ All this evidence points to the conclusion that the Republican River Compact is an obligation of the State of Nebraska and not local Republican River NRDs. As such, Nebraska's compliance with the Compact should be considered a state purpose under the Duis Amendment.

¹²⁰ *Texas*, 482 U.S. at 128.

¹²¹ *Id.*

¹²² Republican River Compact, *supra* note 14, art. IX.

¹²³ See Special Master's Second Report, *supra* note 5, at 39. The governors and attorney generals of Nebraska, Kansas, and Colorado signed the Settlement Agreement committing each state to the terms of the settlement.

¹²⁴ Special Master's Second Report, *supra* note 5, at 39.

ii. L.B. 701’S PROPERTY TAX – A STATE PURPOSE

Since Compact compliance is likely to be seen by a court as a state purpose, the next question is whether the property tax under L.B. 701 is designed to achieve that state purpose. The Nebraska Supreme Court does not allow political subdivisions to carry out indirectly what the state cannot do directly under the Duis Amendment.¹²⁵ Therefore, the inquiry must focus on whether the new property tax authorized under Nebraska Revised Statute § 2-3225 is designed not to achieve a local 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, L.B. 701 expanded this power by allowing the Republican River NRDs to place a property tax on all taxable property within each NRD “in order to implement its duties and obligations under the Nebraska Ground Water Management and Protection Act.”¹²⁶ Since this provision focuses solely on the Ground Water Protection and Management Act (“L.B. 962”), not the Republican River Compact, on its face the statutory language could shield the law from a Duis Amendment “state purposes” attack focused on compliance with the Republican River Compact. If NRDs are not authorized to levy the property tax for the purpose of complying with the Compact, but rather to provide the NRDs with resources to address water issues within their jurisdiction arising as a result of L.B. 962, then the state purpose argument is weaker. If the state authorizes a property tax “for purposes substantially local [it] does not contravene the prohibition of the constitutional amendment,”¹²⁷ and addressing local water concerns, such as resolving disputes between groundwater and surface water users under L.B. 962 within an NRD, would likely be viewed by a court as a local and not a state purpose.

However, given the fact that only those NRDs with jurisdiction “including a river subject to an interstate compact among three or more states”¹²⁸ are given the new taxing authority, resolution of local water issues, such as the implementation of L.B. 962, seems to be a narrow view of L.B. 701. Especially when the timing of the bill’s enactment is viewed in the context of

¹²⁵ Swanson v. State of Neb., 249 Neb. 446, 476, 544 N.W.2d 333, 340 (1996).

¹²⁶ L.B. 701, 100th Leg., 1st Reg. Sess., at § 6(1) (Neb. 2007) (codified at NEB. REV. STAT. § 2-3225(d) (2007)).

¹²⁷ State of Neb. ex rel. Western Technical Cmty Coll. Area v. Tallon, 196 Neb. 201, 210, 219 N.W.2d 454, 459 (1974).

¹²⁸ NEB. REV. STAT. § 2-3225(d).

the Republican River Compact, Nebraska’s increasing consumptive water use, and the rising conflict with Kansas.¹²⁹ 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 L.B. 701 extends only to NRDs “with jurisdiction that includes a river subject to an interstate compact among three or more states.”¹³⁰ From this language alone, it is not difficult to make the argument that Compact compliance, a state goal, is the primary goal of the property tax authorized in L.B. 701.

In addition to the fact that only Republican River NRDs are giving the new taxing authority, the unambiguous language of the taxing statute excluding the new 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. Sections (1)(a) through (1)(c) of Nebraska Revised Statute § 2-3225 allow the Republican River NRDs to tax in order to raise revenues for the “operation of the district;”¹³¹ authority which NRDs already had prior to the enactment of L.B. 701. However, L.B. 701 adds to the following property taxing authority to subsection (1)(d): “a [Natural Resources] 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.”¹³² The statute goes on to state that while revenues raised through subsections (1)(a) through (1)(c) are to be used for “the operation of the district,” taxes raised pursuant to subject (1)(d), the section added by L.B. 701, are explicitly excluded from being used for the operation of the district.¹³³ 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.

¹²⁹ Nebraska Farm Bureau, Republican River Basin Newsletter, Vol. 1, Issue 1 (June 2007) (available at <http://www.nefb.org/archivej/uploads/FB%20News%20for%20Republican%20Basin%20June%202007.pdf>); Nate Jenkins, *Water Meeting Could Give Kansas More Ammunition*, McCook Daily Gazette, Aug. 12, 2007, at 1.

¹³⁰ L.B. 701, 100th Leg., 1st Reg. Sess., at § 6(1) (Neb. 2007) (codified at NEB. REV. STAT. § 2-3225(d) (2007)).

¹³¹ NEB. REV. STAT. § 2-3225(1)(a)–(c) and (2).

¹³² NEB. REV. STAT. § 2-3225(1)(d) (emphasis added).

¹³³ NEB. REV. STAT. § 2-3225(2).

In sum, the plain language of Nebraska Revised Statute § 2-3225 provides a strong argument that the property taxing authorized under the statute violates the Duis Amendment. First, only those NRDs whose jurisdiction including a river subject to an interstate compact are granted the new taxing authority and second, the new tax is expressly excluded for use for the operation of the NRD. This language combined with the fact that compact compliance should be considered a state purpose makes a persuasive argument that the Nebraska legislature has enacted L.B. 701 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 Duis Amendment.

IV. CONCLUSION

While Nebraska must find a way to comply with its Republican River Compact obligations, L.B. 701 is not going to be the answer. The bill's primary goal, leasing and purchasing water rights so that Nebraska reduces its consumptive water use, is probably the quickest way Nebraska can hope to achieve Compact compliance. However, allowing local NRDs to levy property taxes in order to pay for the water rights should be found to be in violation of the Duis Amendment. While the State itself is not issuing the property tax, L.B. 701 allows the NRDs to issue a property tax for a state purpose and is an attempt by the state to do indirectly through the NRDs what it cannot do directly. The Nebraska Supreme Court has clearly held that in order for the Duis Amendment to have any force, the state cannot be allowed to sidestep the Amendment by authorizing local political subdivisions to issue property taxes in order to achieve a state purpose. In allowing NRDs to issue the property tax, the state has attempted to indirectly issue a property tax in order to meet Nebraska's obligations under the Republican River Compact. While many believed that L.B. 701 would be a step towards achieving Compact compliance, there is significant merit to the argument that L.B. 701 is simply unconstitutional. In order to effectively manage Nebraska's water resources in the Republican River, and achieve Compact compliance, Nebraska's legislature must find a constitutional answer to Nebraska's Republican River problems.¹³⁴

¹³⁴ The author would like to thank Professors Sandra Zellmer and Mike Jess for the guidance and expertise they contributed to this seminar paper.