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To the extent the Workers' Compensation Court has authority to foreclose an injured worker's right to benefits under the Act, that authority was not (and could not have been) appropriately exercised in this case. And as we understand EMC's arguments, all of its assignments of error rest on the premise that the court's March 28, 2008, order *could* and *did* dismiss Hofferber's petition with prejudice. We find no merit to that premise, so we correspondingly find no merit to EMC's assignments of error.

V. CONCLUSION

We find no merit to Hofferber's argument on cross-appeal that the trial court lacked jurisdiction to enter the March 28, 2008, order in an improper venue. But we also find no merit to EMC's arguments that the March 28 order effectively dismissed Hofferber's claim for benefits with prejudice. Therefore, we affirm the judgment of the review panel remanding the cause to the trial court for further proceedings.

AFFIRMED.

WRIGHT, J., not participating.

TOM KIPLINGER ET AL., APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA DEPARTMENT OF NATURAL RESOURCES ET AL., APPELLEES AND CROSS-APPELLANTS, AND SCOTT OLSON ET AL., APPELLEES.

803 N.W.2d 28

Filed September 16, 2011. No. S-10-296.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
4. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the

former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

5. ____. The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
6. **Judgments: Actions: Parties.** In the context of whether a prior judgment has preclusive effect with respect to a subsequent action, privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.
7. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
8. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
9. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
10. **Taxation: Property: Valuation.** Generally, a property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.
11. ____: ____: ____. Property taxes, by their very nature, target the value of that which is being taxed.
12. **Taxation.** An excise tax is imposed upon the performance of an act.
13. ____. A tax imposed upon the doing of an act, including a business or license tax, is an excise tax and not a property tax.
14. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.
15. ____: ____. Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
16. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
17. **Special Legislation: Words and Phrases.** A "closed class" is one that 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.
18. **Statutes: Special Legislation.** In deciding whether a statute legitimately classifies, the 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.
19. **Constitutional Law: Taxation: Public Purpose.** A tax levy does not equal a commutation merely because the taxing district is broadened to reflect the actual benefits to the public. So long as all taxpayers receive the benefit of the taxes

they remit, the taxing district passes constitutional muster without offending the prohibition against commutation.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Jeanelle R. Lust and Katherine S. Vogel, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellees Nebraska Department of Natural Resources and its director.

Donald G. Blankenau and Thomas R. Wilmoth, of Blankenau Wilmoth, L.L.P., for appellees Upper Republican Natural Resources District, Middle Republican Natural Resources District, and Lower Republican Natural Resources District.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, J.

STEPHAN, J.

In *Garey v. Nebraska Dept. of Nat. Resources*,[1] we held that a property tax levy authorized by L.B. 701, enacted in 2007,[2] was a property tax for a state purpose and therefore unconstitutional, in violation of Neb. Const. art. VIII, § 1A. In this case, we are presented with the question of whether an occupation tax authorized by L.B. 701 violates the same constitutional provision or, alternatively, the constitutional prohibitions of special legislation[3] and commutation of taxes.[4] The landowners who commenced this action appeal from an order of the district court for Lancaster County upholding the constitutionality of the occupation tax. We affirm.

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[1] *Garey v. Nebraska Dept. of Nat. Resources*, 277 Neb. 149, 759 N.W.2d 919 (2009).

[2] 2007 Neb. Laws, L.B. 701.

[3] Neb. Const. art. III, § 18.

[4] Neb. Const. art. VIII, § 4.

I. BACKGROUND

1. Republican River Compact

The states of Colorado, Kansas, and Nebraska, and the United States are signatories to the Republican River Compact (Compact), which was authorized by federal legislation in 1943 and ratified by the legislatures of the three states.[5]

As we stated in *Garey*, the primary purposes of the Compact are to

> "provide for the most efficient use of the waters of the Republican River 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 [b]asin 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."[6]

Under the terms of the Compact, each signatory state is allotted a specific number of acre-feet of water per year from designated sources for "beneficial consumptive use."[7] Pursuant to this allocation, Nebraska receives 49 percent of the annual water supply, Kansas receives 40 percent, and Colorado receives the remaining 11 percent.

On December 15, 2002, representatives of the three signatory states entered into a stipulation to settle litigation initiated by Kansas in the U.S. Supreme Court regarding their respective rights under the Compact. Nebraska's Governor and Attorney General sent letters to water users in the Upper, Middle, and Lower Republican Natural Resources Districts (Republican NRD's) advising of the settlement and stating that the Republican NRD's would be developing management plans to address water allocation and usage.

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[5] See, Pub. L. No. 78-60, 57 Stat. 86 (1943); 2A Neb. Rev. Stat. appx. § 1-106 (Reissue 2008). Colo. Rev. Stat. Ann. § 37-67-101 (West 2004); Kan. Stat. Ann. § 82a-518 (1997).

[6] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 151, 759 N.W.2d at 922, quoting § 1-106, art. I.

[7] § 1-106, art. IV.

2. L.B. 701

On May 1, 2007, L.B. 701 was enacted with an emergency clause. According to its introducer, L.B. 701 was "designed to address the water problem in the Republican River Basin" and "[p]rovide a way to guarantee that Nebraska stays in compliance with the . . . Compact . . . with Kansas on an annual basis."[8] As originally enacted and in effect on the dates relevant to this action, L.B. 701 authorized 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" to issue "river-flow enhancement bonds."[9] The proceeds of these bonds could be used only for specified purposes, including acquisition of water rights, acquisition or administration and management of canals and other works, vegetation management, and augmentation of riverflows.[10] Riverflow enhancement bonds authorized by L.B. 701 are payable from three funding sources: "(a) funds granted to [an issuing natural resources] district by the state or federal government for one or more qualified projects, (b) the occupation tax authorized by section 2-3226.05, or (c) the levy authorized by section 2-3225."[11] In a press release announcing the enactment of L.B. 701, the Governor's office stated that the legislation would "'help our state make substantial progress in our goal of achieving sustainable water use throughout Nebraska,'" and further, that L.B. 701 "'addresses both our short-term issues in the Republican River Basin and creates a framework for addressing our long-term water challenges.'"[12]

In May and June 2007, the Republican NRD's entered into an "Interlocal Cooperation Agreement" to create the Republican

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[8] Introducer's Statement of Intent, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. (Feb. 28, 2007).

[9] Neb. Rev. Stat. § 2-3226.01(1) (Cum. Supp. 2008).

[10] See Neb. Rev. Stat. § 2-3226.04 (Reissue 2007).

[11] § 2-3226.01(1).

[12] Press Release, Office of the Governor, Governor Heineman Signs Landmark Water Legislation Into Law (May 1, 2007), http://www.governor.nebraska.gov/news/2007_05/01_landmark.html (last visited Sept. 9, 2011).

River Basin Coalition. The purpose of the coalition was to take actions necessary to ensure that the Republican NRD's remained in compliance with the Compact and to "specifically act within the authorities granted by LB 701."

3. *Garey v. Nebraska Dept. of Nat. Resources*

Garey involved a constitutional challenge to the property tax levy authorized by L.B. 701 as codified at Neb. Rev. Stat. § 2-3225(1)(d) (Cum. Supp. 2008). Under that statute, 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" was authorized to "annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district." The use of the proceeds of this levy was restricted to repayment of riverflow enhancement bonds and repayment of funds disbursed by the Department of Natural Resources from the Water Contingency Cash Fund created by L.B. 701.[13]

The nine individual plaintiffs in *Garey* were residents and taxpayers of the Republican NRD's. The defendants included the Department of Natural Resources and its acting director, the Republican NRD's, and various other governmental officials and entities responsible for collection of property taxes in the counties situated within the Republican NRD's. The *Garey* plaintiffs challenged the levy authorized under § 2-3225(1)(d) on three grounds. They claimed that it constituted a property tax levy for state purposes, in violation of Neb. Const. art. VIII, § 1A; that it resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4; and that the statute authorizing the levy constituted special legislation, in violation of Neb. Const. art. III, § 18.

The district court rejected the first two claims, but concluded that the statutory authorization of the levy constituted special legislation, in violation of Neb. Const. art. III, § 18. The defendants appealed, contending that the district court

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[13] See § 2-3225(1)(d) and Neb. Rev. Stat. §§ 2-3226.07 and 2-3226.08 (Cum. Supp. 2008).

erred in determining that the statute which authorized the levy constituted special legislation. Plaintiffs cross-appealed, contending that the district court erred in not concluding that the challenged levy was not an unconstitutional property tax for state purposes and a commutation of taxes. We found merit in one issue raised on cross-appeal and concluded on the bases of the legislative history and plain language of L.B. 701 that "the controlling and predominant purpose behind the property tax provision in § 11(1)(d) of L.B. 701 is for the purpose of maintaining compliance with the Compact, which we conclude is a state purpose."[14] Based upon the severability clause included in L.B. 701, we severed the offending provision and affirmed the judgment of the district court, albeit on different reasoning. We specifically noted that our decision had "no bearing on the remaining provisions of L.B. 701" and that because of our resolution of the case, we did not reach or consider "the remaining assignments of error."[15]

4. Current Action

This case presents a constitutional challenge to the occupation tax levied pursuant to L.B. 701 as codified at Neb. Rev. Stat. § 2-3226.05 (Cum. Supp. 2008). The statute provides in pertinent part:

> (1) The district may levy an occupation tax upon the activity of irrigation of agricultural lands within such district on an annual basis, not to exceed ten dollars per irrigated acre, the proceeds of which may be used for the purpose of repaying principal and interest on any bonds or refunding bonds issued pursuant to section 2-3226.01 for one or more projects under section 2-3226.04 or for the repayment of financial assistance received by the district pursuant to section 2-3226.07.
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> (2) Acres classified by the county assessor as irrigated shall be subject to such district's occupation tax unless, on or before July 1, 2007, and on or before March 1 in

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[14] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 160, 759 N.W.2d at 928.

[15] *Id.* at 161, 759 N.W.2d at 928.

each subsequent year, the record owner certifies to the district the nonirrigation status of such acres.

In 2007, the boards of the Republican NRD's voted to levy the occupation tax authorized by § 2-3226.05. This resulted in the taxation of the appellant landowners, who are residents and taxpayers of natural resources districts in the Republican River basin who have ownership interests in agricultural land situated in various counties within the boundaries of the Republican NRD's which is assessed as irrigated. In August 2008, the landowners' representatives made written requests to the boards of the Republican NRD's to cease levying the occupation tax and to refund any taxes paid, on the grounds that the occupation tax was unconstitutional and illegal.

Unsuccessful in this effort, the landowners brought this action for declaratory and injunctive relief seeking to have the occupation tax declared unconstitutional and its levy and collection enjoined. The appellees, defendants below, include the Department of Natural Resources and its director, the Republican NRD's, the state Property Tax Administrator, and a number of county officials responsible for imposing and collecting the occupation tax in the various counties where the tax has been levied.

The landowners alleged in their complaint that the occupation tax was in fact a "'property tax for state purposes'" prohibited by Neb. Const. art. VIII, § 1A; that the occupation tax resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4; and that § 2-3226.05 was special legislation in violation of Neb. Const. art. III, § 18, because it created two closed classes—the Republican NRD's, to which it granted the privilege of levying the occupation tax, and Nebraska irrigators outside the Republican NRD's who were exempted from the occupation tax. They further alleged that the judgment of the district court in *Garey* collaterally estopped the named defendants from relitigating the issue of whether L.B. 701 created an unconstitutional, closed class consisting of the Republican NRD's.

The county officials filed answers generally denying the allegation that the occupation tax was unconstitutional and asserting certain affirmative defenses. Upon stipulation of the

parties, the action was stayed pending our resolution of the appeal in *Garey*. When the stay was lifted, the Department of Natural Resources and its director, the state Property Tax Administrator, and the Republican NRD's filed a motion to dismiss, which was overruled by the district court. Those parties then filed an answer generally denying that the occupation tax was unconstitutional and asserting various affirmative defenses.

The case proceeded to trial on stipulated facts. In addition to the facts summarized above, the parties stipulated to the maximum ground water allocations per acre permitted under the former and current integrated management plans of the Republican NRD's, and various factors which affect the availability of both ground water and surface water for irrigation. The parties further stipulated that the Department of Natural Resources had proposed options for amending the integrated management plans of the Republican NRD's for dry years. Also, the parties stipulated that land within various irrigation districts which is classified as "irrigated" had not received surface water for irrigation during some or all of the preceding 10-year period; that there are lands within each of those irrigation districts which have supplemental ground water wells available during years when surface water was not received; that the Republican River Basin in Nebraska has been determined by the State to be "fully appropriated" and, as such, no new surface water rights will be granted so long as such determination remains in place; and that each of the Republican NRD's named as defendants has placed a moratorium on the drilling of new irrigation wells within its jurisdiction.

The district court entered an order on March 12, 2010, upholding the constitutionality of the occupation tax. The court determined that the occupation tax was not a property tax, but, rather, an excise tax levied "'upon the activity of irrigation,'" and therefore did not violate Neb. Const. art. VIII, § 1A. The court rejected the landowners' claim that the occupation tax resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4, after it concluded that any funds raised from the imposition of the occupation tax would benefit the taxpayers of the Republican NRD's rather than divert taxes raised by

the Republican NRD's to the sole use and benefit of another district. Finally, the court rejected the claim that § 2-3226.05 was special legislation in violation of Neb. Const. art. III, § 18, concluding that the landowners had not met their burden of proving that the statute created a closed class. In reaching this conclusion, the court first rejected the defendants' argument that the provision of Neb. Const. art. III, § 18, prohibiting legislation "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever" does not apply to political subdivisions such as natural resources districts.

The landowners appealed from this order, and the Department of Natural Resources, its director, and the Republican NRD's (hereinafter appellees) have cross-appealed. We moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

The landowners assign, renumbered and restated, that the district court erred in (1) concluding that the appellees were not collaterally estopped by the district court's judgment in *Garey* from litigating whether the occupation tax permitted under § 2-3226.05 based on the classification of districts found in § 2-3226.01(1) was unconstitutional special legislation under Neb. Const. art. III, § 18; (2) concluding that the occupation tax permitted under § 2-3226.05 based on the classification of districts found in § 2-3226.01(1) was not unconstitutional special legislation under Neb. Const. art. III, § 18; (3) concluding that the occupation tax permitted under § 2-3226.05 was not a property tax for state purposes in violation of Neb. Const. art. VIII, § 1A; and (4) concluding that the occupation tax permitted under § 2-3226.05 was not a commutation of taxes in violation of Neb. Const. art. VIII, § 4.

In their cross-appeal, the appellees assign, restated, that the district court erred in (1) concluding that the landowners' claims in this action were not barred by the doctrine of res judicata or claim preclusion, because the landowners failed to raise constitutional objections to the occupation tax at the earliest practical opportunity when they challenged the property tax provisions of L.B. 701 in *Garey*, and (2) concluding that the

provision of Neb. Const. art. III, § 18, prohibiting legislation "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever" applies to natural resources districts.

III. STANDARD OF REVIEW

[1,2] The applicability of the doctrines of res judicata and collateral estoppel is a question of law.[16] On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[17]

[3] Whether a statute is constitutional is also a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[18]

IV. ANALYSIS

This case, like *Garey*, is concerned with the language of § 2-3226.01(1) as originally enacted in 2007. The parties note in their briefs that in 2010, the Legislature amended § 2-3226.01(1), effective July 15, 2010,[19] and that this action involves only the validity of occupation taxes levied and collected through that date.

1. Res Judicata

[4,5] We first address the potentially dispositive issue raised by the cross-appeal of whether, under the doctrine of res judicata, this action is barred by the final judgment in *Garey.* The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were

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[16] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[17] *Id.*

[18] *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010); *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1.

[19] 2010 Neb. Laws, L.B. 862, § 1.

involved in both actions.[20] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[21]

Garey was a final judgment on the merits by a court of competent jurisdiction. The defendants in that case were essentially the same persons and entities as the defendants in this case. But only three of the plaintiffs in *Garey* are named as plaintiffs in this case. Six of the *Garey* plaintiffs are not parties to this case, and 88 of the landowners in this case were not plaintiffs in *Garey.* While acknowledging that there is not an identity of plaintiffs in the two cases, appellees argue that for purposes of application of the doctrine of res judicata, the landowners who brought this action are in privity with the *Garey* plaintiffs.

[6] In the context of whether a prior judgment has preclusive effect with respect to a subsequent action, privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.[22] Appellees argue on cross-appeal that because all the landowners who brought this action were subject to the property tax challenged in *Garey*, they are in privity with the *Garey* plaintiffs. But the landowners argue that because occupation tax applies only to land which is classified as irrigated, the occupation tax is levied against a small subset of the real estate subject to the property tax challenged in *Garey*.

We agree that because of this distinction, the plaintiffs in the two cases are not "really and substantially in interest the same" and are therefore not in privity.[23] The plaintiffs in *Garey* shared the trait of being residents of the Republican NRD's whose land would be subject to the property tax imposed by L.B. 701, while the landowners in this case shared the trait of

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[20] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008); *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[21] *Id.*

[22] See, *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

[23] See *id.*

being residents of the Republican NRD's whose land is "agricultural land assessed as irrigated" that would be subject to the occupation tax. While the three persons who were plaintiffs in each case would be subject to the occupation tax, it is unknown whether the other plaintiffs in *Garey* owned land that would be subject to the occupation tax. Different interests appear to bind the group of plaintiffs in each case.

We are aware that in *Nolles v. State Com. Reorganization School Dist.*,[24] the Eighth Circuit Court of Appeals concluded that if presented with the issue, that court would "consider the doctrine of virtual representation in determining whether a subsequent party was in privity with a party to an earlier suit" for purposes of res judicata. Virtual representation is "'an equitable theory rather than . . . a crisp rule with sharp corners and clear factual predicates, such that a party's status as a virtual representative of a nonparty must be determined on a case-by-case basis.'"[25] As the Nebraska Court of Appeals subsequently noted in *Haskell v. Madison Cty. Sch. Dist. No. 0001*,[26] this court has never adopted the "expansive definition of privity" embodied in the doctrine of virtual representation, and we decline to do so on the facts and legal arguments presented by this case.

Based upon our de novo review of this question of law, and applying the traditional notion of privity reflected by our jurisprudence, we conclude that at least some of the landowners who brought this action have not been shown to be in privity with the plaintiffs in *Garey.* Because this is so, we need not and indeed cannot consider whether the substantive issues in this case could have been presented in *Garey.* We therefore conclude that the judgment in *Garey* does not bar this action under the doctrine of res judicata.

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[24] *Nolles v. State Com. Reorganization School Dist.*, 524 F.3d 892, 903 (8th Cir. 2008).

[25] *Id.* at 902, quoting *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994). See, also, *Haskell v. Madison Cty. Sch. Dist. No. 0001*, 17 Neb. App. 669, 771 N.W.2d 156 (2009).

[26] *Haskell v. Madison Cty. Sch. Dist. No. 0001, supra* note 25, 17 Neb. App. at 673, 771 N.W.2d at 162.

2. Constitutional Claims

[7-9] We proceed, therefore, to the merits of the constitutional challenges to the occupation tax authorized by L.B. 701, as codified at § 2-3226.05. We are guided by familiar general principles governing the degree of deference which must be given to a legislative enactment alleged to be unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[27] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[28] The unconstitutionality of a statute must be clearly established before it will be declared void.[29]

(a) Is Occupation Tax "a property tax for state purposes" in Violation of Neb. Const. Art. VIII, § 1A?

Neb. Const. art. VIII, § 1A, provides: "The state shall be prohibited from levying a property tax for state purposes." To determine whether the occupation tax at issue here violates this prohibition, we must determine whether it constitutes a "property tax."

[10-13] Generally, a property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.[30] Property taxes, by their very nature, target the value of that which is being taxed.[31] An excise tax, on the other hand, is imposed upon the performance of an act.[32] Thus, a tax imposed upon the doing of an act, including a business or license tax, is an excise tax and not a property

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[27] *Yant v. City of Grand Island, supra* note 18; *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[28] *Id.*

[29] *Yant v. City of Grand Island, supra* note 18. See, also, *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002).

[30] See, *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985); Black's Law Dictionary 1596 (9th ed. 2009).

[31] See *State v. Garza, supra* note 30.

[32] See, *id.*; *State v. Galyen, supra* note 30; Black's Law Dictionary, *supra* note 30 at 646.

tax.[33] Applying these principles, we have held that a tax stamp imposed on the sale of marijuana,[34] a statutory fee per head of cattle sold within the state,[35] a tax per gallon of motor vehicle fuel sold within the state,[36] and a tax imposed as an annual charge upon the right to continue corporate existence[37] were excise taxes, not property taxes.

Applying the same principles, the district court concluded that the occupation tax was an excise tax, because it was unassociated with the value of the property being taxed and was levied "upon the activity of irrigation."[38] But the landowners argue on appeal that the occupation tax is a "property tax in disguise," because the tax is levied against property which is "'classified by the county assessor as irrigated'" without regard to whether the "'activity of irrigation'" is actually occurring.[39] We reject this argument for two principal reasons. First, it does not address the fact that the occupation tax is not dependent upon the value of the land being taxed. Although two tracts, both classified as irrigated, may have vastly different value based upon various other factors, the levy of the occupation tax does not take the differing values into account. Second, the fact that land is "classified . . . as irrigated" would seem to be a reasonable indicator that the "activity of irrigation" is actually occurring on the land. And if that were not the case, the landowner can avoid the occupation tax by certifying to the natural resources district "the nonirrigation status" of the land on a year-by-year basis.[40] We therefore conclude that the occupation tax authorized by L.B. 701 and codified at § 2-3226.05 is not a "property tax for state purposes" prohibited by Neb. Const. art. VIII, § 1A.

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[33] See *State v. Galyen, supra* note 28.

[34] *State v. Garza, supra* note 30.

[35] *State v. Galyen, supra* note 30.

[36] *Burke v. Bass*, 123 Neb. 297, 242 N.W. 606 (1932).

[37] *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945).

[38] § 2-3226.05(1).

[39] Brief for appellants at 23-24 (emphasis omitted). See, also, § 2-3226.05(1) and (2).

[40] See § 2-3226.05(2).

(b) Does Statute Authorizing Occupation Tax Constitute Special Legislation Prohibited by Neb. Const. Art. III, § 18?

(i) Effect of Garey v. Nebraska Dept. of Nat. Resources

The landowners argue that the district court erred in rejecting their contention that *Garey* resolved the special legislation claim in their favor under principles of collateral estoppel. In *Garey*, the district court held that § 2-3225(1)(d) as it existed was unconstitutional as special legislation, in violation of Neb. Const. art. III, § 18, because it limited the authority to levy an ad valorem property tax for payment of fund riverflow enhancement bonds to "'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 basin.'"[41] In this appeal, the court found that this constituted a closed class, based upon its finding that it was "'highly improbable'" that the state would ever again enter into an interstate compact of this nature.[42] As noted, this determination was assigned as error in the *Garey* appeal, but we did not reach it because we concluded that the property tax violated Neb. Const. art. VIII, § 1A. In this appeal, the landowners argue that because the statutory authority to levy an occupation tax is similarly limited,[43] the appellees are collaterally estopped from contesting their special legislation argument.

[14,15] Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.[44] Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action

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[41] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 152, 759 N.W.2d at 923.

[42] See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

[43] See §§ 2-3226.01(1) and 2-3226.05.

[44] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011); *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. For purposes of collateral estoppel, we conclude that the final judgment in *Garey* was our order denying the appellants' motion for rehearing. As noted, our resolution of *Garey* did not reach the question of whether the district court erred in its analysis of the special legislation claim because we affirmed on other grounds. Accordingly, there was not a final judgment on the merits of that claim, and *Garey* therefore has no preclusive effect on this case under the doctrine of collateral estoppel.

(ii) Legislative Classification of Political Subdivisions

Neb. Const. art. III, § 18, prohibits the Legislature from passing "local or special laws" in 21 enumerated circumstances. The landowners here focus on the last of these, which prohibits a local or special law "[g]ranting 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 their cross-appeal, appellees contend that the district court erred in rejecting their claim that this prohibition is inapplicable to legislative classifications of political subdivisions, including natural resources districts. They argue that the principle of ejusdem generis "precludes the Constitution's explicit limitation to corporations, associations, and individuals from being expanded to implicitly include cities, counties, and [natural resources districts]."[45] But as the district court observed, our cases have applied this constitutional provision to legislative classifications involving political subdivisions. In *State, ex rel. Campbell, v. Gering Irrigation District*,[46] this

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[45] Brief for appellees on cross-appeal at 48.

[46] *State, ex rel. Campbell, v. Gering Irrigation District*, 114 Neb. 329, 334, 207 N.W. 525, 527 (1926).

court held that an amendment was special legislation prohibited by Neb. Const. art. III, § 18, because it authorized the board of directors of one irrigation district to impose upon landowners certain burdens and expenses and the amendment was "so framed that it cannot in the future become of general application" and limited "its application as clearly as though it had by name designated the district to which it was to apply." Similarly, in *Axberg v. City of Lincoln*,[47] this court held that a statute violated the special legislation clause because it exempted "one city of the first class . . . from the special obligations and burdens of the firemen's pension law, while others in the same class [were] required to submit to such obligations and burdens." In *State ex rel. Douglas v. Marsh*,[48] we held that a statute which prevented a county from moving from one classification to another for purposes of receiving state aid constituted unconstitutional special legislation by creating a "frozen classification into which no other county may enter even though it may subsequently acquire the very same characteristics which afforded the first county the benefits it receives." And we have held: "The law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable."[49]

While the appellees' argument would have some logical appeal if we were writing on a clean jurisprudential slate, we are not persuaded to depart from long-established precedent applying the constitutional prohibition against special legislation to legislative classifications involving political subdivisions. We therefore proceed to the merits of the landowners' argument that the district court erred in concluding that the statute in question did not violate this constitutional provision.

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[47] *Axberg v. City of Lincoln*, 141 Neb. 55, 64, 2 N.W.2d 613, 617 (1942).

[48] *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 606, 300 N.W.2d 181, 186 (1980).

[49] *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 261, 175 N.W.2d 74, 79 (1970).

(iii) Merits

[16] The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.[50]

The landowners contend that the statutes in question create two closed classes, one "consisting of the [Republican NRD's] to which the legislature has granted the privilege to levy an occupation tax under § 2-3226.05"; and another consisting of "Nebraska property owners . . . possessing irrigated property not located within the [Republican NRD's], who are exempt from such taxation."[51]

We have little difficulty in concluding that the second of these is not a closed class. Real property being alienable, the makeup of any "class" consisting of owners of property located outside the boundaries of the Republican NRD's is subject to constant change.

[17,18] The landowners' principal argument is that by conferring the power to levy an occupation tax on natural resources districts 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,'" the Legislature has created a permanently closed class consisting of the Republican NRD's within the Republican River Basin, the only natural resources districts in the state which currently have within their jurisdiction a river which is subject to an interstate compact.[52] A "closed class" is one that

> "'limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development . . .'" . . . "In deciding whether a statute legitimately classifies, the court must consider the actual probability that

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[50] *Yant v. City of Grand Island, supra* note 18; *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[51] Brief for appellants at 15.

[52] *Id.*

> others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation."[53]

The landowners do not dispute the possibility that the State of Nebraska could enter into future interstate compacts with adjoining states relating to rivers other than the Republican, but based upon the legislative history of L.B. 701, they argue that it is improbable that this would occur.

The introducer's statement of intent states that L.B. 701 was intended to "[p]rovide a way to guarantee that Nebraska stays in compliance with the . . . Compact . . . with Kansas on an annual basis" and that the legislation would be restricted "to the Republican River Basin using appropriate open class language."[54] In introducing amendments to the bill, counsel for the Natural Resources Committee noted that the bonding authority of natural resources districts "is restricted to those districts that are subject to an interstate compact consisting of three or more states, which at this time is the Republic[an] River Basin only."[55] In testimony before the committee, a special counsel to the attorney general stated:

> First, while everyone has talked about [how] this applies to the Republican River[,] and in fact the [Republican NRD's] 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, so it is an open class and satisfies the constitutional prohibition against special legislation. But to paraphrase Senator Wehrbein in a debate over the Southeastern Dairy Compact a couple of years ago, no Legislature in its right

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[53] *City of Ralston v. Balka*, 247 Neb. 773, 781, 530 N.W.2d 594, 601 (1995) (citations omitted).

[54] Introducer's Statement of Intent, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. (Feb. 28, 2007).

[55] Natural Resources Committee Hearing, L.B. 701, 100th Leg., 1st Sess. 4 (Apr. 4, 2007).

> 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 [sic] Republican River that benefits from this.[56]

During the floor debate, the introducer of L.B. 701 noted:

> And right now, this is mostly focused on the [C]ompact and mostly where you have a 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. I think Senator Christensen outlined it quite well in his opening remarks and when he went on the history of when the compact started. It had to be done back in the early 40s. And the reason for that was so that the federal government would go in and build some of those dams and reservoirs in there. And they had to have the three states on the Republican River agree to it because at that time that river did run through three states, starting in Colorado, Kansas, Nebraska, and back into Kansas again. 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 LB701 and everything directs most of the bonding authority and the authority that we're giving the [natural resources districts] at the present time and the [Republican NRD's] in the Republican River project and agreement. So I think that's one of the concerns, that we tried to narrow it down so it didn't affect a lot of areas in the state. . . . But 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 [NRD's], 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.[57]

While we consider these statements as part of the pre-enactment legislative history of L.B. 701, we agree with the

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[56] *Id.* at 71.

[57] Floor Debate, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. 31 (Apr. 10, 2007).

reasoning of the district court that they amount to nothing more than speculation and opinion as to whether future Nebraska Legislatures would authorize the state to enter into additional interstate compacts with respect to rivers. In *Haman v. Marsh*,[58] we concluded that it was "highly improbable" that a class consisting of depositors of industrial loan investment companies insured by the defunct Nebraska Depository Institution Guaranty Corporation would ever be expanded beyond the depositors of three failed institutions, in light of changes in the law which required such institutions to obtain federal deposit insurance or post notice that they had no insurance at all. But because of the complex nature of water policy in general and interstate water management in particular, and the dynamic natural conditions which they address, we cannot in any principled manner declare the improbability that Nebraska and its neighboring states will ever again utilize a legal mechanism for the management of riverflow which they have used in the past. Moreover, we note that the statutory authority conferred by L.B. 701 to issue riverflow enhancement bonds and levy an occupation tax to provide revenue for their payment cannot be fairly seen as a "special favor" bestowed upon an a natural resources district. Rather, it is an instrument to be utilized in maintaining compliance with an interstate compact, which, in *Garey*, we specifically determined to be "a state purpose."[59] For these reasons, we conclude that these statutes do not constitute special legislation prohibited by Neb. Const. art. III, § 18.

(iv) Is L.B. 701 Occupation Tax Commutation of Taxes in Violation of Neb. Const. Art. VII, § 4?

The landowners contend that the occupation tax violates Neb. Const. art. VIII, § 4, which provides in relevant part:

> [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, or the property therein, from their or its proportionate share of

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[58] *Haman v. Marsh, supra* note 42, 237 Neb. at 718, 467 N.W.2d at 849.

[59] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 160, 759 N.W.2d at 928.

> taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever[.]

The constitutional proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax.[60] The landowners argue that because the entire state benefits from compliance with the Compact, requiring only irrigators within the Republican NRD's subject to the Compact imposes a disproportionate burden upon them.

[19] While it is true that compliance with an interstate compact is a state obligation, it is likewise true that irrigators within a river basin subject to an interstate compact have an interest that is distinct from other taxpayers, in that they derive a direct benefit from the riverflow. A tax levy does not equal a commutation merely because the taxing district is broadened to reflect the actual benefits to the public. So long as all taxpayers receive the benefit of the taxes they remit, the taxing district passes constitutional muster without offending the prohibition against commutation.[61] The landowners do not contest that they derive a benefit from the water projects financed by the occupation tax, but they argue that their burden is disproportionate to that of taxpayers owning property outside the Republican NRD's.

The record indicates that compliance with the Compact implicates a variety of funding sources including but not limited to the occupation tax. Indeed, § 2-3226.01(1)(a) specifically provides that riverflow enhancement bonds are payable in part from "funds granted to [an issuing natural resources] district by the state or federal government for one or more qualified projects." The record does not disclose the total cost of compliance with the Compact or the percentage of the total to be derived from the occupation tax. We conclude that the landowners did not meet their burden of establishing that the

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[60] *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

[61] *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *State, ex rel. City of Omaha v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922).

occupation tax authorized by L.B. 701 violates the constitutional prohibition against commutation.

V. CONCLUSION

For the reasons discussed, we conclude that the landowners have not overcome the presumption of constitutionality with respect to the challenged statutes, and we therefore affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

ROBERT MURRAY, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY K. MURRAY, AND ROBERT MURRAY, INDIVIDUALLY, APPELLEES, V. UNMC PHYSICIANS, FORMERLY KNOWN AS UNIVERSITY MEDICAL ASSOCIATES, A CORPORATION, APPELLANT.

806 N.W.2d 118

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1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Motions for New Trial.** The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.
3. **Negligence: Evidence: Tort-feasors.** While the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed.

Jeffrey A. Nix, Thomas J. Shomaker, and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellant.

Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellees.