BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

The Central Nebraska Public Power & Irrigation District, Appellant, v. Dawson County Board of Equalization, Appellee, and David Karlberg & Kurt Karlberg, Appellees.	Case Nos: 17E 0078, 17E 0079, 17E 0080, 17E 0081, 17E 0082, 17E 0083, 17E 0084, 17E 0085, 17E 0086, 17E 0087, 17E 0088, 17E 0089, 17E 0090, 17E 0091, 17E 0092, 18E 0002, 18E 0003, 18E 0004, 18E 0005, 18E 0006, 18E 0007, 18E 0008, 18E 0009, 18E 0010, 18E 0011, 18E 0012, 18E 0013, 18E 0014, 18E 0015 & 18E 0016 **DECISION AND ORDER REVERSING THE DECISIONS OF THE DAWSON COUNTY BOARD OF EQUALIZATION**

For the Appellant:
Charles D. Brewster,
Anderson, Klein, Swan & Brewster

For the Appellees:
Jared R. Dean,
Deputy Dawson County Attorney

Tod McKeone,
Attorney at Law

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property consists of 15 agricultural parcels owned by the Central Nebraska Public Power & Irrigation District (hereinafter referred to as Central) in Dawson County, Nebraska. The legal descriptions for each parcel are found in Exhibits 1 to 30. The Property Record Cards for each parcel are found at Exhibit 47, pages 36 through 45.

II. PROCEDURAL HISTORY

The Dawson County Assessor (the County Assessor) determined that the fifteen parcels of the Subject Property were not exempt from taxation for tax years 2017 and 2018. The County Assessor determined the assessed value of the Subject Property as follows:

Case Nos.	**Parcel Number** **Acres**	**2017 Assessment**	**2018 Assessment**
Case No. 17E 0078 Case No. 18E 0002	240011368 269.23 acres	$246,316[1]	$319,619[2]
Case No. 17E 0079 Case No. 18E 0003	240010574 78.3 acres	$68,513[3]	91,611[4]
Case No. 17E 0080 Case No. 18E 0004	240010833 81.2 acres	$71,050[5]	$95,004[6]
Case No. 17E 0081 Case No. 18E 0005	240010752 350.1 acres	$355,824[7]	$422,541[8]
Case No. 17E 0082 Case No. 18E 0006	240011198 360.6 acres	$359,650[9]	$428,792[10]
Case No. 17E 0083 Case No. 18E 0007	240011457 451.9 acres	$436,113[11]	$534,391[12]
Case No. 17E 0084 Case No. 18E 0008	240010582 46.9 acres	$42,893[13]	$55,153[14]
Case No. 17E 0085 Case No. 18E 0009	240010663 257.4 acres	$273,841[15]	$315,484[16]
Case No. 17E 0086 Case No. 18E 0010	240010760 190.5 acres	$214,040[17]	$238,265[18]

[1] Exhibit 47:36.
[2] Exhibit 47:36.
[3] Exhibit 47:14.
[4] Exhibit 47:14.
[5] Exhibit 47:29.
[6] Exhibit 47:29.
[7] Exhibit 47:23.
[8] Exhibit 47:23.
[9] Exhibit 47:32.
[10] Exhibit 47:32.
[11] Exhibit 47:39.
[12] Exhibit 47:39.
[13] Exhibit 47:17.
[14] Exhibit 47:17.
[15] Exhibit 47:20.
[16] Exhibit 47:20.
[17] Exhibit 47:26.
[18] Exhibit 47:26.

Case Nos.	Parcel Number Acres	2017 Assessment	2018 Assessment
Case No. 17E 0087 Case No. 18E 0011	240007921 552.4 acres	$582,448[19]	$697,370[20]
Case No. 17E 0088 Case No. 18E 0012	240007328 444.5 acres	$415,456[21]	$524,907[22]
Case No. 17E 0089 Case No. 18E 0013	240007840 52.4 acres	$56,980[23]	$62,988[24]
Case No. 17E 0090 Case No. 18E 0014	240020928 36.08 acres	$33,764[25]	$42,545[26]
Case No. 17E 0091 Case No. 18E 0015	240022041 393.4 acres	$424,290[27]	$470,638[28]
Case No. 17E 0092 Case No. 18E 0016	240021878 277.06 acres	$254,421[29]	$325,971[30]

The Central Nebraska Public Power & Irrigation District (Central) protested the determination by the County Assessor that the Subject Property was taxable to the Dawson County Board of Equalization (the County Board) and requested that the Subject Property be exempt from taxation. The County Board determined that the Subject Property was not exempt from taxation.[31]

[19] Exhibit 47:11.
[20] Exhibit 47:11.
[21] Exhibit 47:5.
[22] Exhibit 47:5.
[23] Exhibit 47:8.
[24] Exhibit 47:8.
[25] Exhibit 47:42.
[26] Exhibit 47:42.
[27] Exhibit 47:48.
[28] Exhibit 47:48.
[29] Exhibit 47:45.
[30] Exhibit 47:45.
[31] Exhibits 1-30.

Central appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission issued notice of the appeal to the County Board, and to David Karlberg and Kurt Karlberg who subsequently intervened in the appeals.

The Commission held a hearing on July 23, 2019, with Commissioner Hotz presiding. The Commission took notice of its case files for the captioned appeals for jurisdictional purposes. Exhibits 1 through 50 were offered and admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.[32] "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal."[33] When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."[34]

> That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.[35]

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or

[32] See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).
[33] *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).
[34] *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).
[35] *Id.*

arbitrary.[36] Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.[37]

In an appeal, the Commission "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based."[38] The Commission may also "take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge," and may "utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.[39] The Commission's Decision and Order shall include findings of fact and conclusions of law.[40]

V. FINDINGS OF FACT

Central is a Public Power and Irrigation District, a not-for-profit political subdivision organized in Nebraska for the purpose of providing irrigation and generating electricity. Central made payments in lieu of taxes to Dawson County for tax years 2017 and 2018.[41]

The Subject Property is located on Jeffrey Island, 3,842 acres lying between two branches of the Platte River in Dawson County. In order to operate, Central is required to comply with the terms of its Federal Energy Regulatory Commission (FERC) license, as well as dam safety, water policy, and land management regulations imposed by other departments of state and federal government. The FERC license includes articles which require Central to maintain and enhance the Subject Property for habitat in accordance with a Long-Term Enhancement and Maintenance Plan for the Jeffrey Island Habitat Area (the Plan).[42] If Central does not adhere to the Plan, it faces a number of potential penalties, including the loss of its FERC license.

The income received by Central from Jeffrey Island comes from pasture leases, held by Kurt and David Karlberg (the Karlbergs) in 2017 and 2018, and from some hunting leases. The Karlbergs entered into the pasture leases after a competitive bidding process in which they were

[36] Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).
[37] *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).
[38] Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).
[39] Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).
[40] Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).
[41] Exhibit 36:1-2, testimony of Rochelle Jurgens.
[42] The Plan is found at Exhibit 44.

the highest bidders; Kurt Karlberg considered the lease a better deal than any other available opportunity. The pasture leases contain no provisions stating that the lessees are, or might be required to, pay property taxes. Central incurred expenses for maintaining Jeffrey Island, $165,187 for 2017 and $128,866 for 2018, against combined annual lease proceeds of $54,970. None of the proceeds from these leases go to any officer or director of Central or any private person.

The pasture leases are seasonal. They cover the grassland portions of the island and were developed in consultation with the U.S. Fish and Wildlife Service and the Nebraska Game and Parks Commission for the purpose of implementing the Plan. The leases determine when cattle can be grazed on different portions of the island and require rotation of grazing areas to benefit native grasses.[43] They permit grazing in spring and fall, for a total of about six months per year. The grazing of cattle provides "hoof action," which allows seed greater contact with soil and encourages growth of native grasses, which benefits wildlife on the island, including endangered and threatened species such as whooping cranes, least terns, and piping plovers. In the opinion of Mike Drain, Central's Natural Resources and Compliance Manager, grazing, along with controlled burns, is the most effective tool available to achieve Central's objectives in complying with the Plan.

Of the 3,842 acres comprising Jeffrey Island, less than half is fenced off and available for rotational grazing. There are no buildings or ranching facilities on Jeffrey Island. The Karlbergs move their cattle onto the island in mobile pens when the grazing period defined by the lease begins, and move them off the island to other grazing lands in the same manner when the grazing period ends. No other farming or business activity takes place on Jeffrey Island. The Subject Property is also open to the public for hiking, fishing, and other forms of recreation; members of the public are requested to call an employee of Central for access through a gated fence.

On February 28, 2017, the County Assessor mailed Central a Notice of Intent to Tax relating to the Subject Property, stating:

> At the urging of the Dawson County Board of Commissioners, I am enclosing a notice of intent to tax property owned by Central Nebraska Public Power &

[43] See Exhibit 39:6.

> Irrigation District (Central) that is being leased by you for other than a public use, in accordance with Nebraska Statute 77-202.12. […]
>
> Any of this property, or other property owned by Central, that is being leased for agricultural or hunting purposes may be subject to property tax.[44]

On February 26, 2018, the County Assessor mailed Central a Notice of Intent to Tax relating to the Subject Property for tax year 2018, stating:

> At the urging of the Dawson County Board of Commissioners, I am enclosing a notice of intent to tax property owned by Central Nebraska Public Power & Irrigation District (Central) that is being leased to a person or persons for other than a public use, in accordance with Nebraska Statute 77-202.12. […]
>
> Any of this property, or other property owned by Central, that is being leased for agricultural or hunting purposes may be subject to property tax.[45]

Central did not send the notices of intent to tax issued by the County Assessor to the Karlbergs as described by Neb. Rev. Stat. § 77-202.12(1), nor did it send the lease information to the County Assessor as described by Neb. Rev. Stat. § 77-202.11(2). The Karlbergs did not become aware of the County Assessor's intent to tax the Subject Property until they received notices of appeals from the Commission. The notices of the 2017 appeals were mailed to the Karlbergs on June 9, 2017.[46] The first notice mailed to the Karlbergs by the Commission for the 2018 appeals was an Order for Hearing and Notice of Hearing mailed April 23, 2019.[47] The Karlbergs petitioned to intervene in the proceedings on July 18, 2019.[48] That petition was granted on July 19, 2019, and the Karlbergs participated in the hearing on the appeals.

The protests Central filed with the County Board raised two objections to the taxation of the Subject Property: first, that Central had already made the in lieu of tax payments, and second, that the property was used for a public purpose.[49] The basis for the County Board's action listed on the protest forms was "Exemption denied – Not providing a public service" for each of the 2017 protests and "Denial: Not for public use" for each of the 2018 protests.[50]

---

[44] Exhibit 47:1.
[45] Exhibit 47:3.
[46] Case files, Case Nos. 17E 0078 through 17E 0092.
[47] Case files, Case Nos. 18E 0002 through 18E 0016.
[48] Case files, Case Nos. 17E 0078 through 17E 0092 and 18E 0002 through 18E 0016.
[49] Exhibits 1-30, 48 and 49.
[50] Exhibits 1-15 (2017), 16-30 (2018).

VI. ANALYSIS

Central made payments in lieu of taxes for tax years 2017 and 2018 as required by the Nebraska Constitution, which provides, in part:

> Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957. … The payments in lieu of taxes as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, payments in lieu of taxes, franchise payments, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.[51]

As we have concluded in prior appeals and as discussed below, Central is not obligated to pay property taxes in addition to making a payment in lieu of tax, because property taxes are "among the taxes covered by a payment in lieu of tax."[52]

The County Board asserts that even though Central made payments in lieu of tax for tax years 2017 and 2018, nonetheless the Subject Property is not exempt from property tax because the Subject Property was not being used for a public purpose. Neb. Rev. Stat. § 77-202 provides, in relevant part:

> (1) The following property shall be exempt from property taxes:
>
> (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision:
>
> (i) Property of the state and its governmental subdivisions means (A) property held in fee title by the state or a governmental subdivision … and
>
> (ii) Public purpose means use of the property (A) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public

[51] Neb. Const. Art. VIII, § 11.
[52] *Conroy v. Keith Cty. Bd. of Equal. and Central Nebraska Public Power and Irrigation District*, 288 Neb. 196, 205-06, 846 N.W.2d 634, 641-42 (2014).

> health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (B) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose.[53]

The County Board asserts that since the Subject Property was leased to a private lessee, and the lessee's use of the property was not for a public purpose, the property should not be exempt from taxation.

Neb. Rev. Stat. § 77-202.11 provides:

> (1) Leased public property, other than property leased for a public purpose as set forth in subdivision (1)(a) of section 77-202, shall be taxed or exempted from taxation as if the property was owned by the leaseholder. The value of the property shall be determined as provided under section 77-201.
>
> (2) On or before January 31 each year, the state and each governmental subdivision shall provide to the appropriate county assessor each new lease or preexisting lease which has been materially changed which went into effect during the previous year and a listing of previously reported leases that are still in effect.
>
> (3) Taxes on property assessed to the lessee shall be due and payable in the same manner as other property taxes and shall be a first lien upon the personal property of the person to whom assessed until paid and shall be collected in the same manner as personal property taxes as provided in sections 77-1711 to 77-1724. The state or its governmental subdivisions shall not be obligated to pay the taxes upon failure of the lessee to pay. Notice of delinquent taxes shall be timely sent to the lessee and to the state or the governmental subdivision. No lien or attachment shall be attached to the property of the state or the governmental subdivisions for failure of the lessee to pay the taxes due.
>
> (4) The state or any governmental subdivision may, if it chooses to do so in its discretion, provide the appropriate county assessor a description of the property rather than a copy of the lease; request that the assessor notify it of the amount of tax which would be assessed to the leaseholder; voluntarily pay that tax; and collect that tax from the leaseholder as part of the rent.

[53] Neb. Rev. Stat. § 77-202 (Reissue 2018).

> (5) Except as provided in Article VIII, section 11, of the Constitution of Nebraska, no in lieu of tax payments provided for in any other section of law shall be made with respect to any leased public property to which this section applies.[54]

Neb. Rev. Stat. § 77-202.12 provides:

> (1) On or before March 1, the county assessor shall send notice to the state or to any governmental subdivision if it has property not being used for a public purpose upon which a payment in lieu of taxes is not made. Such notice shall inform the state or governmental subdivision that the property will be subject to taxation for property tax purposes. The written notice shall contain the legal description of the property and be given by first-class mail addressed to the state's or governmental subdivision's last-known address. If the property is leased by the state or the governmental subdivision to another entity and the lessor does not intend to pay the taxes for the lessee as allowed under subsection (4) of section 77-202.11, the lessor shall immediately forward the notice to the lessee.
>
> (2) The state, governmental subdivision, or lessee may protest the determination of the county assessor that the property is not used for a public purpose to the county board of equalization on or before April 1. The county board of equalization shall issue its decision on the protest on or before May 1.
>
> (3) The decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission on or before June 1. The Tax Commissioner in his or her discretion may intervene in an appeal pursuant to this section within thirty days after notice by the Tax Equalization and Review Commission that an appeal has been filed pursuant to this section.[55]

In addition to these statutes, our analysis of these appeals relies heavily upon three cases decided by the Nebraska Supreme Court: *Upper Republican Natural Resources District et al. v. Dundy County Board of Equalization*[56] *(URNRD), Conroy v. Keith County Board of Equalization and Central Nebraska Public Power and Irrigation District (Conroy),*[57] and *City of York v. York County Board of Equalization (York).*[58]

---

[54] Neb. Rev. Stat. § 77-202.11 (Reissue 2018).
[55] Neb. Rev. Stat. § 77-202.12 (Reissue 2018).
[56] *Upper Republican Natural Resource District v. Dundy Cty. Bd. of Equal.*, 300 Neb. 256, 912 N.W.2d 796 (2018).
[57] *Conroy & Sorenson v. Keith Cty. Bd. of Equal. and Central Nebraska Public Power and Irrigation District*, 288 Neb. 196, 846 N.W.2d 634 (2014).
[58] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003).

In *URNRD,* the Dundy County Assessor sent URNRD notices of taxable status for 18 parcels.[59] These notices stated that the parcels were taxable because they were not being used for a public purpose, and made no reference to whether the parcels were being leased at less than fair market value. The notices advised URNRD that if the property was leased to another entity and URNRD did not intend to pay the taxes, it "must immediately forward this notice to the lessee." URNRD had acquired 12 of the 18 parcels through purchase/leaseback agreements with a company called FEM, which in turn sub-leased the parcels to its subsidiary M&L Cattle Co. URNRD did not forward the notices to the lessees, and the lessees did not have actual notice of the assessments.

The Dundy County Board of Equalization determined that all 18 parcels were not exempt on the basis that the surface of the land and the buildings were not being used for a public purpose. The Dundee County Board was not presented with and did not address the issue of whether the lease was at fair market value. The lessees did not have notice of URNRD's protests and were not parties to the proceedings before the Dundy County Board.[60]

URNRD appealed to the Commission. Over URNRD's objection, the Commission found that any determination of whether the property was used for a public purpose would have implications for lessee tax obligations, and joined the lessees to the appeals.[61] The Commission ultimately concluded that the majority of the subject property was used for a public purpose and was exempt. The Court affirmed the Commission's decision on this issue.[62] The Commission also concluded that URNRD was not permitted by law to assume the tax liability for the subject property, that FEM's due process rights were violated by lack of notice of the proceedings before the Dundy County Board of Equalization, and that the tax liabilities of FEM in relation to the non-exempt parcels were void.[63] These portions of the Commission's order were vacated or reversed and remanded by the Court.[64]

[59] All information in this paragraph is from *URNRD* at 259 to 260, 800.
[60] *URNRD* at 259-60, 800.
[61] *URNRD* at 260, 800.
[62] *URNRD* at 287, 816.
[63] *URNRD* at 269-70, 805-06.
[64] *URNRD* at 268-69, 805.

The Court determined that "the statutory limitation of the scope of the appeal from a county board of equalization is jurisdictional."[65] It also noted a prior exemption decision stating:

> Since the issue was not presented to the [board of equalization], it could not be presented to TERC, and TERC had no power to reach the issue sua sponte. The appeal is restricted to questions raised before the [b]oard. TERC has no authority to consider questions not raised before a county board of equalization.[66]

The Court further clarified:

> [Neb. Rev. Stat. § 77-5016(8)] provides that for questions other than taxable value, the TERC's power is limited to questions that are both (1) raised in the proceeding before the TERC and (2) a basis for the order, decision, determination, or action appealed from. […] When the TERC addresses questions outside the scope of its limited statutory authority, its decision in that respect must be vacated.[67]

The Court also discussed the burden of proof in these cases: "Though it may be the burden of the party seeking the exemption to prove tax exempt status, the assessor initially frames the issues that the party seeking the exemption must respond to."[68] The Court determined that the issue as initially framed by the County Assessor was whether the parcels were being used for a public purpose; the parties only raised before the County Board the question of whether the parcels were being used for a public purpose; and the County Board determined that they were not being used for a public purpose, without addressing any other issue; and on appeal to TERC, the only issue raised by the parties was whether the parcels were being used for a public purpose.[69] Thus, "[i]n deciding whether to affirm or reverse the Board's decision, the TERC erred in considering questions beyond whether the parcels were being used for a public purpose."[70]

---

[65] *URNRD* at 275, 808, citing *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1 at 19, 465 N.W.2d 111 at 122 (1991).
[66] *URNRD* at 273, 808, citing *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454 at 458, 640 N.W.2d 398 at 402 (2002).
[67] *URNRD* at 275, 809. We note that protest proceedings before a county board of equalization may not be recorded or transcribed. Thus, the Commission's knowledge of the basis of a county board's decision is limited to what is stated on the protest form by the Taxpayer as the reason for the appeal, what is stated on the protest form or a separate form issued by the County Board as the reason for its decision or determination, and what evidence is received in the appeal.
[68] *URNRD* at 275, 809.
[69] *URNRD* at 275-76, 809.
[70] *URNRD* at 276, 809.

The Court found plain error in the Commission's consideration of the fair market value of the leases, stating:

> [W]e find plain error in the TERC's consideration of the fair market value of the lease. […] Neither the issue of assessment to the NRD nor the issue of fair market value was the basis for the Board's order. And, as discussed, § 77-5016(8) limits the TERC's review to questions upon which the Board's decision was based. Furthermore, neither the issue of assessment to the NRD nor the issue of fair market value was an issue raised in the proceeding before the TERC. And § 77-5016(8) also limits the jurisdiction of the TERC to the questions raised before it.
>
> Thus, we vacate the TERC's decision inasmuch as it addressed whether the parcels were leased at fair market value, whether the NRD could be assessed the tax on the one FEM parcel and the portions of the two FEM parcels it found nonexempt, and whether to assess this tax to the lessees would violate due process.[71]

In *Conroy*, for tax year 2011, the assessor decided to assess property taxes on parcels owned by Central on the basis that they were not being used or being developed for a public purpose.[72] Central protested this assessment to the Keith County Board of Equalization, which determined that because Central had already made a payment in lieu of tax, the parcels should not be taxed. The Tax Commissioner and Property Tax Administrator (collectively, the Department) appealed to the Commission. The Commission affirmed the Keith County Board of Equalization's decision on the basis of the payment in lieu of tax and rejected the Department's argument that Central's property tax obligation should be determined based on the use of the property. The Commission also extended this reasoning to indicate that there "should be no assessed value" and "no separate property tax of the Subject Property for tax year 2011; any and all property tax obligations having been included in Central's payment in lieu of taxes."[73] The Department appealed.

The Court agreed that Central's payment in lieu of tax for a particular tax year eliminated its liability for property taxes in that same year:

> Central's payment in lieu of tax for tax year 2011 took the place of any property tax obligations it might otherwise have been required to pay, regardless of the purpose

[71] *URNRD* at 276-77, 809-10.
[72] All the information in this paragraph is a restatement of the facts from *Conroy*, at 197-201, 636-39.
[73] *Conroy* at 201, 638.

> for which the property was being used. Therefore, Central was not obligated to pay property taxes once it made the annual payment in lieu of tax.[74]

The Court also found that the Commission could not consider whether property taxes on the relevant parcels could be assessed against Central's lessees without the Commission exceeding its jurisdiction.[75] "Without the lessees being parties to the action, the Commission could not determine whether there should be a separate tax obligation on the parcels or whether the parcels had an assessed value."[76] The Court listed a number of factors related to this determination: the lessees were not sent notice of potential tax liability by the county assessor or Central, despite the fact that statutory provisions require such notice; the lessees were not parties to the protests before the County Board; the lessees were not made parties in the appeals before the Commission; and the lessees did not intervene in the appeals before the Commission.[77] The Court acknowledged that the question of whether the property was used for a public purpose "would have been determinative of the lessee's tax liability on the relevant parcels," if the Commission had jurisdiction to reach the issue of the lessees' liability.[78]

In *York*, the City of York was required by the Federal Aviation Administration (FAA) to either seed and otherwise maintain land in a buffer zone around the York Municipal Airport, or lease the property in the buffer zone for restricted agricultural use.[79] The City leased the land to a private party for agricultural use consistent with the restrictions required by the FAA; the lease was subject to approval by the FAA and to the terms of the FAA-approved layout plan for the airport.[80] The Court recited the well-established rule, "[t]he primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation."[81] The Court determined that "[t]he property is leased for the purpose of maintaining the area surrounding the runways as a buffer zone as required by the FAA assurances, federal legislation, and state law."[82] After reviewing similar cases from other jurisdictions, the Court ruled that "the land is being leased for agricultural use, which is incidental to its purpose as a buffer zone for the

---

[74] *Conroy* at 211, 645.
[75] *Conroy* at 203, 640.
[76] *Id.*
[77] *Id.*
[78] *Conroy* at 212, 645.
[79] *York* at 664 N.W.2d 447.
[80] *Id.* at 448.
[81] *York* at 304, 450-51, citing *Doan College v. County of Saline*, 173 Neb. 8, 11, 112 N.W.2d 248, 250 (1961).
[82] *York* at 304, 451.

airport. We conclude as a matter of law that the leased property is being used for a public purpose and is exempt from taxation."[83]

With these principles in mind, we turn to our analysis of Central's appeals. The protests Central filed with the County Board raised two objections to the taxation of the parcels: first, that Central had already made the in lieu of tax payment, and second, that the property was used for a public purpose.[84] The County Board denied all of the protests on the basis that the property was not used for a public purpose.[85]

The parties do not dispute that Central made payments in lieu of taxes for both 2017 and 2018. This issue was raised by Central in its protest to the County Board and in its appeals to the Commission; testimony and other evidence on the issue was taken during the Commission's hearing. As in *Conroy*, Central's "payment in lieu of tax … took the place of any property tax obligations it might otherwise have been required to pay, regardless of the purpose for which the property was being used."[86] Therefore, Central is not obligated to pay property taxes on the Subject Property.

The next question is whether the Karlbergs are obligated to pay taxes on the Subject Property. In both *Conroy* and *URNRD*, the Supreme Court determined that the Commission did not have jurisdiction to determine the tax liability of the lessees of the governmental subdivision that owned the subject property.[87] In *Conroy*, the lessees were not sent notice of potential tax liability by the county assessor or Central, the lessees were not parties to the protests before the board of equalization, the lessees were not made parties in the appeals before the Commission, and the lessees did not intervene in the appeals before the Commission.[88]

In the present case, the lessees were not sent notice of potential tax liability by the County Assessor or Central,[89] and they were not parties to the protests before the County Board.

---

[83] *Id.*
[84] Exhibits 1-30, 48 and 49.
[85] Exhibits 1-30.
[86] *Conroy* at 211, 645.
[87] *Conroy* at 203, 640; *URNRD* at 268-69, 805.
[88] See *Conroy* at 203, 640.
[89] The County Board argued, in essence, that Central should not be permitted to shield its lessees from tax liability by failing to immediately forward the notice of intent to tax to the Karlbergs, as required by Neb. Rev. Stat. § 77-202.12(1). We agree that Central failed to meet its statutory obligations in that respect, but the statute does not currently provide a remedy for this failure, and it is not within our authority to create one.

However, the Commission did provide them with notice of the appeals for tax year 2017 and notices of the hearings for both tax years.[90] In addition, the Karlbergs intervened in the appeals on their own motion[91] and participated in the hearing.

Therefore, the Commission has jurisdiction to reach the issue of the Karlbergs' liability, and the issue is whether the property was used for a public purpose. Leased public property that is used for an authorized public purpose is specifically exempted from property taxation.[92] We find that it was, as explained below. These appeals are similar to *York* in that a governmental subdivision has leased property to a private party for agricultural use in order to meet requirements imposed on the governmental subdivision by a federal regulatory agency. The primary or dominant use of the property, and not an incidental use, is controlling in determining whether property is exempt from taxation.[93]

Central has provided persuasive evidence that the primary or dominant use of the Subject Property is maintenance and improvement of wildlife habitat in accordance with the requirements of the Plan, which is necessary for Central to maintain its FERC license and continue providing irrigation and hydropower. The income from the grazing leases represents less than half of Central's costs in maintaining Jeffrey Island, and the leases allow grazing only half of the year, on less than half of the total acreage of the island. Multiple expert witnesses testified that the grazing of cattle encourages growth of native grasses, which benefits wildlife on the island, including endangered and threatened species such as whooping cranes, least terns, and piping plovers.

In *Platte River Whooping Crane Maintenance Trust v. Hall County Board of Equalization*, the Court determined that a trust managing and protecting habitat for the benefit of migratory birds was operated "exclusively for the purpose of the mental, social, or physical benefit of the public," because maintenance of that habitat was a service which "the state is relieved pro tanto from performing."[94] The Subject Property is also open to the public for hiking, fishing, hunting,

[90] Neb. Rev. Stat. § 77-5015.01 (Reissue 2018), *repealed*, Laws 2020, LB 4.
[91] See, Case File.
[92] Neb. Rev. Stat. § 77-202.11(1); *Conroy* at 210, 644.
[93] *URNRD* at 278-279, 811.
[94] *Platte River Whooping Crane Trust v. Hall Cty. Bd. of Equal.*, 298 Neb. 970, 976, 906 N.W.2d 646, 651 (2018) (*Crane Trust*). We recognize that *Crane Trust* is otherwise distinguishable from the present appeals because the trust was not a governmental subdivision and its property tax exemption arose under a different statute.

and other forms of recreation. Just as the agricultural use of the property in *York* was incidental to its primary use as a buffer zone for the airport,[95] and just as the grazing of cattle on the property in *Crane Trust* was "incidental to the Crane Trust's primary purpose of conserving and protecting the natural habitat for migratory birds and wildlife for the public's benefit,"[96] the agricultural use of the Subject Property is incidental to its primary, federally mandated use of maintaining wildlife habitat. Therefore, we find that the Subject Property was used for a public purpose.

The language in Neb. Rev. Stat. § 77-202(1)(a)(ii) stating that "[p]ublic purpose does not include leasing of property to a private party unless the lease of the property is at fair market value" has been in the statute at all times material to *URNRD* and the present appeals.[97] Nonetheless, in *URNRD*, the Court found "plain error in the TERC's consideration of the fair market value of the lease" because the issue of fair market value was not the basis for the underlying order of the county board.[98]

The issue in the present appeals was initially framed by the county assessor as whether the Subject Property was being leased "for other than a public use."[99] The basis for the County Board's action on Central's protests in the present appeals was "Exemption denied – Not providing a public service" for each of the 2017 protests and "Denial: Not for public use" for each of the 2018 protests.[100] The Court further found in *URNRD* that "neither the issue of assessment to the NRD nor the issue of fair market value was an issue raised in the proceeding before the TERC. And § 77-5016(8) also limits the jurisdiction of the TERC to the questions raised before it."[101] Neither party in the present appeals raised the issue of the fair market value of the leases in the course of the hearing before the Commission and the evidentiary record was not developed on that issue. Thus, the Commission does not have jurisdiction to consider the issue of whether the leases were at fair market value.

---

[95] *York* at 304, 451.
[96] *Id.* at 978, 653.
[97] See Neb. Rev. Stat. § 77-202(1)(a)(ii) (Reissue 2009), Neb. Rev. Stat. § 77-202(1)(a)(ii) (Reissue 2018).
[98] *URNRD* at 276-77, 809-10.
[99] Exhibit 47:1, 3.
[100] Exhibits 1-15 (2017), 16-30 (2018).
[101] *URNRD* at 276-77, 809-10.

The Appellants have adduced clear and convincing evidence that Central made a payment in lieu of tax, which takes the place of any property tax obligations it might otherwise have been required to pay. The Appellants have also adduced clear and convincing evidence that the Subject Property was used for a public purpose. The Subject Property should be exempt from property taxation for tax years 2017 and 2018.

VI. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For the reasons set forth above, the decisions of the County Board should be vacated and reversed.

VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Dawson County Board of Equalization are vacated and reversed.
2. The Subject Property is exempt from taxation for tax years 2017 and 2018.
3. This decision and order, if no appeal is timely filed, shall be certified to the Dawson County Treasurer and the Dawson County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax years 2017 and 2018.

7. This order is effective for purposes of appeal on June 7, 2021.

Signed and Sealed: June 7, 2021

_____
Robert W. Hotz, Commissioner

SEAL

_____
James D. Kuhn, Commissioner