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Natural Resources Committee
November 20, 2008

[LR291 LR377]

The Committee on Natural Resources met at 1:30 p.m. on Thursday, November 20, 2008, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR291 and LR377. Senators present: LeRoy Louden, Chairperson; Tom Carlson; Mark Christensen; Annette Dubas; Deb Fischer; and Norman Wallman. Senators absent: Carol Hudkins, Vice Chairperson, and Gail Kopplin.

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SENATOR LOUDEN: Well, good afternoon. We'll start this interim hearing on LR291 and LR377. My name is LeRoy Louden. I'm the senator from the 49th Legislative District at Elsworth. And here today the senator on my right at the present time is Senator Tom Carlson from Holdrege; and the senator on my left is Senator Deb Fischer from Valentine. On my far left is Barb Koehlmoos, committee clerk; to my immediate right is Laurie Lage, committee counsel. With that, we'd turn off any of your cell phones or pagers so that we don't have any interruption in the hearing room. And those wishing to testify on a resolution should come to the front of the room when that is to be heard. As someone finished testifying, the next person should move immediately into the chair at the table. If you do not wish to testify, but would like your name entered into the official record as being present at the hearing, there is a form by each door that you can sign. This will be part of the official record of the hearing. We're using computerized transcription program and it is very important to complete the green sign-in sheets for testifiers prior to testifying. They're on the tables by the doors, need to be completed by all people wishing to testify. If you are testifying on more than one resolution, you need to submit a form for each one when you come up to testify. And please place the form in the box by the committee clerk. Please print. It is important to complete the form in its entirety. If our transcribers have a question about your testimony, they use this information to contact you. We've now been joined by Senator Mark Christensen from Imperial, and also our page today is Blair Gay. She's a junior at UNL and she's from Columbus, Nebraska. With that, I would ask for the first testifier...or have committee

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counsel open on LR291. []

LAURIE LAGE: Thank you, Senator Louden, members of the Natural Resources Committee. I'm Laurie Lage, L-a-g-e, counsel to the committee here to introduce LR291. LR291 was introduced for the purpose of examining the process for obtaining an instream flow right by either a natural resources district or the Game and Parks Commission. This study looks at the process as a whole and includes issues such as the costs involved when applying for an instream flow right, the number of applications who currently has the stream flow right and for how much water, length of process, and costs. We will look at these issues to determine whether and how the application process can be streamlined, made more efficient, and cost less. This hearing is the second held on this resolution. I do believe, and I'm sure you see that there are representatives from the affected agencies here, and they've already entered their testimony for the record at the last hearing. So they're not planning on testifying, but I believe they are available for questions, should the committee have any. So with that, I'll close and ask if you have any questions. [LR291]

SENATOR LOUDEN: Any questions for Counsel Lage? Okay. Thank you, Laurie. First testifier, please, for LR291. Is there no one...everybody is satisfied with the way they're going to do it, I guess. [LR291]

BRUCE KENNEDY: I'll go first. [LR291]

SENATOR LOUDEN: Okay. [LR291]

BRUCE KENNEDY: My name is Bruce Kennedy. I am here representing Friends of the Niobrara River Association. And we support this resolution. We think that there are some changes that need to be made in the rules and regulations. We are concerned that when state agencies make application that they have to go through quite a lengthy planning process that may take up to four or five years. And at the same time, why,

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other users just simply plop the money down and pretty much get the water. So we think that there should be some kind of a situation where at the time that the Game and Parks makes the application, or it could be the NRD in that case, that they would receive some kind of a senior consideration to the application. We have to understand that flows that are granted or asked for, and then hopefully granted by these agencies are flow...whether they be for fish, wildlife, recreation or whatever, these flows are in the public interest. And therefore, I think that some kind of, at the time of application, some kind of senior right or inline should be granted. I guess that concludes my testimony. [LR291]

SENATOR LOUDEN: Okay. Thank you. AT the present time, we are also joined by Senator Norm Wallman from Cortland. Questions for Mr. Kennedy? Senator Fischer. [LR291]

SENATOR FISCHER: Thank you, Chairman Louden. Thank you, Mr. Kennedy, for being here today. An instream flow as I understand it, the Game and Parks is doing some studies in looking at their application for an instream flow on the Niobrara. For recreational use, what do you think should be the CFS? When you go down the Niobrara either tubing, canoeing, kayaking, what do you think is appropriate just as your personal view on that? [LR291]

BRUCE KENNEDY: I'm really not that familiar with that, so I don't think I am qualified to answer that. [LR291]

SENATOR FISCHER: Have you ever visited with any of our local outfitters in my area on that? [LR291]

BRUCE KENNEDY: Yes. [LR291]

SENATOR FISCHER: Do you know what they think? I know what they've told me, but I

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was just wondering what you would think. [LR291]

BRUCE KENNEDY: Well, you know, we talk in terms of high water, low water, but we've never got into CFS's. So I really can't answer that question. [LR291]

SENATOR FISCHER: Okay. Thank you. [LR291]

SENATOR LOUDEN: Senator Carlson. [LR291]

SENATOR CARLSON: Senator Louden. Mr. Kennedy, I'm not asking this because I know it, I'm just interested in what you're saying because I don't know a whole lot about Friends of the Niobrara. Tell me a little bit about them and what their purpose is? [LR291]

BRUCE KENNEDY: Yes. We are a statewide organization. We are a group of people who works with the National Parks Service, the Nebraska Game and Parks Commission, the Niobrara Council. And basically we're interested in the environmental integrity of the Niobrara River Valley. That includes the water in the river and the valley itself. And we have cost shared with the council on conservation easements. We have cost shared with the council on day camps. We have worked with the park service in implementing the management plan. Basically a citizen support organization to the different entities that are involved on the Niobrara. [LR291]

SENATOR CARLSON: Okay. And again because I don't really know, your members a cross section of people from all walks of life or is it somewhat restricted or give me an example of it? [LR291]

BRUCE KENNEDY: We have a statewide membership. We have some outfitters on the river. We have some land owners on the river. And pretty much a cross section of the Nebraska public. [LR291]

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SENATOR CARLSON: Okay. Thank you. [LR291]

SENATOR LOUDEN: A question I have, Mr. Kennedy, then you kind would be interested in wanting some type of a shorter application time for an NRD or the Game and Parks to get this in place, is that what you're telling me? [LR291]

BRUCE KENNEDY: Well, considering that they have to go through this study period, you know, which may take three years, four years, five years that some type of consideration would be made at the time that they make that application so that we would be saying, hey, these people have applied for this flow for this certain section of the river. We might want to just...to give them maybe the same inline consideration that other people that are applying for at the time. And by the time they wait, you know, by the time they do their three or four year study and everybody else has applied and got water, things have changed a lot. [LR291]

SENATOR LOUDEN: Yeah, and that would bring me to my next question. Yeah. Someone wants to pump some water out of that river, divert some or something like that, they apply for appropriations. And my understanding is if it's available, then they will be given this appropriations. Now, when say the Game and Parks or an NRD goes that same route, where should they stand in line for priority rights? I mean, my understanding is that once they get this instream flow, then that's more or less takes priority over the other appropriated rights. Is that right or wrong? [LR291]

BRUCE KENNEDY: Well, obviously I don't understand all ramifications of it. The general nature would be to place them, you know, in line as they would fall in line and not have to come back after this three- or four-year period and say, now we want to make application and all this other stuff. But you know, all this other stuff has been going on during those three and four years. [LR291]

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SENATOR LOUDEN: I see. You want to shorten up the application period then. [LR291]

BRUCE KENNEDY: Well... [LR291]

SENATOR LOUDEN: I'm just wondering because what I understand when you give the instream flow rights, that's a lot different than giving somebody an appropriated rights to divert some water out of the river. And that's where I'm wondering how that has to stand according to senior rights, you know. Are they going to be like where they come in now and other senior rights above them would take precedent or have you got any idea how that would work? [LR291]

BRUCE KENNEDY: No, I haven't. But I was hoping, you know, that might be worked out in the study period and that maybe, you know, as we're doing this study and we might bring together all of the people who are using water and maybe at the table and maybe hash something out. [LR291]

SENATOR LOUDEN: Okay. Other questions? Senator Fischer. [LR291]

SENATOR FISCHER: Thank you, Chairman Louden. Mr. Kennedy, I'm sure you know the Niobrara Basin is fully appropriated. [LR291]

BRUCE KENNEDY: Yes. [LR291]

SENATOR FISCHER: That means that there will be no water rights granted for agricultural use, either ground water or surface water. Do you understand that? [LR291]

BRUCE KENNEDY: Yes. [LR291]

SENATOR FISCHER: So in this case, I guess I'm just questioning why you think we should shorten the period for Game and Parks because it doesn't apply to the Niobrara

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Basin. If we would shorten the period from when they would start the process of doing their study because no other water rights are going to be granted in this time period anyway. And I know your focus is with the Niobrara Basin. [LR291]

BRUCE KENNEDY: Well, I also mentioned the NRDs in that. And I guess we have to understand that the instream flow rights the Game and Parks would be asking for is a nonconsumptive use of water, and that there might be, as I understand it, that there might be...the basin is fully appropriated, but somewhere along the line, there might be water rights that have been relinquished. And so there might be additional water rights. [LR291]

SENATOR FISCHER: So you're looking ahead in case the basin no longer has that designation of being fully appropriated. [LR291]

BRUCE KENNEDY: I think that's correct. [LR291]

SENATOR FISCHER: Okay. Thank you. [LR291]

SENATOR LOUDEN: Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you, Bruce. Would you say then if you're going to give an instream flow right to an organization, they should follow junior to anybody that has pumping right ahead of them since they've come in later? [LR291]

BRUCE KENNEDY: Nebraska water law is very complicated and obviously I don't understand all of the ramifications. So I don't know that I'm qualified to answer that. [LR291]

SENATOR CHRISTENSEN: Well, in your opinion if five people have a right here and

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then somebody applies for another right, they should never jump ahead of them, should they? [LR291]

BRUCE KENNEDY: No. I'm not saying that. I'm just saying that... [LR291]

SENATOR CHRISTENSEN: It should be in order then... [LR291]

BRUCE KENNEDY: No, no. [LR291]

SENATOR CHRISTENSEN: ...is what I'm saying. They should maintain... [LR291]

BRUCE KENNEDY: It's the new ones that come in while the study period is taking place. [LR291]

SENATOR CHRISTENSEN: Because what I'm saying instream flow rights should never become priority over the previous... [LR291]

BRUCE KENNEDY: That wasn't what I was suggesting. [LR291]

SENATOR CHRISTENSEN: Okay. That's what I was checking. Thank you. [LR291]

SENATOR LOUDEN: Seeing no more questions, I thank you for your testimony. [LR291]

BRUCE KENNEDY: Thank you very much for this opportunity to testify. I appreciate it. [LR291]

SENATOR LOUDEN: Thank you for being here. Next testifier. [LR291]

JACKIE CANTERBURY: Good afternoon and thank you. My name is Jackie Canterbury

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and I come as a landowner on the Niobrara River, and I believe I've had the honor of testifying before you before. I guess in response to Senator Fischer and Senator Christensen's questions... [LR291]

SENATOR LOUDEN: Oh, could I have you spell your name, please? [LR291]

JACKIE CANTERBURY: Yes. It's C-a-n-t-e-r-b-u-r-y, like Canterbury TalesChaucer's Canterbury Tales. First name Jackueine and it's Doctor. I'm a biologist and I used to do a lot of work, actually, in fisheries in Alaska, worked for a long time. And essentially most streams have instream flows. And that's the basis to which all management happens in terms of the amount of fish that come back, in terms of managing all streams. So I hope I didn't get the wrong impression, but I think that...and the Game and Parks people can correct me, but my understanding is that most streams have instream flows. And it's the basis of all management of streams, particularly in the West, not necessarily in the Midwest. But when you allocate fisheries, for example, what you do is you establish a minimum instream flow. And then above all that, that's when you allocate to other resources. So I hope that helps. Does it? Does that help? [LR291]

SENATOR CHRISTENSEN: I'll address questions in a little bit. [LR291]

JACKIE CANTERBURY: All right. The other thing too is that I think that we've experience a great political climatic change in this country. And I also think that we can no longer look at water as a commodity to waste. And in that context, I think that it has to be looked at that we all own it. And so in other words if on my piece of land on the Niobrara which I dearly love and I've spent actually 15 years restoring, if I want to conserve water, than I hope that you all will respect my rights just as you would my neighbor who would like to take water out of the Niobrara, which I wholly respect because he has every right to make a living, but I do as well under the laws, I believe, in the state of Nebraska. I in complete support of the instream flow regulation. I can't answer questions about the specificities of it because I'm not a fisheries biologist, but I

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am a physiology biologist. And so what I will address is the idea that any stream in its entity and in protecting and managing for the basis of conservation should have some form of an instream flow. And then you allocate above that base amount so that you always error on the side of conservation. And so the water resources for the people in the state of Nebraska are protected and also the landowners. Because I can say that my little small cadre of landowners on the Niobrara feel exactly the way I do. And my land sits south of Nenzel, and the neighbors on both sides of me, one of them irrigates quite heavily, but the others ones don't. And I think that having an instream flow would also help to ease the tension between those landowners because I think what it does is it says, okay, we're going to manage this piece of land for its biological factors. And we do know...and I'll end by saying this that I've actually gone down and asked for people to sign petitions for the Niobrara. And I did a lot of work in Alaska as well. And I must say that there's an incredible amount of pride in this beautiful river that we have. No matter if you own land like I do, like I'm lucky enough to do, or if you don't. And I think we have a really incredible opportunity to do something that's right for both the people that use those resources who I respect and people that essentially don't, like myself. So thank you very much for your time. And I'll take any questions. [LR291]

SENATOR LOUDEN: Questions for Jacqueline? Senator Fischer. [LR291]

JACKIE CANTERBURY: Yes, Senator Fischer. [LR291]

SENATOR FISCHER: Thank you, Chairman Louden. Thank you, Dr. Canterbury... [LR291]

JACKIE CANTERBURY: Thank you. [LR291]

SENATOR FISCHER: ...for being her again today. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

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SENATOR FISCHER: I have some questions... [LR291]

JACKIE CANTERBURY: Sure. [LR291]

SENATOR FISCHER: ...on your testimony... [LR291]

JACKIE CANTERBURY: Sure. [LR291]

SENATOR FISCHER: ...on some of the things you said. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR FISCHER: You said that all streams have instream flows. [LR291]

JACKIE CANTERBURY: Many of them in the West have...they have allocated instream flows that are allocated by fish and game. So in other words, that's a very common thread in fisheries and management in Alaska and in the West. I can't speak to it in the Midwest. [LR291]

SENATOR FISCHER: Not so much here. [LR291]

JACKIE CANTERBURY: Yes. I can't speak to it. [LR291]

SENATOR FISCHER: I would also question, you said we need to manage for the biological factors. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR FISCHER: Do you realize that the primary purpose of the instream flow the

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Game and Parks is requesting is for recreation use on the Niobrara River? [LR291]

JACKIE CANTERBURY: Yes, but it would have a dual effect. [LR291]

SENATOR FISCHER: Pardon me? [LR291]

JACKIE CANTERBURY: It would have a dual effect. [LR291]

SENATOR FISCHER: Depending on the CFS that come out of it. [LR291]

JACKIE CANTERBURY: Yes, but I mean I think anytime you take on a study, if I may add, that looks at recreational values, in many cases you're also looking at those biological values. And that's a very good question on your part. [LR291]

SENATOR FISCHER: Thank you. [LR291]

JACKIE CANTERBURY: Um-hum. [LR291]

SENATOR FISCHER: You've also said that when you speaking of instream flows that above that... [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR FISCHER: ...then you would allocate for other resources. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR FISCHER: So are you saying that we need to determine the instream flows on our rivers in this state, as you said, for biological factors, and then look at possible irrigation needs after that? [LR291]

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JACKIE CANTERBURY: If I had your job, if I was lucky enough to be a manger, that is what I would do, yes. [LR291]

SENATOR FISCHER: What about water laws that go back over 100 years in this state and the effect such a decision if we could even make such a decision with our constitution, what would that have on the people in this state? [LR291]

JACKIE CANTERBURY: I think that's a good question. And I think that goes more to the matter of how you make those decisions. In other words, to me in a perfect world you would have all those stakeholders at a table and then make those decisions. You don't make those kind of decisions without people present that are being effected. And I understand what you're saying. However, I think we've seen it happen throughout the world, our resources are becoming very limited, particularly water. And we're going to be faced with some very difficult choices. And it's always been my opinion and the foundation of my work that if you error on the side of conservation that you come out ahead for all wildlife, for all fisheries, and for the people because of the fact that then it becomes sustainable. [LR291]

SENATOR FISCHER: We could have a discussion on the definition of sustainability I think at this point. [LR291]

JACKIE CANTERBURY: Yes, yes. [LR291]

SENATOR FISCHER: We won't get into that though. [LR291]

JACKIE CANTERBURY: Okay. [LR291]

SENATOR FISCHER: When you spoke about your neighbors and you said your neighbors agree with you, but then you happen to mention you have one who irrigates.

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[LR291]

JACKIE CANTERBURY: Yes, yes. [LR291]

SENATOR FISCHER: Do you think your neighbor who irrigates agrees with you that instream flow should be the primary concern, the priority for the state of Nebraska in regards to our surface water that we enjoy in this state? Do you think that person would agree? Excuse me, do you think that person would agree that the water rights that they have established by the constitution in this state should be changed? [LR291]

JACKIE CANTERBURY: I'll put it this way, we've had this conversation because actually he and I go way back. He bought the land next to me long after I owned it, and I used to lease to Mr. Bond (phonetic) actually. And so we have had this conversation. And I think that I can't speak for him, but I will assume, I will guess from what he said that he would follow any law that's put forth to him. And I think it's... [LR291]

SENATOR FISCHER: Well, hopefully anybody would follow any law that's out there. [LR291]

JACKIE CANTERBURY: Not necessarily. [LR291]

SENATOR FISCHER: Well, I would hope so. There are consequences if you don't. [LR291]

JACKIE CANTERBURY: I would hope so. Yes, I would hope so. But in answer to that, I would think he would follow any law that was put forth. [LR291]

SENATOR FISCHER: Thank you. [LR291]

JACKIE CANTERBURY: You're very welcome. [LR291]

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SENATOR LOUDEN: Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you, Doctor. Are you familiar with levels of flow in the Niobrara in the last ten years? [LR291]

JACKIE CANTERBURY: Yes. Specifically in terms of cubic feet. You know how I'm very familiar with it actually is visually, by looking and seeing what's happened at different times of the year. Very much so. [LR291]

SENATOR CHRISTENSEN: All right. Are they increasing or decreasing? [LR291]

JACKIE CANTERBURY: You're asking...I'm going to answer this in two different ways. Okay. First of all, I think there is one study that suggests in some areas they're increasing. And when I look at it and when I go out in the summer and when irrigation is really in full force, to the west of me the stream is definitely down to where you can see...in fact, I've made a couple of calls because it's down so low that you can see the vegetation on the side of the river. And that's happened the last two years actually. Before that, no. But the last two years when we had a combination of drought, not this last year, but the year before, when we didn't get any rain and when there was heavy irrigation, yes, I did notice it. [LR291]

SENATOR CHRISTENSEN: Well, I think if you look at the measure, it's rising. And you know, the drought is something nobody is going to be able to control. [LR291]

JACKIE CANTERBURY: Uh-huh. [LR291]

SENATOR CHRISTENSEN: You know, I can take Republican for a classic example. We run behind for five years and now we've made it up. [LR291]

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JACKIE CANTERBURY: Uh-huh. [LR291]

SENATOR CHRISTENSEN: You know, we can't control what God does, but we can control what's man is doing. But Niobrara is not a river decreasing in major concern right now. [LR291]

JACKIE CANTERBURY: You're talking...okay, can I ask you a question? [LR291]

SENATOR CHRISTENSEN: I don't think that's allowed. (Laughter) [LR291]

JACKIE CANTERBURY: All right. Then I'll respond to that. Okay? And my response would be and I would probably ask you is how many years have you observed that? And I would say for myself, I've observed it two. But I don't think that I professionally would not base my opinion on looking at something, in other words, what I said. And I would also not base it on whether you think the river is increasing or decreasing because of the point that I made originally. And that is that the stream and the water in the stream belongs to all Nebraskans, and that we error on the side of conservation because you have no idea the catastrophic events that could happen in the next 10 to 20 years. So I'm not looking in a time period of ten years, I'm looking to the future and the sustainability of a river. And so my logic says I'm going to look at this over a longer period of time, not just a year, not just two years. [LR291]

SENATOR CHRISTENSEN: Well, I wasn't talking to just one or two years, but that's fine. Thank you. [LR291]

JACKIE CANTERBURY: You're welcome. Thank you. That was a good question. [LR291]

SENATOR LOUDEN: Senator Carlson. [LR291]

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SENATOR CARLSON: Senator Loudon. Dr. Canterbury, I don't know this for sure, but I'm picking it up from discussion here. There have been some studies done to attempt to measure the flow on Niobrara. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: And it sounds like that you maybe don't agree with the results of those studies. [LR291]

JACKIE CANTERBURY: I think one of the recommendations that I would have is that I think science leads you to more questions. And I think the previous speaker suggested this and that is my expectations are not that Game and Parks is going to come up with a final answer. But the idea is that they come up with something that's workable for all, and something that's workable in the context of science. And so my recommendation is to begin something because I think that it's going to take a long period of time and it's not necessarily going to prove anything. It's just going to give you numbers that you start with and then that you refine through time as you work. [LR291]

SENATOR CARLSON: Okay. I'm going to continue a little bit on this question. [LR291]

JACKIE CANTERBURY: Sure. [LR291]

SENATOR CARLSON: And it's really not to put on a spot... [LR291]

JACKIE CANTERBURY: That's fine. [LR291]

SENATOR CARLSON: ...or the Niobrara on a spot. [LR291]

JACKIE CANTERBURY: Sure. [LR291]

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SENATOR CARLSON: But I also got another question that... [LR291]

JACKIE CANTERBURY: Okay. [LR291]

SENATOR CARLSON: ...I may do that a little bit. [LR291]

JACKIE CANTERBURY: Sure. [LR291]

SENATOR CARLSON: But you've got a scientific background. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: So would you agree with me that there can be studies done that are as accurate as techniques at the particular time a study is done allow for in terms of accuracy? [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: And that because a study gives a result and that result may be generally accepted as being accurate, it may or may not be very accurate. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: And it's not perfect, so even the result of a study in a sense is an estimate of the real world? [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: Thank you. [LR291]

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JACKIE CANTERBURY: It's a prediction. [LR291]

SENATOR CARLSON: Okay. Now earlier in your comments you talked about water is not a commodity to waste, and I fully agree with you. [LR291]

JACKIE CANTERBURY: Thank you. [LR291]

SENATOR CARLSON: But to make that statement, you must feel like there's being water wasted and how? [LR291]

JACKIE CANTERBURY: Um-hum. I do. I think that the mentality is that we have abundant natural resources, and we have had those. And I think that we have not--and I'm not saying Nebraska, I'm saying the United States, perhaps the world and where I come from, the West particularly--that we have not looked at resources as something that are...they're not sustainable the way we are managing them. And when I say "waste," I say waste in terms of managing water, irrigating where, you know, essentially so much of it is evaporated. To me, that's not sustainable. Building economies based on something that perhaps is going to come to an end because there's not going to be any water is not sustainable. Erring on the side of conservation and looking at the finite limit of our resources is the definition of "sustainability." And it's being honest with people, it's being very forthright and honest, which I think and not just to stray away from, but I think we're coming to that now in this country is that how we have behaved towards our natural resources has not been and is not sustainable. And I think it would be very forward-thinking and brave to come up with something in a collaborative effort that manages water and in a sustainable manner. [LR291]

SENATOR CARLSON: You're not saying that irrigation shouldn't take place. [LR291]

JACKIE CANTERBURY: Not at all, not at all. No. [LR291]

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SENATOR CARLSON: But I get an answer similar to this and sometimes I don't like it.
[LR291]

JACKIE CANTERBURY: Yeah. [LR291]

SENATOR CARLSON: But whether water is in the stream or in the field... [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: ...it's going to evaporate. [LR291]

JACKIE CANTERBURY: Yeah. I see where you're going. But I'm not condemning irrigation, you know, at all. It's part of the lifeblood of the state. But I also think that, you know, that suggesting that this is going to go on forever...and, you know, this is a disservice because then you put people at jeopardy that put their lives on the line. And it's a disservice in my opinion. I think something like instream flow goes back to the very basic premise of erring on the side of caution. And so you know your stream is protected. You know that there's a basic instream flow. You know there will be X amount of water that flows down this stream, and then you allocate from there. And then you don't have people coming and saying, well, there's no water left. [LR291]

SENATOR CARLSON: Well, the idea of having a water policy makes it sustainable...
[LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR CARLSON: ...I fully agree with. [LR291]

JACKIE CANTERBURY: Thank you. [LR291]

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SENATOR CARLSON: And it's a matter of how to get there... [LR291]

JACKIE CANTERBURY: Yes, it is. [LR291]

SENATOR CARLSON: ...and what's the best way to get there... [LR291]

JACKIE CANTERBURY: ...and how do we do it... [LR291]

SENATOR CARLSON: ...that is not economically devastating to anyone. [LR291]

JACKIE CANTERBURY: I know. I agree. [LR291]

SENATOR CARLSON: Okay. Thank you. [LR291]

JACKIE CANTERBURY: Thank you. Very nice comment. [LR291]

SENATOR LOUDEN: Senator Wallman. [LR291]

SENATOR WALLMAN: Thank you, Chairman Louden. Thank you, Doctor. [LR291]

JACKIE CANTERBURY: Thank you. [LR291]

SENATOR WALLMAN: Have you read the book Collapse? [LR291]

JACKIE CANTERBURY: I have, yes. Yes, I have. [LR291]

SENATOR WALLMAN: And that scares me when I read that book. And it's all across the world. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

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SENATOR WALLMAN: We could be dealing with that here in the next 25 years.
[LR291]

JACKIE CANTERBURY: That's my point. [LR291]

SENATOR WALLMAN: And so I appreciate your point of view. [LR291]

JACKIE CANTERBURY: Thank you. [LR291]

SENATOR WALLMAN: I don't know where we're going to go from here,... [LR291]

JACKIE CANTERBURY: No. [LR291]

SENATOR WALLMAN: ...but we're definitely going to have to conserve a lot more.
[LR291]

JACKIE CANTERBURY: Thank you [LR291]

SENATOR WALLMAN: So Australia is dealing with it. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR WALLMAN: Africa, some places. [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR WALLMAN: The Middle East. So if you have any answers to this, I'd appreciate it because I don't. Thank you. [LR291]

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JACKIE CANTERBURY: Well, you know, it is tough and I think it's hard being the descending opinion because I see Senator Fischer and Senator Christensen, neither one, probably like what I have to say. But I think that we need to hear it. And particularly, you know, I think along with this is my love of this river, and also my view that what we're doing isn't sustainable. So I'll just end in saying I read the first chapter of Collapse and I almost couldn't read anymore. You know, so but thank you very much. And thank you for your time. [LR291]

SENATOR LOUDEN: I got a question here. You're not done yet. (Laughter) What part of the river you live on? I don't know as I caught what you said. Where do you live at on the Niobrara River? [LR291]

JACKIE CANTERBURY: It's west of Valentine, 29 miles. There's a little town, Nenzel. [LR291]

SENATOR LOUDEN: Nenzel? South of Nenzel is where you are? [LR291]

JACKIE CANTERBURY: South of Nenzel. It's about eight miles south of Nenzel on the Niobrara. [LR291]

SENATOR LOUDEN: Okay. And then how wide is the Niobrara there? [LR291]

JACKIE CANTERBURY: It really changes. It's actually quite narrow, you know, it's pretty narrow there in front of my place. It's about I'd say 25 feet. [LR291]

SENATOR LOUDEN: Now, as you go further west up that river, is there irrigation wells and that sort of thing on that river or is too hilly and sandy to have much... [LR291]

JACKIE CANTERBURY: No, actually some new wells were just put in by my neighbor to the east. So he's on both sides now. That's just new now, actually. I think there's

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been a big, after probably the last year, there's been a big push to put in some irrigation wells, so. [LR291]

SENATOR LOUDEN: Um-hum. When you talk about instream flows in other rivers and that sort of stuff... [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR LOUDEN: ...now, what's the difference between instream flows and riparian rights for a river? [LR291]

JACKIE CANTERBURY: Riparian rights, you know, in my way of think is essentially the rights that you have as a landowner on your riparian corridor, on the area that you live in. And those are basic water rights. And some states in the West will allocate, say for example, you have water rights, others you don't. In other words, on the Niobrara, I own, you know, midstream. Other places in the West, you don't. So there's really different rights allocated. [LR291]

SENATOR LOUDEN: But my understanding is riparian rights, there's supposed to be a certain amount of water flow down the creek or river or whatever it is at any certain time, and that was I was wondering by doing instream flows or riparian rights or whatever. Riparian rights has to be done before 1895, but instream flows...and they would be senior water rights then, is that correct? [LR291]

JACKIE CANTERBURY: You have to ask Game and Parks that. I wouldn't want to say anything. You know, that's... [LR291]

SENATOR LOUDEN: But I mean the way the discussions went on when you put an instream flow in there, they would be senior to everything else. [LR291]

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JACKIE CANTERBURY: I think so. [LR291]

SENATOR LOUDEN: And it would be something like a riparian right then that there would be a certain amount of water would have to flow down that river all the time... [LR291]

JACKIE CANTERBURY: Exactly. Yes, yes. [LR291]

SENATOR LOUDEN: ...irregardless whether it's drought or however unless you set up some system that you have a gauging station someplace and you always have a percentage that's supposed to go by, that would be the... [LR291]

JACKIE CANTERBURY: And to make it simple. You know, I see it as basic instream flow, just a basic amount of water. And how I look at it as a biologist is it's a basic amount of water that has to flow through a riparian corridor so that it is biologically viable. [LR291]

SENATOR LOUDEN: Okay. Now, one other question I'd like to ask you... [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR LOUDEN: ...on the Niobrara. What about the vegetation, the trees and stuff... [LR291]

JACKIE CANTERBURY: Yeah. [LR291]

SENATOR LOUDEN: ...where you live there? Are there a lot of pine trees? [LR291]

JACKIE CANTERBURY: Yes. [LR291]

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SENATOR LOUDEN: And are there are lot of...is there some fuel load that needs to be cleaned out of there or what's it like in your area there for that? [LR291]

JACKIE CANTERBURY: Actually, yes, and I did a controlled burn--I was actually the first one in my area to do so--two years ago. So yes, there is. And I did do a controlled burn, so. [LR291]

SENATOR LOUDEN: Okay, because I was wondering. I haven't been on that part of the Niobrara that much, but I know as you go further on down, there's some... [LR291]

JACKIE CANTERBURY: Yeah. [LR291]

SENATOR LOUDEN: ...real dangerous fuel loads... [LR291]

JACKIE CANTERBURY: Yeah. [LR291]

SENATOR LOUDEN: ...in some of those areas, so. Okay. Have you...I'm more familiar with the Niobrara River from south of Gordon and south of Rushville and off in that country. [LR291]

JACKIE CANTERBURY: Sure, sure. [LR291]

SENATOR LOUDEN: And when you say it's...and it's about 25 or 30 feet wide or so there. And is it actually narrower through your area than what it is there, say, south of Gordon? [LR291]

JACKIE CANTERBURY: Actually it narrows in my area and then it widens out. I've got about three miles on the Niobrara, and so a little bit farther east on my place it really widens out to probably about 50 to 60 feet. So it really changes just in front of my place. But mainly if you go west of my place, it's a lot narrower in general when it flows.

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[LR291]

SENATOR LOUDEN: Are there creeks that add to that there? [LR291]

JACKIE CANTERBURY: Yes, there are. [LR291]

SENATOR LOUDEN: Like through Merriman... [LR291]

JACKIE CANTERBURY: Yes. [LR291]

SENATOR LOUDEN: ...I think has a creek that goes down there and dumps in there.
[LR291]

JACKIE CANTERBURY: Yeah. [LR291]

SENATOR LOUDEN: Is there someone then pumping as much water out as what that creek puts into it in order to...as you say it gets dry to the west of you there? [LR291]

JACKIE CANTERBURY: It gets dry. The last couple of years, not this last because it was pretty wet, but I began to get concerned just as a landowner in just looking, in a very unscientific observation and watching it really almost sort of cleaved from the side of the banks to at least two feet to where all the vegetation was showing on the side bank. And I remember I called Game and Parks because of the fact that you could even see sort of clumps of the bottom of the river. And this was in August, and this was--I don't know if you remember, but it was really dry--it was a combination of irrigation. It was really dry at that time. And the Niobrara throughout is sustained by these seep streams. So probably about every 25 feet on that place I have water that comes in. So it's continually fed. And so I was really struck by how much it was reduced in August.
[LR291]

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SENATOR LOUDEN: Okay. Thank you for your testimony. [LR291]

JACKIE CANTERBURY: Thank you very much. [LR291]

SENATOR LOUDEN: Thank you for being here today. [LR291]

JACKIE CANTERBURY: Thank you. Appreciate it. [LR291]

SENATOR LOUDEN: Next testifier. [LR291]

BILL BUSKEVICIUS: My name is Bill Buskevicius. I'm the current president of the Trout Unlimited Nebraska Chapter 710. And we represent approximately 300 members statewide. [LR291]

SENATOR LOUDEN: Can you spell your name for us? [LR291]

BILL BUSKEVICIUS: It's B-u-s-k-e-v-i-c-i-u-s. [LR291]

SENATOR LOUDEN: Okay. Go ahead. [LR291]

BILL BUSKEVICIUS: After reading the testimonies of Rex Amack, Mel Thornton, Wes Sheets, and Dan Stahr from the August 20th hearing in Alliance, it's kind of clear to me that the views and recommendations on instream flow rights that they have are in line with potentially the vast majority of Nebraskans who truly appreciate the value of these resources and see the need to protect them. It's kind of the opinion of our organization that Nebraska is falling behind other states in the area of instream flow. And we see any support that can be given to the Game and Parks as far as lessening the restrictions on them to get instream flow studies going and their rights to instream flows is detrimental to the state in general. Now, Nebraska has tried Trout Unlimited people associate us basically with trout, but that's not our main focus. Our focus is directed toward water

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quality. And we feel that the instream flows that the Game and Parks are interested in and studying are detrimental in that sense. We see trout as an indicator to water quality. And streams in Nebraska are suffering in the sense of water quality. And the trout indicators, they're being depleted. And it's just out opinion that we should do anything we could to support the Game and Parks. [LR291]

SENATOR LOUDEN: Questions for Bill? Senator Carlson. [LR291]

SENATOR CARLSON: Senator Louden. Bill, where's the best trout stream in Nebraska? [LR291]

BILL BUSKEVICIUS: Well, it probably runs either between Long Pine and Greeley as far as availability of trout and access. [LR291]

SENATOR CARLSON: How familiar are you with Nine Mile Creek? [LR291]

BILL BUSKEVICIUS: I've never been to Nine Mile Creek, but I am familiar with Nine Mile. [LR291]

SENATOR CARLSON: And that's a wonderful story there on the removal of Russian Olives. [LR291]

BILL BUSKEVICIUS: Yes. [LR291]

SENATOR CARLSON: And restoring the flow and the trout that you can hardly believe standing on the bridges looking at them. So I don't know about the other place that you mention, but I know of Nine Mile Creek through some real efforts on the part of the property owners has been returned to a wonderful stream. And I simply wanted to see if you were aware of that or not. And if you haven't been there, I'd invite you to go. [LR291]

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BILL BUSKEVICIUS: Yes, yes. And I'm aware of it, and that's true. Like you said, it is a cooperative effort between the land owners to get those stream flows up to a point where they will sustain a trout population. [LR291]

SENATOR CARLSON: And in that case, it's not irrigation at all that created the problem. It was the vegetation, and once that was removed, the stream returned. [LR291]

BILL BUSKEVICIUS: That's true. [LR291]

SENATOR CARLSON: Thank you. [LR291]

SENATOR LOUDEN: You talk about the instream flows, now your for giving some instream flows to the Game and Parks. Is that what I understand you to say? [LR291]

BILL BUSKEVICIUS: If it is necessary to sustain those streams, yes. [LR291]

SENATOR LOUDEN: Now, what about giving those instream flows to NRDs? [LR291]

BILL BUSKEVICIUS: Depends upon how it's going to be utilized. Is it going to be utilized for sustaining the streams to support habitat? If that's the case, then I couldn't say that we'd object to that. But Game and Parks has always seemed to have held the interest of the state in general when it comes to habitat and recreation. [LR291]

SENATOR LOUDEN: Okay. Then we should have instream flows to maintain a certain flow in the river whether it's the NRDs or Game and Parks, and then the offshoot of that will be there will be fishing or boating or whatever comes with it providing we keep that certain flow in that river. Is that what you're telling me? [LR291]

BILL BUSKEVICIUS: It's a matter of, yeah, keeping it to a point where it will sustain the

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habitat. [LR291]

SENATOR LOUDEN: Okay. Other questions? Seeing none, thank you for your testimony there. Appreciate your being here today. [LR291]

BILL BUSKEVICIUS: Thank you. [LR291]

DUANE HOVORKA: Good afternoon. My name is Duane Hovorka, H-o-v-o-r-k-a, and I'm from Elmwood, Nebraska. And I want to make sure that people understand the underpinnings of the instream flow law, which is the doctrine of the public trust. And the public trust legal doctrine dates back actually to Roman times. It says: that fish, wildlife, and water resources are a public resource, not private property, that they're held in trust by the state, that they're managed for the benefit of the whole community. And our state and other states have a responsibility, not just a right, but a responsibility to protect and manage those public resources. The Public Trust Doctrine is embedded in common law and that makes it part of our state's law, part of the law of the land here, whether it's specifically recognized in the statutes or not. I think it's fair to say that Nebraska and other states, virtually every other state, ignored that public trust responsibility when it come to wildlife. And that's why in the 1800s unregulated harvest virtually eliminated deer, elk, bison, turkey, almost every other huntable species that was in Nebraska 200 years ago was by the year 1900. It took a herculean effort of many decades and a whole lot of public resources and private efforts to restore some of those wildlife populations to what we have today, which is huntable species, huntable levels for many of those species. I think it's also fair to say that Nebraska also ignored that public trust responsibility for fish and stream flows for most of its history. That through inadequate regulation, streams like Pumpkin Creek and Frenchman Creek were allowed effectively to be pumped dry. The public trust responsibility is implemented in different ways in different states and different countries. In some places, the state has set those minimum stream flow requirements, and then the right to use water comes secondary to those minimum flows. That's not the Nebraska approach. In others, individuals or groups have

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resorted to lawsuits to see that that public trust responsibility is upheld. And again, we haven't seen public trust lawsuits in Nebraska. But my first point is that stream flows in Nebraska are a public trust, that providing protection for that resource is not an option, it's an obligation for the state of Nebraska. In Nebraska, if you look at our instream flow law, that's basically one way that that public trust for water is manifested in our state laws. And in my view, the law, we've heard objections that it's too strong, and in fact I think that it's probably too weak. That if you look at some of the places where our current law falls short, one is that it denies a canoe outfitter a fishing guide, a water fowl guide, the same right to obtain a surface water right for a beneficial use of stream flows, the same rights that current law grants to a farmer, a rancher, an industry or city to obtain those rights. A farmer has alternatives to the use of irrigation of water. You can grow crops like wheat that don't require irrigation, plant and harvest native grasses. But a canoe outfitter does not have an option if a river runs dry. In that, they're a lot like a livestock producer who needs water for their livestock. And there's just no substitute for having the water there. So unlike a farmer or rancher, the canoe outfitter, fishing guide, duck outfitter have no right to apply for or to hold an instream flow water right to protect the water that's needed for their business and to protect their investment in their businesses. Second, a current Nebraska law can create a rush to the courthouse over water rights. And again, unlike an irrigation or a small commercial right where you can go in, it's a relatively short form, you file it that day, and once your right is granted, your water right runs from the day you filed it. That's not the case with an instream flow application. That, in fact, it can take years to develop the science and the support that you need in order to justify the water right. The problem is that it's all in a public open process, whether it's the Game and Parks Commission or whether it's a natural resource district everybody's on notice that you're developing an instream flow water rights application as Game and Parks is on the Niobrara. What that can result in is a rush to the courthouse from other folks who want to obtain those water rights first to get their application in. And in essence then what happens then is you defeat the purposes of the law because by the time the application for an instream flow water right is filed, you could lose...basically all the water could go to somebody else. And since we

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operate under first in time, first in right water system, that water basically could no longer be there. We have a special situation on the Niobrara because of the fully appropriated status. And that has other implications. But in the vast majority of the state where we don't have instream flow protections for rivers, in those situations we're the Game and Parks to announce that we're going to develop an application for an instream flow water right there, what you would see is basically a rush to the courthouse door or to the DNR door by people in that watershed to obtain those water rights before Game and Parks could get their application in. So the Legislature could and should correct the situation by providing that the priority date for an instream flow right would run from the date that the applicant, whether it's the commission or a natural resource district, actually filed a notice to the Department of Natural Resources that gave their intent to file an instream flow application. Should probably be accompanied by a time limit so that the commission or the district had maybe three years or whatever is appropriate to actually put together the information and get the thing filed. But that way the water right would run from the notice that an application was going in, and any subsequent water right applications would fall next in line to that application. And third, as I said, very few of the streams in the states are now protected by an instream flow application. And that's the primary way that we recognize this public trust in this state. So by providing clear direction and funding to the Game and Parks Commission to take on a statewide assessment of the needs and the potential for other instream flow water rights across the state that would help us identify the streams where we have some high priority resources, whether they're recreation or biological resources, that are currently unprotected. And it would give the Game and Parks Commission some funding to figure out which of those places it makes the most sense to provide protection now. It's always easier to protect water in streams when there's still a surplus, and when there's still other water to be appropriated in addition to those instream flows than it is to wait until a stream is depleted and then to have to buy back the water from the folks who have rights. And that's clearly what we're doing in the Platte and the Republican Basin out in western Nebraska. So it would be good avoid that in other parts of the state where we're going to see similar pressure in the future. And that's all I've got to say. I'd be glad to try

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to answer any questions. [LR291]

SENATOR LOUDEN: Questions? Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you for your testimony. Does the applicant process prohibit you from doing the study and then applying for it and preventing the rush to apply for permits? [LR291]

DUANE HOVORKA: Well, I suppose the Game and Parks Commission could in secret develop an application and spend several years doing the biology or the recreational studies, and then I guess apply for it. But I honestly don't think that's the best way to run a government. What they would do is they'd get criticized by people, why are you doing this in secret? Why didn't you talk to anybody in the basin? Why didn't you talk to the NRD? So I don't think that's the best way to develop an application. [LR291]

SENATOR CHRISTENSEN: I don't think it would have to be in secret if you're doing a study. There's studies done all the time. All I'm saying is I understand your side that you're saying that you'd like to have priority date from the date it's applied for. I understand that part of it. I would just ask if there is no...since studies going all the time, they could do their studies and then apply for a permit, hand in the study in part of that process, correct? [LR291]

DUANE HOVORKA: I guess you could, but I think the current statute provides for a negotiation process with the folks who oppose the application, which I suppose could... [LR291]

SENATOR CHRISTENSEN: Before it's approved, yes. [LR291]

DUANE HOVORKA: Yeah, before it's approved. [LR291]

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SENATOR CHRISTENSEN: You wouldn't have that long delay though I guess is the point I was getting. [LR291]

DUANE HOVORKA: Yeah. [LR291]

SENATOR CHRISTENSEN: And you know, I guess you mentioned the Frenchman which I'm from that area. And I don't deny wells have had affect on stream. But I guess I probably get pretty sensitive when everybody always says, well, it's the wells when like Senator Carlson mentioned on Nine Mile, vegetation. Unfortunately it's easy to shut off someone's livelihood and we worry about one person we harm versus we use state dollars or we work collectively to remove vegetation, that's harder to get done because it's easier to step on someone or a small area than it is to come up with dollars. But you know, I just might say tread light, say there's many causes to these streams going down. Because some of it pumping, some of it is vegetation, some of it is conservation. Unfortunately we've done such a great job of selling conservation practices, we don't get the runoffs we used to. I'm a no-till farmer. I hold the water on my land, it don't run off. I don't have ditches no more because that water soaks in that grows something harmed that stream. That's why I say it's a multifaceted problem. I just say you might be careful just saying wells have dried this up. There's three pretty equal forces here. [LR291]

DUANE HOVORKA: And I don't disagree with that. It's a combination of changed in rainfall, changes in land management, both surface and groundwater irrigation, and the stuff that's growing up. I mean, I know Mike Sarchet out on Nine Mile Creek who's been one of the folks very active in that. And that's really...that's incredibly encouraging to see the results they got on a small stream by going in and taking out some of the invasive plants, so. [LR291]

SENATOR CHRISTENSEN: Yes. Thank you. [LR291]

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SENATOR LOUDEN: Senator Fischer. [LR291]

SENATOR FISCHER: Thank you, Chairman Louden. First I need to apologize, sir. I didn't get your name. [LR291]

DUANE HOVORKA: Duane Hovorka. [LR291]

SENATOR FISCHER: With and H? [LR291]

DUANE HOVORKA: H-o-v-o-r-k-a. [LR291]

SENATOR FISCHER: Thank you. And who are you with again? [LR291]

DUANE HOVORKA: I don't think I'm representing anybody today. [LR291]

SENATOR FISCHER: You're here for yourself, good. [LR291]

DUANE HOVORKA: For myself, yeah. [LR291]

SENATOR FISCHER: Good. I like that. First, I'd like to thank you. When we talk about instream flows, the focus seems to be on the Niobrara right now because Game and Parks is doing a number of studies there. I'm glad you pointed out that there's a difference with a fully appropriated basin and looking at all of the streams in the state and the affect that this study will have on the entire state. So I appreciate that you brought that up. I liked one of the points you brought up where either the Game and Parks or the NRD would file notice, and then you give them a time limit on when they would have to have their process completed. Did I understand you correctly on that? [LR291]

DUANE HOVORKA: Um-hum. Yes. [LR291]

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SENATOR FISCHER: What kind of time period do you think is necessary? [LR291]

DUANE HOVORKA: Well, you want it to be short enough that it doesn't drag on forever, especially when there's other people who might want those potential rights. And, you know, I don't have much experience with those kinds of studies. You know, my guess is that probably if you did some of the basic work ahead, as Senator Christensen said, that two or three years would be...I don't think you'd want to go much longer than that. [LR291]

SENATOR FISCHER: If the Game and Parks would file the notice, if we would change this so it would go from the date when you file notice, and since it wouldn't be a fully appropriated basin, they would have a water right at that point, either for recreation of fish and wildlife is what an instream flow right is. So they would have that right then to finish their studies in a certain time period. So everybody else...would you put everybody else on hold for a water right because it would be a surface water right in this case. So you'd put everybody else on hold because you really wouldn't know how much water would be needed for the instream flow. Do you agree with that? Am I following you? [LR291]

DUANE HOVORKA: Sort of. [LR291]

SENATOR FISCHER: Okay. [LR291]

DUANE HOVORKA: And I think what you would do it have the agency, the district or the commission, would need to know enough about the range of flows they're likely to ask for to be able to say, we're going to apply for this range of CFS based on our preliminary studies. And when we finish our final studies, they'll be, you know, a single number, but here's the range. And then subsequent water right applications, the DNR could look at that and say, well, if Game and Parks is approved up to the maximum, is there water left

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for them. And if there is, then they could approve the right and it would be next in line behind the instream flow right during dry times. And so they could continue to approve applications that wouldn't impinge on that right, on the instream flow right. And they could give I suppose conditional approval to folks where you got to the point where you're now down into the instream flow water, you could give conditional approval and say that we can conditionally approve this, but you're not going to get final approval until we know for sure whether the instream flow gets approved at all or whether it's, you know, what the number is, so. [LR291]

SENATOR FISCHER: yeah, I see what you're getting at. That's interesting. I'm devil's advocate a lot on this stuff. [LR291]

DUANE HOVORKA: Sure. [LR291]

SENATOR FISCHER: If you give a conditional right, you have people that are making investments though. And any time you're dealing with the farm economy, there's a very small margin of profit anyway that you can work with as a person in agriculture. So if you only get a conditional approval...I'm just trying to look at the side of the person who wants to make that investment then in irrigation. [LR291]

DUANE HOVORKA: Sure. [LR291]

SENATOR FISCHER: We'll have to talk about that. [LR291]

DUANE HOVORKA: Yeah, yeah. [LR291]

SENATOR FISCHER: I appreciate it. That's an interesting concept, and I appreciate that you brought up something new here for us to look at. Another point you brought up was on the public trust. And Game and Parks may want to correct me on this, but from my notes on our hearing this summer we had in the western part of the state, I believe

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Game and Parks, one of the suggestions they made was to remove public interest. I'm seeing no response out here. Maybe my notes are incorrect. But if I would happen to be correct on that where they would want to remove that public interest part of instream flow, how do you feel about that then? [LR291]

DUANE HOVORKA: I wasn't at that hearing, so I'm not sure exactly what the suggestion was, so maybe I shouldn't answer. [LR291]

SENATOR FISCHER: Fair enough, fair enough. (Laughter) I appreciate your being here today and bringing forward new ideas and again realizing the difference in our fully appropriated and the rest of the streams in the state of Nebraska. Thank you. [LR291]

SENATOR LOUDEN: Senator Wallman. [LR291]

SENATOR WALLMAN: Thank you, Chairman Louden. Thank you for being here, Duane. This is an emotional issue as you well know, and water rights, first rights, second rights. I've got a couple of rivers in my area, and so far Kansas is concerned about water quality. And that will probably be our next thing. Are you concerned about water quality in our rivers and such? [LR291]

DUANE HOVORKA: Oh sure. Yeah, of course. And if you look at our rivers, virtually every major river in Nebraska is polluted, they fail to meet state and federal water quality standards. And it's something we have to start tackling seriously. And it's, I mean, it does relate in part to some of the stream flows because the less water you have in a river, the more concentrated the pollutants. And so, you know, the more you decrease stream flows, if you still have the same kind of runoff into the watershed, you're going to make your pollution problem even worse. [LR291]

SENATOR WALLMAN: And that's one reason why vegetation grows fast too, you know, high nitrogen levels. In Iowa now, they put severe, in certain stream beds, severe

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restrictions on nitrogen use. You know, split applications, all this. [LR291]

DUANE HOVORKA: Yeah. [LR291]

SENATOR WALLMAN: So I would appreciate increasing our water quality. [LR291]

SENATOR LOUDEN: Duane, I have a question I guess. When you talk about the instream flow then, as you're indicating, that would be a senior right. Is that correct? [LR291]

DUANE HOVORKA: Well, it's only senior to everyone who files an application afterwards. It's junior to everybody who's already got a water right. [LR291]

SENATOR LOUDEN: Okay. Then they would be set right in that place where they are at that present time. [LR291]

DUANE HOVORKA: Yeah. [LR291]

SENATOR LOUDEN: Then what happens if the flow gets restricted down? Then do you still service those with the senior water rights and then the instream flow goes away? That's my impression that's the reason you have the instream flow is so you can always maintain that one flow. [LR291]

DUANE HOVORKA: Well, what happens as the flow drops you shut off the most junior irrigators. And so you start shutting off the junior irrigators that are junior to the instream flow. And then once you get to the instream flow application, you don't shut the application off because it's water in the river. But what that does is then give you a buffer until the next senior appropriator and then presumably if your river dropped far enough that you were not even meeting the instream flow and you were carving into somebody's senior water right, then you start shutting off people on the other side.

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[LR291]

SENATOR LOUDEN: Start shutting off the senior ones above them? [LR291]

DUANE HOVORKA: But not to serve the instream flow application. That's to serve the more senior...the people more senior to them. [LR291]

SENATOR LOUDEN: Okay. Then so you shut off a couple of appropriations that were in just ahead of your instream flow. Where does that instream flow fit then? Instream flow is already shut down and then you have your other senior rights on that down there that were the original senior rights? [LR291]

DUANE HOVORKA: Yeah, yeah. If you weren't meeting your instream flow... [LR291]

SENATOR LOUDEN: Take for instance that generation plant that Sparks has all the water in the Niobrara. Somewhere along the line you put your instream flow in there and all of a sudden there isn't enough water to serve that generation, which if they'd put the call on it, there isn't. Who gets shut off...I understand everybody under the instream flow date would get shut off. What about those above the instream flow date? Will they get shut off to maintain your instream flow? That's what I'm wondering is how you're going to set that in there. [LR291]

SENATOR FISCHER: Say what? (Laughter) [LR291]

SENATOR LOUDEN: If he can answer it, we'll know. [LR291]

DUANE HOVORKA: And my understanding of it is that the Spencer Dam I think is what you're talking about has a very senior water right. And so to the extent they're not getting their water, they can ask that junior people to them are shut off so that they get their water. The instream flow water right would be way junior to Spencer Dam and it

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would be junior to all the people who now have water rights. So you wouldn't shut off anybody who currently has a water right to serve the instream flow. You would only shut off people who got water rights after the application is submitted, assuming it was approved for the...did I answer your question or just confuse myself? [LR291]

SENATOR LOUDEN: Okay. Pretty close, but now my next question on that would be if that's the case, then the Spencer Dam has their call on the water, then why to you even need an instream flow because that water has got to go down there to serve that Spencer Dam? [LR291]

DUANE HOVORKA: yeah. That's a good question. And let me tell you why is because dams aren't permanent, that just as any other water right or water use is not permanent. You know, 30, 40, 50 years from now, we don't know what the irrigation technology is going to be. We don't know farmers who are using water now, if they're still going to need as much water, if they're going to be growing some completely different crop and not need it. We don't know how long that dam is going to be there and how long it's going to last or how long that power district is going to exercise that water right because it's largely in their hands right now. They can decide whether to exercise it and how to exercise it, and that's why now they have, as I understand it, not been shutting off irrigators who are at least willing to negotiate with them. And I'm not party to those deals. But if Spencer Dam should get taken down, if the hydroplant goes offline, if the power district decides not...that it's too much trouble to deal with those water rights, then all of sudden you don't have that protection that you now have. And then that does open it up in the future to more appropriations. And so that's why that instream flow right is important. [LR291]

SENATOR LOUDEN: Then you're telling me then that that instream flow right is granted, then it's perpetual. [LR291]

DUANE HOVORKA: No. I mean, it's a water right that, like every other water right, is a

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beneficial use of that water that the state has permitted. But every 15 years, I think it's 15 years, those instream flow rights come up for review. And at that time then whoever has it, the district or the commission, has to go in and justify that that is still meeting beneficial uses for the state and that the flows are still appropriate to have. And so that water right then continues for presumably another 15 years. And so, I mean, it's perpetual in that it's a water right. But I guess I would argue it's a little different than a private property right like an irrigation right or a commercial right because the state can't take away an irrigation right because there's a property right there. So it has to buy it or it has to use eminent domain or so other way of taking it with fair compensation. Whereas an instream flow right is held by a public agency. So if the state decided that that instream flow right was no longer serving the public interest, the state Legislature could come in and say, you guys have too much water and here's what you're going to get or they could change the basis of that right. So it's a little bit different than a private property right. [LR291]

SENATOR LOUDEN: Okay. Then you think there should be instream flows consideration on nearly all running water in Nebraska, I mean, most all creeks and that sort of thing? Is that what I understood you to... [LR291]

DUANE HOVORKA: I wouldn't go that far. And in fact there's a lot of parts of Nebraska where we don't even have that opportunity because they're already overappropriated. And so there's basically no instream flow there to get a right on. But certainly there are high priority resource waters in our state. Maybe not every, you know, every creek and every stream and every river in the state, but there are high priority resources, whether it's for fisheries or for recreation, other kinds of canoeing rivers. Those sorts of things where we do have a fairly high priority resource, either biologically or in terms of recreation where it makes sense to do the studies and to look at now while there's still plenty of water in those areas, you know, what's the minimum that we would need to protect the resource that's there, and let's lock those rights in now so that everybody from the future, we protect those for future generations. [LR291]

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SENATOR LOUDEN: Okay. Thank you. Seeing no more questions, thank you for your testimony today. [LR291]

DUANE HOVORKA: Sure. [LR291]

SENATOR LOUDEN: Thank you for being here. Next testify. [LR291]

DEAN EDSON: (Exhibits 1, 2) Good afternoon, Chairman Louden and members of the committee. My name is Dean Edson, it's spelled D-e-a-n E-d-s-o-n. I'm the executive director for the Nebraska Association of Resources Districts presenting some testimony on behalf of the association, and also submitting some written testimony from the Middle Niobrara NRD who unfortunately couldn't make it in today to testify. And I want to apologize up front. I've got a little tickle in my throat, so I've got a little cough drop in there to make sure that tickle doesn't bother my presentation too much. So if I cough a little bit, excuse me. [LR291]

SENATOR LOUDEN: Could have fooled me, Dean. (Laughter) [LR291]

DEAN EDSON: What I want to hand out to you--is there a page still here--is the written testimony from the Middle Niobrara NRD, and basically it's the same testimony that was presented to you up in Alliance on August 20. I'm not going to read it verbatim, but I want it submitted as part of the record. I want to hit a couple point out of their testimony, and then also some other issues we'd like to bring up. First of all, I want to point out that Central Platte Natural Resource District in Grand Island does hold an instream flow right on parts of the Platte. So we do...the NRDs do hold a right. The Game and Parks also holds a separate instream flow right on that Platte River system. We have tried in the past and continue to work into the future on trying to work with Game and Parks on instream flow issues and flow needs for fish, wildlife, and habitat purposes on all Nebraska rivers. Most recently evidence of that is we've been working together for the

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last nine years on the stretches of the Lower Platte River, looking at habitat needs for the pallid sturgeon. And also looking at different things we may be able to do in order to protect the species in that area, and then also provide additional habitat outside of changing the loss. Referring to the testimony by Mike Murphy that's given there, I wanted to emphasize what their feelings are from the Middle, Upper, and Lower NRDs. And if you look at that first paragraph, they have an continue to request coordination with the Game and Parks Commission to work jointly to see if an instream flow right is appropriate on the Niobrara River Basin or not. There's another key point in his testimony here. An instream flow right does not put water in a river, it only caps the use of the water. His next point there is also important as in the case of the Niobrara River. It's a question where the instream flow would currently serve a purpose because the fully appropriated determination has been made already on the river as of January of 2008. The final point in his opening paragraph here is also very, very important is that from a natural resource district we have to look at all the uses of the water for that river, and all the users in that basin. So we have to take all of those in consideration. And those include what he highlights, consideration for production agriculture, industries, municipalities, and in regard to the economic impacts that decisions on instream flows could have. So we're looking at it for all users, not just fish and wildlife, not just agriculture, not just industry alone or not just municipality or public power. We got to take all those into consideration. The other piece of testimony I'd like to touch on a little bit was the testimony that I handed out from Reed Welke, the Middle Niobrara water programs coordination. This is, again, the same testimony that you received up in Alliance. And this is stream flow gauge information. And I'm just going to briefly go over a few highlights with you on this again. On pages 3, 4, 5, and 6, and 7 are all the charts that we'll go over. And we'll start with figures 1, 2, and 3, and these are flow information near Sparks, Nebraska. And here's where some more detailed analysis needs to come in and why it needs to come in. If you look at the Sparks gauge in figure 1, that shows data from 1946 through 2007. This shows an average yearly decline of 1.7 cubic feet per second. However, you start looking at figure 2. Figure 2 starts breaking that gauge down a little bit more, looks from 1946 to 1963. And if look at those dates, that shows an

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average yearly increase of 1.1 CFS for that 1946 through 1963. Figure 3 is '64 through 2007. That shows an average increase of 1.1 CFS. So you start to wonder why is that that that first graph shows a downtrend, and you start figuring out that's due to the construction of Merritt Reservoir in 1964. But if you look at it and break those data out in preconstruction, post construction, you see that streams are increasing. The next chart, figure 4, is the Long Pine Creek near Riverview. It's 1949 through 2007 data. That shows an increase of 1.4 CFS. Figure 6 shows the period of 1963 through 2007. Once again, an increase of 1.7 CFS. The Niobrara River near Spencer, this data goes through 2001, don't have the data available after that. But 1928 through 2001 shows an increase of 6.5 CFS for that period. Figure 8 in 1928 through '63 shows an increase of 13.6. Figure 9, time period '63 through 2001 shows an increase of 15.8 CFS. Now, we move on to figure 10, Niobrara River near Verdel, that's 1939 through 2007 shows an average yearly increase of 7.8 CFS. And go to figure 11, the Keya Paha River near South Dakota, 1938 through 2007, yearly increase of .06 CFS. Now, in looking at all that, if you look at the trend lines for all these, they're all increasing. Now, here's the other thing, you know, that we need to take a look at is that when you look at the individual data points. And just go to figure 3, the flow near Sparks, you'll see some dots above and dots below the lines. Well, if you got a dot below the line you could say, well, I went out to the river the other day and it's way down and I could see the vegetation. Well, we're going to have periods where it's dry and the streams don't flow as much and it's going to fall below that line. You could go out there the day after a rain, and it's going to be way above that. But what we have to look at is what's the long-term trend? Are we going down? Are we going up? Are we stabilizing? What we see not only with the stream flows up there, but also see in groundwater levels increasing in that basin. So there doesn't appear to be any long-term immediate danger to losing the water out of the Niobrara River if you look at the data. We have some time in which to rationally think through what changes need to be made to any laws, if any, to secure instream flow rights for Nebraska's rivers and streams, in particularly up in the Niobrara valley. Now, there's a couple other things I want to point out. Some things that are in statute today, and give you some background on it, there's a 20 percent stream flow requirement

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that's in statute. And I'll tell you where that came from. In 1996, there was a bill passed that put that provision in place. And that was due to a compromise that was reached between the parties that were opposed to the Game and Parks instream flow on the Platte and those were supporting of the instream flow. What happened was the Game and Parks had applied for an instream flow right on the Platte River at a level that historically had never been there. It may have been there one time in the last hundred years in a flood stage. And what the parties finally did is they agreed that to a flow that was there at least 20 percent of the time. And they agreed that also when they reached that agreement on that application that the parties would support the legislation to apply that 20 percent rule in statute so that we don't run into that problem again. That's why that 20 percent rule is there. Now, there is another factor that got put into the statute at the time when that compromise was reached, and that was this other questions of what do you do with an instream flow right on regulating uses, especially those junior uses that come in after this. And keep in mind, we didn't have fully and overappropriated status back then. We were just looking at we granted them an instream flow right, so next question is what's next. What do we do to regulate any uses that come in after that? And it was agreed upon back then that we would not try to regulate those new uses that came in. On the Platte stretch, there was not going to be anymore surface water rights granted in that Platte stretch. And back then we didn't figure there was much impact from groundwater use, so it was agreed upon that they were not going to regulate that. However, that provision got taken out of the statute with the passage of LB962. And now the districts can regulate any junior uses on instream flow if they choose to do that. The department can also request that. So that was a change that's already been made in the last ten years off of this compromise. But I wanted to point that out to you that there has been a couple of changes in law and why those things were put in there in the first place. One other thing I wanted to just maybe raise more questions about, there's been some discussion and quite a bit of discussion about changing a priority date on an application. And I'm kind of scratching my head wondering how that would work and why you would only apply that to one class. If you wanted to change a priority date to a date that some entity decided to file an application,

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why would that just be the Game and Parks and why wouldn't you apply that to anybody? So if a public power district or a limited liability company decided to file for or was thinking about filing for a water right or something, would you grant that same opportunity to those folks to go back in time and say, well, it would be the date that our board considered that at first? That raises a lot of questions about changing that. And I think what we have with the filing date right now is probably the best we can do, and I would urge a little bit of caution about rushing and changing that right off the bat without taking other water users into consideration. With that, I will stop and try to answer any questions you may have. [LR291]

SENATOR LOUDEN: Questions for Dean? Senator Fischer. [LR291]

SENATOR FISCHER: Thank you, Chairman Louden. Thank you, Mr. Edson, for being here today. You were at the hearing in Alliance, weren't you, in August? [LR291]

DEAN EDSON: Yes. [LR291]

SENATOR FISCHER: Maybe you can refresh my memory or I'll refresh yours. I made the comment earlier that Game and Parks I thought from my notes they had talked about removing public interest. Did you hear anything like that? [LR291]

DEAN EDSON: I heard something about that, but I didn't bring my notes with me and I'd hate to comment on that without... [LR291]

SENATOR FISCHER: Okay. Also under the Game and Parks testimony at that time one of their suggestions was to limit arbitration to 30 days. Would you like to make a comment on that? What is it currently? [LR291]

DEAN EDSON: I don't know what the current requirement is on arbitration or limits. I think any time you get into trying to limit arbitration or any of that, you're probably...

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[LR291]

SENATOR FISCHER: Doesn't that get into maybe a person or a group's rights? [LR291]

DEAN EDSON: yes. An individual's right to appeal. [LR291]

SENATOR FISCHER: Yes. [LR291]

DEAN EDSON: Yes. [LR291]

SENATOR FISCHER: Okay. Thank you for bringing the testimony from one of my NRDs and please give them my regards. Thank you. [LR291]

DEAN EDSON: Well, I know they wanted to come in today, but today just didn't... [LR291]

SENATOR FISCHER: I know they probably did. [LR291]

DEAN EDSON: It just didn't work out. [LR291]

SENATOR FISCHER: It's a 300 mile drive one way. [LR291]

DEAN EDSON: It is. [LR291]

SENATOR FISCHER: So please give them my regards. [LR291]

SENATOR LOUDEN: Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you, Dean. I guess unless I misunderstood earlier, I wouldn't change it for just one entity. It would be

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everybody. I guess I would never look...separate one group. [LR291]

DEAN EDSON: Yeah. And I guess if you did that, that raises the question of okay, does that entity need to bring us the minutes to show the board action and if it's a limited... [LR291]

SENATOR CHRISTENSEN: Well, I think you'd have to grandfather everything previous if you was going to change the rules and go forward. [LR291]

DEAN EDSON: Yeah. [LR291]

SENATOR CHRISTENSEN: Thank you. [LR291]

SENATOR LOUDEN: Senator Carlson. [LR291]

SENATOR CARLSON: Senator Louden. In an application for an instream flow, Dean, who grants that? [LR291]

DEAN EDSON: The Department of Natural Resources does that. [LR291]

SENATOR CARLSON: Now, I understand that a concern in here and a request that an NRD would say if Game and Parks files for an instream flow, it should be a mutual decision generated through a coordinated effort. I'm trying to digest that. You mentioned the Platte. When Central Platte NRD got their instream flow, was that a mutual decision with the city of Grand Island or Hall County or anybody else? [LR291]

DEAN EDSON: That goes back to the early nineties, and I believe what they tried to do was get the Game and Parks to come along with them on that application. And the Game and Parks chose not to do that at that time because they were going to work on their own. There was some contestants, some parties that contested that application for

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an instream flow right from Central Platte NRD at the time. And again, as I mentioned, there were parties when the Game and Parks came in later, there were parties that contested that. What you find when you get into these contested hearings, and this is why Mr. Murphy is urging cooperation, is that those will get very, very expensive and they're time consuming and it takes up a lot more time. That's why what we're trying to do is if we're going to look at these instream flow applications, let's get the Game and Parks and the NRDs sitting down at the same table, but not just talking about the policy of instream flow right, let's look at the data and make sure that all the parties understand the data behind the application and understand why we're doing it. Those are the compromises we're trying to reach. [LR291]

SENATOR CARLSON: Okay. But to kind of follow along so that I can grasp this a little bit better. You know, you'd mentioned that...Senator Christensen...you wouldn't grant somebody of getting an advantage of setting a date with an application unless that was across the board to everybody. So isn't it kind of the same thing here, all interested parties? Rather than simply be the Game and Parks and the NRDs when those two, they got to cooperate, but nobody else does. I don't quite understand that. That's... [LR291]

DEAN EDSON: Well, when we're doing this, especially in the Lower Platte River now...when I mentioned to you, maybe I was too brief in my explanation. But when you get into these contested issues, they get expensive, and they get expensive because you got to go in and you've got to duplicate the data. Somebody else on the opposing side is going to look at the analysis and they're going to bring in their experts and they're going to try to figure out what the appropriate stream flow level should be. They're going to bring in their attorneys, their parties. And so you've got legal expenses, professional expenses, they all get duplicated on that. But we're talking about let's bring all the parties together and sit down and see if we can work this out. Have one set of data that we try to work off of, see if we can come up with a consensus. Again, as Mr. Murphy in his written testimony is that they've got to take in consideration all the other

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users too. So we're bringing all the other users to the table. And we'll see if we can work these issues out without having to go to a contested case, without having to bring it back to the Legislature and get some law changes to give advantage to one party or the other. [LR291]

SENATOR CARLSON: Okay. And I understand that, and that brings me back to a point I hope I made earlier that in addition to expense, if the NRDs have their own data, the Game and Parks doesn't like that data and they get their own data, the two aren't going to match anyway because both of them are estimates. [LR291]

DEAN EDSON: Well, they're either estimates or they're actuals from whatever data we have, like these stream flow gauges, those stream flow levels. But you're right. I mean, what are you going to use? What are you going to use for recreational value? Well, we'll sit down and figure that out rather than having two competing values. [LR291]

SENATOR CARLSON: Well, I'm simply bringing that up because it's going to relate to...if you listen to me speak Monday, I'll bring this back up. [LR291]

DEAN EDSON: On Monday? [LR291]

SENATOR CARLSON: Yes. I want you to be there. [LR291]

DEAN EDSON: What time? (Laughter) [LR291]

SENATOR CARLSON: I don't know. I got a lot going. [LR291]

DEAN EDSON: Well, you let me know and I'll make sure to be there. [LR291]

SENATOR CARLSON: Okay. Thank you. [LR291]

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SENATOR LOUDEN: He's supposed to be there at 1:30. (Laughter) [LR291]

DEAN EDSON: Okay. [LR291]

SENATOR LOUDEN: I want to point out at this time that Senator Dubas from Fullerton has joined the committee. Senator Wallman. [LR291]

SENATOR WALLMAN: Thank you, Chairman Louden. Thank you, Dean. Thank you for what you do. I know it's a tough job. And I'm probably one of the few on here that's not on well moratoriums. You know, that's a property right taken away from us. And if we're going to have depleting aquifer, than I'll have to cut back whether I've had the damn irrigation well 100 years or 10. So How do you think we're going to...don't you think we can work out this better somehow through legislation or what do you think? [LR291]

DEAN EDSON: Well, yeah. I think if the parties serious tries to sit down and see if we can work this out. And I'm not saying that...don't take me wrong that I'm saying the Game and Parks is at fault or that they NRDs are as pure as the driven snow. You know, I'm not saying that. We have our differences of opinion. What we need to do and what I try to do is encourage those districts to work with the agency folks and see if you can work your issues out. And see if we can come up with some common ground and something that is workable for that community on an instream flow that provides, if that's what needs to be done and to provide a stream flow at some level that is acceptable to everybody up there, not just a few. And that's going to mean some compromises on a lot of people's part. [LR291]

SENATOR WALLMAN: Sure. And I can respect that. [LR291]

DEAN EDSON: Yeah. [LR291]

SENATOR WALLMAN: Now, I appreciate what you do. Thank you. [LR291]

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DEAN EDSON: You bet. [LR291]

SENATOR WALLMAN: Sure, and I can respect that. [LR291]

DEAN EDSON: Yeah. [LR291]

SENATOR WALLMAN: And I appreciate what you do. Thank you. [LR291]

DEAN EDSON: You bet. [LR291]

SENATOR LOUDEN: Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Dean, what would you think of the state coming in and putting in minimum flows like some other states have done? [LR291]

DEAN EDSON: I guess, you know, the question would be what are they going to be? And, you know... [LR291]

SENATOR CHRISTENSEN: Correct, I understand. [LR291]

DEAN EDSON: And here's the thing that we find, you know, if it's a minimum flow, does it take into account weather variability? If we go into extended periods of drought, we know we're going to have stream flow decreases. So if minimum flow, does it take into account those things? [LR291]

SENATOR CHRISTENSEN: I understand that. I live in the Republican. I've seen... [LR291]

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DEAN EDSON: Absolutely. [LR291]

SENATOR CHRISTENSEN: ...dry beds for months and I've seen it run for a year and a half straight now so I understand. [LR291]

DEAN EDSON: And to do that is probably going to require a lot of data collection to figure out what a minimum flow needs to be for each one of the streams. I think Mr. Murphy highlighted in his testimony there was about 15,000 miles of streams in Nebraska. It needs some review so that's a lot of data collection. [LR291]

SENATOR CHRISTENSEN: Well, I know it wouldn't be easy. I just wanted to hear your opinion. Thank you. [LR291]

DEAN EDSON: Yeah. [LR291]

SENATOR LOUDEN: Seeing no more test...oh, I got one more here. Senator Fischer. [LR291]

SENATOR FISCHER: Just a short comment, Senator Louden. I was handed the transcript from our last meeting, but I didn't find it, but what I was looking for...I would like to compliment Game and Parks because at the last hearing they did say that we needed science to show what was needed. And I think everybody up here agrees that that's what's necessary and that's what we need to base our decisions on is what is the science because my perception of the situation is entirely different than anyone else's. And I appreciate that you've provided us with data that goes back a number of years to the '20s and I think that's important. Thank you. [LR291]

DEAN EDSON: You're welcome. [LR291]

SENATOR LOUDEN: Seeing no questions, thank you, Dean, for your testimony.

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[LR291]

DEAN EDSON: Thank you. [LR291]

SENATOR LOUDEN: Thank you for being here today. Next testifier. [LR291]

JAY REMPE: Good afternoon, Senator Louden, members of the Natural Resources Committee. My name is Jay Rempe and that's J-a-y R-e-m-p-e, state director of governmental relations for Nebraska Farm Bureau Federation. First, let me thank you for the opportunity to come visit with you a little bit about instream flows. Farm Bureau has a long history with instream flows. We've been involved in the issue over many years, well before I got involved with Farm Bureau, and I'm sure it will be many years to come. And let me start by saying that there's always been a healthy dose of skepticism on the part of our organization when it comes to instream flows because being irrigators or members that are irrigators and water users when it comes to instream flows, you are taking water off the table for potential uses and that causes concern. They want to make sure if you're going to do that let's make sure we do it right. And so when you look at our policy as it applies to instream flows, that skepticism is built in. And so you'll see things in our policy in making sure that when instream flows are granted that you allow...make sure that there is still some water available for other potential uses in that river basin. Our policy also supports...I know last spring there was some discussion about the involvement of NRDs in the decision making on instream flows. Our policy supports that, thinking that the more eyes looking at these the better, particularly now with...we have integrated management, that in instream flow can trigger integrated management and potentially ground water controls. And so it's good to have the NRDs involved up front, and as you had the discussion with Mr. Edson, maybe avoid some conflict in the future. Our...I guess we've heard a lot of comments today about the complexity and the expense and the time it takes to take an instream flow, to get an instream flow from the application and the process and things. And to our members, that's how it should be because you are...and I heard a comment earlier about instream flow is not being a

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consumptive use. But they have the same...to folks in the river basin, they have the exact same effect as a consumptive use because you are taking water off the table. And so because you're taking that water off the table, to our members we've got to make absolutely sure again that we use the best science that we're doing it right because the impacts are real. I've had members call me up that have been junior to the instream flows in the Lower Platte in the Platte River system. They are junior surface water rights that have been shut off in times of drought to protect those instream flows. And it's difficult to explain to somebody when they call and say they see their crops suffering because of a drought or they don't have the water to say you can't irrigate because we have to protect this instream flow. So the impacts of these are real, and as such, in our minds we think that the process that the Legislature has laid out and the complexity and the difficulty of it they took...the Legislature when they did this earlier took their time and we think did it right. And you got to make sure that the need for the flows are critical, that there's unappropriated water available for those flows, and that they are necessary to maintain either the recreation or the species. Those are the criteria that are built in, and we think it's vitally important. The case on the comments earlier about the concern about the run on the bank that if everybody knows that Game and Parks may be trying to apply for an instream flow or an NRD might be trying to apply and then you're going to see this run on the bank. It's something I haven't given a whole lot of thought to, but as I look at the state of things today, a significant portion of the state has been declared fully overappropriated so the risk there is minimal. We also have other parts of other state where NRDs on their own have gone in and put in moratoriums on ground water development and requested DNR to put a moratorium on surface water development. I know in the Loup and parts of the Lower Platte that is the case. And so the risks there are minimal. We have in the Lower Platte system today...it's my understanding if anybody applies for a surface water appropriation in the Lower Platte system, and this would include the Elkhorn and the Loups because they drain into the Lower Platte, that DNR will consult with Game and Parks because endangered species concerns. And so there's some protections built in there. So I just offer caution that I don't know how great of a risk that really is out there when you look at the state of things as far as our water

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management today in the state. So with that, I think I will be quiet, and I'll answer any questions you might have. [LR291]

SENATOR LOUDEN: Questions for Jay? Senator Christensen. [LR291]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you, Jay. What is the three steps you said that have to be taken into account or you were recommending there like the necessity for the instream flow was the second one. You gave like three of them. [LR291]

JAY REMPE: Well, the three that I listed, that we make absolutely certain that the need for the flows is critical, that there's unappropriated water available, and that the flows are necessary to maintain the species or recreation. I know two of those are in law today. I'm not sure about the part about the need for flows is critical, but the unappropriated water and that the flows are necessary to maintain the species, those are in law today. [LR291]

SENATOR CHRISTENSEN: Okay. Do you think we got the information that we could make minimum or instream flows? Do you feel that's necessary--some states have but we haven't? [LR291]

JAY REMPE: Yeah, it's something...well, first let me answer your first question. Do we have the information available? No. One of the things that continually astounds me is as I work on these water issues is of all the work that we've done in the data gathering and the research we've done, there's still so much that we don't understand or know. And so to make those kind of decisions, no, I don't think we have the information we would need. Is it something we need to do? I think we've have to proceed very cautiously, just because of the conversation you had earlier with Mr. Edson. We have times where streams go dry just naturally. And so when you start putting minimum flows in there, how does that impact things? I'm not sure. [LR291]

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SENATOR CHRISTENSEN: Critically. [LR291]

JAY REMPE: Yes. [LR291]

SENATOR CHRISTENSEN: Do we not have stream gauges on all streams so we would have some historic flows? They are accumulated I would assume. [LR291]

JAY REMPE: You know, I can't answer that. I don't...we do have stream gauges to the extent that we have that data and how long we've have it, I'm not sure. [LR291]

SENATOR CHRISTENSEN: Thank you. [LR291]

SENATOR LOUDEN: Senator Wallman. [LR291]

SENATOR WALLMAN: Thank you, Chairman Louden. Thank you, Jay, for being here. [LR291]

JAY REMPE: Uh-huh. [LR291]

SENATOR WALLMAN: And you're Farm Bureau and I'm Farm Bureau, a member of also. And Kansas, I hear that every day in the summary, you know, they do the Blue River streamflow. And, are you in contact with Kansas Farm Bureau executives? How do they feel about our water, whether it be Republican or the Blue? [LR291]

JAY REMPE: Let's...suffice to say, we have a little difference of opinion with the Kansas Farm Bureau on water issues. (Laughter) Seriously, we...I think it was about two or three years ago there was a series of meetings that were precipitated between the Kansas Farm Bureau and the Nebraska Farm Bureau and some of the other Midwest states on water issues to see if there were some things we could do collectively on that.

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And they were good meetings in the sense that we learned that each state has its own water challenges and we all address them a little differently. And it was a great education experience, but that was the extent of our discussions. And we found that we...again, Kansas, we have a big difference of opinion on how some things should be handled. [LR291]

SENATOR WALLMAN: And I think even some of the Kansas legislators do because, you know, they have relatives in Beatrice. [LR291]

JAY REMPE: Uh-huh, yeah. [LR291]

SENATOR WALLMAN: And so, I don't know how we're going to go with there, but thanks. [LR291]

JAY REMPE: Yeah, you bet, thank you. [LR291]

SENATOR LOUDEN: Other questions? Seeing none, thank you, Jay, for your testimony. [LR291]

JAY REMPE: Uh-huh. [LR291]

KEN WINSTON: (Exhibit 3) Good afternoon, Chairman Louden and members of the Natural Resources Committee, my name is Ken Winston, last name is spelled W-i-n-s-t-o-n, and I'm appearing on behalf of the Nebraska Chapter of the Sierra Club. I just wanted to say my written testimony is being handed out. I'm not going to read from that. Actually, as I was listening to Duane Hovorka, he said most of what I wanted to say and said it so much better than what I can say it, so I'm not going to try to...my testimony is a weak reflection of what he said earlier. I did want to say a couple of other things that aren't a part of what I had written that were brought up during the discussion this afternoon. There's some discussion about the kinds of notice that would be required

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for an instream flow application, and I agree with what Duane Hovorka said about the need to have the application date from an earlier time so that there isn't a run on applications once there's public knowledge of that. But it seems to me there ought to be some sort of a public notice so that it isn't just a matter of, well, we were thinking about it and therefore, should date from that date. So there ought to be some sort of public notice. And in terms of fairness, it ought to apply to everybody. I mean, it ought to apply to NRDs as well. Then in terms of NRD instream flow rights, there's been a lot of discussion about them. I think one of the things that ought to be fairly apparent from the discussion so far this afternoon, is that they're difficult to obtain. It's a long process and you have to meet some fairly extensive criteria. So it's not something that's granted very lightly. I guess one of the other things that we support, is we support an approach that benefits all of the public, that all sectors of the public ought to be considered. That this is a complicated issue, there's lots of different aspects that need to be considered, And I guess...I'm sorry Senator Carlson left, because of the fact that I wanted to remind him of the fact that, as he brought up, the invasive weeds issue, that was an issue where the Sierra Club supported that and we continue to support the removal of invasive weeds. And obviously, you want to look at all the factors that lead into why is the flow impacted here, so. So we're willing to support reasonable common sense efforts to increase the flows whether that's removal of vegetation that's sucking the water out of the river or what have you. So we're willing to look at those things as well. And then, just a final thing is that we are also in support of use of scientific data and I know that Game and Parks is assembling a lot of scientific data. I haven't had a chance to see it, but I've heard about a lot of the data that they are assembling and I know the NRD certainly do as well. So I know that decisions on, regarding instream flows are made on the basis of scientific data. They're not...these aren't issues that are just made because somebody's got a, because somebody thinks it's a really neat idea. It's something that happens because of the data supports it. I'd be glad to answer questions if I can. [LR291]

SENATOR LOUDEN: Questions for Ken? Senator Wallman. [LR291]

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SENATOR WALLMAN: Thank you, Chairman Louden. Hello, Ken, welcome. You know, as you realize, we've affected instream flows by reservoirs. [LR291]

KEN WINSTON: Yes. [LR291]

SENATOR WALLMAN: And in previous times, I'm sure lots of these streams were dry, during a drought. In fact, my father said the Platte River was dry in the '30s. [LR291]

KEN WINSTON: Yeah, there's lots of factors that play into it and so, yes, I would agree with that. There's, and I guess that was part of what I was trying to get at is, you need to look at all the factors, not just...I mean, to the extent that irrigation plays a factor, that should be looked at. [LR291]

SENATOR WALLMAN: And then they didn't really irrigate much, I don't think. [LR291]

KEN WINSTON: Certainly. But the extent...and reservoirs play a role both ways. I mean, because of the fact that they can limit the amount of flow, but they also can maintain a certain flow because you control them out of discharge out of the reservoir. I'm sorry, did I answer your question? [LR291]

SENATOR WALLMAN: Yeah, thank you. [LR291]

SENATOR LOUDEN: Other questions? Seeing none, Ken, thanks for your testimony today. [LR291]

KEN WINSTON: Thank you, Senator. [LR291]

SENATOR LOUDEN: Next testifier. [LR291]

DON BLANKENAU: Mr. Chairman, my name is Don Blankenau, and I am just appearing

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here today on my own behalf. My last name is spelled B-l-a-n-k-e-n-a-u, and I just wanted to address a couple of items real quickly, First, how other states do instream flows. There are primarily two ways that states grant instream flow rights. One is just like Nebraska through an application process. They sometimes will let other entities other than governmental entities get an instream flow, so that is a possibility in some states. The other way that they get an instream flow right is by getting the Game and Fish Department of the state to make recommendations based upon the flows that are needed to achieve a certain environmental baseline safety level. If there is unappropriated water available, that's what gets granted and it gets a priority date equal to that...the legislation. So what you would have then is a water right granted by the Legislature with a specific priority date limited to that unappropriated water that...if it was available. And you have states like Alaska, which you heard a little bit about earlier today. Alaska is a state with virtually no water rights granted. It's largely undeveloped so when you go there to establish a water right of that nature, there's virtually no competition so you are the base level flow. Alaska, interestingly enough, some years ago disbanded its water rights office and actually made that a...like a two-person subset of a larger agency just because there was so little activity there. The other item I wanted to address, Senator Loudon, was raised by you earlier, about the nature of riparian water rights. Riparian water rights is primarily limited to the eastern U.S., and it allows landowners who abut streams to take water out, whatever quantities they desire, so long as it is not wasteful and for a beneficial use, and so that they don't harm the next user downstream. So there is an informal limit on how much you can take out. Now most eastern states have found that that's even a little too liberal and it has resulted in fights. You see states like Georgia, for instance, which recently passed a law requiring permits if you were going to divert over 100,000 gallons per day, which sounds like a lot of water. It really isn't all that much. The last item I wanted to just touch upon quickly was the Public Trust Doctrine, which you heard Mr. Hovorka talk about. I think that doctrine gets confused a lot with the general philosophy of what legislation needs to pass to protect certain environmental baselines. In fact, the Public Trust Doctrine has only been used in a water rights context, one time, by one state, and that was the Mono

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Lake case, which was a California case and sought to preserve a certain reservoir level. That was the only time in the history of the U.S. that that's been used for reserved water. I wanted to mention one more thing and I know I said that was my last, but it just popped into my head too that when we talk about granting these instream flow rights, they...in other states they never supplant an existing water right without just compensation. That as you heard earlier about the instream flow right being the base line, in fact, no other state does that unless that baseline is unappropriated water. And fundamentally, that's just taking without just compensation, if you were to take water rights from other people or push them to the last on the list. Every state recognizes that as a prior appropriation state, that the value of your water right is that priority date. That's what gives you the ability to turn off your competitor to get the water you want. And if you're going to establish an instream flow right, that then would give you the right to turn off subsequent users. You couldn't jump ahead of anybody without taking the value away from them. And that's why states simply, elsewhere, have always required compensation in that context. That's all the points I wanted to address. I know you've heard more than you probably want today. [LR291]

SENATOR LOUDEN: Questions for Don? Senator Wallman. [LR291]

SENATOR WALLMAN: Thank you, Chairman Louden. I just have one. Do other states rescind that water right then also? [LR291]

DON BLANKENAU: They can rescind them. I'm not aware of any that have. Usually once they're granted, they're there to stay. [LR291]

SENATOR WALLMAN: Okay. Thank you. [LR291]

SENATOR LOUDEN: Senator Carlson. [LR291]

SENATOR CARLSON: Senator Louden. Don, in compensation, how would that be

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determined? [LR291]

DON BLANKENAU: Well, in other states, it's typically if you've got a market established for water rights. So say you're the Legislature, you decide to give an instream flow right that supplants established prior appropriation rights and they're agricultural in nature. If a market has already been established in that state where you can use that to figure out the value of an acre foot of water, that's effectively what you would pay that individual. Now in, I think, Nebraska you could argue that it would be the difference in the value of dryland versus irrigated land. And if that was a pretty valuable water right where your water supply was reliable and regular, that might add some premium value to it. [LR291]

SENATOR CARLSON: Yeah, thank you. [LR291]

SENATOR LOUDEN: Thank you for your testimony, Don. [LR291]

DON BLANKENAU: Thank you. [LR291]

SENATOR LOUDEN: Next testifier? Seeing none, then I guess we'll close the hearing on LR291 and start with the hearing on LR377. Go ahead. [LR291]

LAURIE LAGE: (Exhibits 4 and 5) Senator Louden and members of the Natural Resources Committee, I'm Laurie Lage, counsel to the committee, here to introduce LR377. This is the last of a series of hearings the committee has held over the interim on LR377. The purpose of the study is to examine the organizational structure and responsibilities of the Nebraska Department of Natural Resources, including whether the department has sufficient staffing, funding, and resources to best perform its duties. The resolution was also introduced to look at the department director's duties and qualifications. As you are all aware, this specific question being examined is whether the statute should be changed which requires the director to be a professional engineer. You have in your booklets a few handouts that were made available to you at previous

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hearings. The handouts provide information on relevant state statutes on director qualification requirements and our other agencies as well as director requirements in other states. Just to mention a bit of history, which you likely already know, bills were proposed in the Nebraska Legislature in 2004, 2005, and 2006 to change the department director qualifications. The bills proposed a variety of suggestions but none advanced past general file. You also have in your booklet a letter from Brian Dunnigan, acting director of the Department of Natural Resources, who is not here today, and he has submitted that testimony for the record. Also there is a letter to enter into the record from the American Council of Engineering Companies signed by Jackie McCullough, the executive director. And we'll also place that in the record. And with that I'll just ask if you have any questions. [LR377]

SENATOR LOUDEN: Questions for Laurie? Seeing none, thank you, Laurie. First testifier? [LR377]

PAUL ZILLIG: (Exhibit 6) Good afternoon, my name is Paul Zillig, assistant manager with the Lower Platte South NRD. My name is Paul, P-a-u-l, last name is Zillig, Z-i-l-l-i-g. Senator Louden and members of the Natural Resources Committee, there again I am Paul Zillig, assistant manager with the Lower Platte South NRD here in Lincoln. I'm presenting testimony today on LR377 on behalf of the Lower Platte South NRD and the Nebraska Association of Resource Districts. I am testifying in support of increasing the funding for the Nebraska Resource Development Fund, NRDF, and that is included in the budget for the Department of Natural Resources. The Nebraska Resource Development Fund has primarily funded projects that reduce flood damages to homes, roads, businesses, and property. This year there has been significant flooding in Iowa and across the Midwest. The Nebraska Resource Development Fund is very important if we are to continue to reduce flood threats. The Nebraska Resource Development Fund also benefits fish and wildlife, recreation, and ground water recharge. The success of the Nebraska Resource Development Fund can best be shown in the NRDF 2008 biennial report, which is attached and was recently presented to the Governor and the

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Legislature. Since 1974 there have been 57 completed projects with an additional ten approved projects that are under way. There has been approximately \$93 million of state NRDF funds provided for these projects. Those funds have been matching \$79 million of federal funds and \$64 million in local funds. The estimated benefit from these projects over the project life period is \$1.36 billion in benefits. The reason for my testimony today is to alert you to the funding shortfall for this fund and encourage you to find ways to allocate the necessary funds to complete the current projects on the attached list. Right now there is \$26.9 million over the next six fiscal years for those projects and the pending projects, which include \$63.5 million over the next six years. A summary of each of these projects is also attached as the second portion, part of that handout. The current NRDF annual allocation is \$3.4 million. To fully fund the projects over the next six fiscal years, it will require around \$14.9 million per year in NRDF funding to match the local and in many cases, the federal share of the project cost. We feel it is a very worthwhile investment and that will benefit the state of Nebraska for years to come. That's my testimony. [LR377]

SENATOR LOUDEN: Okay. Questions for Paul? Senator Carlson. [LR377]

SENATOR CARLSON: Senator Louden. Paul, thank you for being here. In your statement, the estimated benefit, \$1.36 billion, can you expand on that a little bit? What does that include, how was it determined? [LR377]

PAUL ZILLIG: Well, that number comes right from the Department of Natural Resources report that they put together. Basically, every project is, from what my interpretation is, there's a 50-year life span for each project as far as the economic cost and benefits of that project. And each project has calculated benefits for those 50 years, and I believe that number is the accumulation of all those projects that have been done for their calculated benefits over that time period. [LR377]

SENATOR CARLSON: Okay. Thank you. [LR377]

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SENATOR LOUDEN: Paul, as I look at this, they're the ones that are doing this project west of Grand Island there, that flood control project, this is... [LR377]

PAUL ZILLIG: That is right. I believe the... [LR377]

SENATOR LOUDEN: And I was going to ask, how deep into this folder is that project? I see a lot of these are things that you've done over the past several years. [LR377]

PAUL ZILLIG: Right. [LR377]

SENATOR LOUDEN: This hasn't all just been done here lately, has it? This is something that has been ongoing? [LR377]

PAUL ZILLIG: Right. It's been going on since 1974, I believe. [LR377]

SENATOR LOUDEN: Okay. [LR377]

PAUL ZILLIG: The...that is one of the more recent projects would be toward the back of the pamphlet there. [LR377]

SENATOR LOUDEN: Yeah, and some of the flood control that goes around the south side of Grand Island there? [LR377]

PAUL ZILLIG: Right. Right. [LR377]

SENATOR LOUDEN: Yeah, okay. Yeah, we visited that last summer when we were at, Ron Bishop and Company gave us a tour, and we had hearings there. I guess, what...the money that you get is usually just general fund appropriations, is that correct? [LR377]

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PAUL ZILLIG: I believe so. [LR377]

SENATOR LOUDEN: Okay. And you usually get about \$3.4 million a year, is that what you're telling me? [LR377]

PAUL ZILLIG: That is the amount. [LR377]

SENATOR LOUDEN: And then you got, what, 14 members on that board to decide where they want to spend it? [LR377]

PAUL ZILLIG: I think there are 16. [LR377]

SENATOR LOUDEN: Or 16 or 17, yeah, maybe that's what it is. Yeah, 13 plus 3. [LR377]

PAUL ZILLIG: Right. [LR377]

SENATOR LOUDEN: Yeah, okay. Fine, yeah, I'll...if we can find the money, I'll vote for giving you more money. The next question is, is, who do we cut to give you guys the money, so we'll see where we go. Anybody else have questions for Paul? Yeah, go ahead. [LR377]

PAUL ZILLIG: One additional comment. I think it's number 59 or on page 27 in the booklet is the Wood River Upper Warm Slough project. [LR377]

SENATOR LOUDEN: Okay. Okay. Oh, okay. [LR377]

PAUL ZILLIG: And I think next, Marlin Petermann is going to talk to you about an NRDF project and how delays in funding impact that, so thank you very much. [LR377]

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SENATOR LOUDEN: (Exhibit 7) Okay. Thank you for testifying today. Okay, at this time we'll enter into the record a letter from Pete McClymont from the Nebraska Cattlemen on the remarks on LR377. Go ahead, Marlin. [LR377]

MARLIN PETERMANN: (Exhibit 8) Chairman Louden, members of the committee, my name is Marlin Petermann, that's P-e-t-e-r-m-a-n-n, and I'm the assistant general manager of the Papio-Missouri River Natural Resources District in Omaha. And I'm here representing them as well as the Nebraska Association of Resource Districts on the subject as well, of resources development funding through the Natural Resources Commission, whose budget is set by the Legislature. What I've handed out to you is an example of a couple of projects to give you an idea of the type of projects that are built here and how that funding process works to give you maybe just a little better feel about the situation that we're in. On the front page, the two projects I'm going to be speaking about are the Walnut Creek Lake and Recreation Area that was, has been completed, and it's near Papillion, Nebraska, and received a 75 percent grant for \$4.2 some million from the Resource Development Fund. And the second project is the Pigeon/Jones Creek Lake and Recreation Area, which is a proposed pending project in Dakota County, up near South Sioux City. They are very identical projects basically doing the same thing. The first one is just a little bit smaller. I'd like to turn your direction to the chart that is attached, the second page of what I handed you, and maybe go through that a little to explain how this process works. This is a very good process but a very rigorous one to see that these projects are worthy of state funding. And the first thing that's done on...I'm going to focus first on the Walnut Creek Lake and Recreation Area, which is the top part of the page there. We first make an application to the commission for research development funds and in this project, it was made in 1990. And it took about a year and a half to complete the application process and review process because what that involves is, preparing a technical study while a technical, environmentally feasible, economically feasible, and financially feasible study to determine whether this project is worthy of funding. So a very rigorous year and a half

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study to determine that and then at the end of that period, there's a determination of whether or not the project is approved. That little star you see there in 1991, so about a year and a half later, the project was approved by the commission meeting all the criteria and funds were allocated to that project. Now in this funding process for the Resource Development Fund, there are two steps. One is an allocation, it's kind of an approval, an allocation of funding, but that doesn't mean you have any money. It just says your project is a good one, we approve it for, in this case, \$4 million worth of funding, but you have to wait for obligations, the other term is obligations, before you actually get any dollars. So it's an allocation and then obligation. In this case, the following year, funds were available for obligation and the project was started. As you can see, design and land rights were done over a four-year period, in 1992 through 1995. That was stretched out a little bit because of the lack of funding to even support those two activities a little bit, back at that time, maybe about a year. But it took about four years to get through that process doing final design and then negotiating with landowners for the acquisition of property in order to build this project. Then finally in 1996, the project was built, the dam was built, which then created a lake and the recreation facilities were then built and the project opened to the public in 1999. So you had about a nine-year window. These projects are not some that you say, here's the dollars, next year go build it and we're done. These are long-term projects that take time and do take a lot of effort and, of course, over that time the funding is not given all up front, it's kind of each year, what are the funding needs. That's 1990 to 1999, that first project. The second one, which is a pending project, is the Pigeon/Jones project up by South Sioux City, very same. It took two years to get through the application process, in this case in 2005 and 2006. The project has been approved and it has been allocated with zero allocation because there is not enough money to...there is a cap that does not allow the project to receive any allocation. So you see the star there is not until 2010. The project was, again, approved as feasible, and so on, but no allocation for three more years, in 2010. The Legislature's Appropriations Committee has set an \$18 million cap between the amount of projects that have been obligated or funded versus how many have been approved. And there's good reason to that so you don't get too far out

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ahead of yourself and have all these projects that, you know, to be built. So they've got an \$18 million difference between the allocated and obligated amount. And that cap is what we're up against right now. And so, this project will not actually be approved for funding until 2010, hopefully. Then you look at the next stretch of time, for six more years, there's not going to be any money at the present funding level as Mr. Zillig mentioned, for \$3.4 million to even put any money into this project. And it's the next project in queue. It's the next one in line, and there will not be any funding until 2016 at present levels to even look at constructing that project. Then, we can start. And at that time then start working on final designs, land rights, and construction, and so on. The bottom line is, you end up with a project that gets built and completed in 2022, 17 years after the time it was even conceived. I think if you look at that...and so basically, what you're saying is, the flood protection needed for that community and for those constituents and their property and the recreation facilities that the landowners and the neighboring communities are looking for, are waiting 17 years from the time they thought they had a project ready to go. Really, I think, you have to agree, it's really unacceptable. How do we operate in that kind of environment? It just isn't feasible. So you're...and you're not only not preventing damages and providing facilities, the costs are going up. So as that is way out there, costs are probably going to increase. We haven't seen too many costs, except for gas, lately, go backwards. So you're seeing costs increase, which means overruns, which means even more. So the bottom line, as Paul mentions, these...mention, these projects are a joint venture between the NRDs and the state at this point. In many states the, in most states, the states do these projects on their own because they don't have NRDs. But here we have a joint venture and we'd sure encourage that the state put a higher priority on their part of this joint venture that these projects can be completed so that we can see the opportunity for economic development in Nebraska continue. I'd appreciate...or I'd be glad to answer questions. [LR377]

SENATOR LOUDEN: Questions for Marlin? Senator Carlson. [LR377]

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SENATOR CARLSON: Senator Louden. Marlin, what's the answer? What should we do? [LR377]

MARLIN PETERMANN: The answer is the \$3.4 million funding level per year is just not adequate. It may have been a number of years ago, but that amount hasn't been increased. And we need, as Paul mentioned, we need close to \$15 billion a year to even catch up with the projects we see are on the shelf right now, today. And I know that's a daunting task to look at that amount in our environment, but I think we have to look at our priorities in this state. Are we looking for trying to protect our constituents and provide them with the facilities they need? And these are worthy, good projects and they just need some additional funding in order to really carry this out. [LR377]

SENATOR CARLSON: What would be the...couldn't ask for it, but what would make it a little easier is when we have requests for dollars for these projects, part of the request should be, what don't we do then in order to do this? That would help us. (Laughter) [LR377]

MARLIN PETERMANN: Sure. I understand, well said. [LR377]

SENATOR CARLSON: I understand you can't. [LR377]

SENATOR LOUDEN: Senator Wallman. [LR377]

SENATOR WALLMAN: Thank you, Senator Louden, Chairman. Yeah, thank you for being here. Is Walnut Creek...I've never been there, is that pretty well utilized? [LR377]

MARLIN PETERMANN: It is, It's just tremendous. It's near Papillion, as I mentioned, and from the day we opened it, it's probably the jewel of the lakes in the area of the Omaha Metropolitan area. It's just outside of that and heavily, heavily used by the, I think, the whole Metro area constituents. [LR377]

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SENATOR WALLMAN: Now Pigeon/Jones, what would the pool of that would be, permanent pool? [LR377]

MARLIN PETERMANN: That would be about a 200 acre lake. It's a little larger. Walnut Creek is about 100, and the communities up there that, I think, you have South Sioux City and so on, of course, but I think even probably constituents from across the river in Sioux City would probably be utilizing that facility. [LR377]

SENATOR WALLMAN: Thanks. [LR377]

SENATOR LOUDEN: Then are you talking about recreation or flood control on these projects? [LR377]

MARLIN PETERMANN: These are primarily flood control, but they...once you create that lake you have the ability to have recreation facilities and fishing and boating and things like that around them. [LR377]

SENATOR LOUDEN: Now, and you say this Pigeon/Jones, that would be a 200 acre lake? [LR377]

MARLIN PETERMANN: It would be a 200 acre lake, yes. [LR377]

SENATOR LOUDEN: And what's below that 200 acre lake? [LR377]

MARLIN PETERMANN: Well, you have roads, farm ground primarily, some homes. So it would be built to a high hazard dam safety standard that... [LR377]

SENATOR LOUDEN: We've had discussions before on how I feel about lakes above a metropolitan area (laughter) and that's why I'm wondering is, you know, what's out there

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and what kind of ground do you cover up with that 200 acre lake? Is this good productive farm ground or is this marginal land or what? [LR377]

MARLIN PETERMANN: Well, in this case it is farm ground. And there's, you know, some flat, I think, probably class 2 to 4 lands in that area. But it's very steep in a hurry and so up in that...you're basically talking Missouri River bluff ground is what this is up in. So it's some pretty steep ground that probably is farmed but, some might suggest, shouldn't be. [LR377]

SENATOR LOUDEN: And how...and 65 percent of it is \$6.4 million or is that... [LR377]

MARLIN PETERMANN: That's right. [LR377]

SENATOR LOUDEN: Okay. Then that would... [LR377]

MARLIN PETERMANN: So it's a little over a \$9 million project. [LR377]

SENATOR LOUDEN: I was going to say it would be about, close to a \$10 million project. [LR377]

MARLIN PETERMANN: Yeah. [LR377]

SENATOR LOUDEN: What's your valuation of the...what you call, Papio-Missouri NRD? [LR377]

MARLIN PETERMANN: Our present levy? [LR377]

SENATOR LOUDEN: What's your...no, your valuation. [LR377]

MARLIN PETERMANN: Oh, our valuation is somewhere near \$50 million. [LR377]

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SENATOR LOUDEN: Fifty million or fifty billion? [LR377]

MARLIN PETERMANN: Fifty billion, I'm sorry. You're right, I'm sorry. [LR377]

SENATOR LOUDEN: And then, how much of a mill levy does that take to raise this \$9 million to do this with on a \$50 billion valuation? [LR377]

MARLIN PETERMANN: Well, at a \$50 billion valuation, of course, each cent would raise \$5 million. So two cents would raise \$10 million. [LR377]

SENATOR LOUDEN: Each cent just raises \$5 million on a...okay, on a \$50 billion valuation? [LR377]

MARLIN PETERMANN: Right. [LR377]

SENATOR LOUDEN: Okay, that don't...are you sure? [LR377]

MARLIN PETERMANN: Yeah, \$50 million is a one cent per hundred. I think that's \$5 million. [LR377]

SENATOR LOUDEN: Yeah, we're talking about \$50 billion not fifty... [LR377]

MARLIN PETERMANN: Yeah, \$50 billion so I think it would raise \$5 million. [LR377]

SENATOR LOUDEN: Okay, don't raise \$50 million? [LR377]

MARLIN PETERMANN: No, I wish. (Laughter) [LR377]

SENATOR LOUDEN: Okay. Well, I'm trying to calculate it out of my head and... [LR377]

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MARLIN PETERMANN: Right now were at about \$3.5 million and we raise around 16...three and a half cents and we raise around \$16 million. [LR377]

SENATOR LOUDEN: Okay. I was just curious to wondering, you know, what other resources were available on this besides state resources. [LR377]

MARLIN PETERMANN: Yeah, there is the partnership, the NRD would be putting in, you know, 35 percent and that's what's proposed in this case. So there's certainly...it's certainly a state and NRD partnership. [LR377]

SENATOR LOUDEN: Well, I always said that if I had that 42-story office building sitting down in my district, I would be a lot of happier (laughter) than you have in downtown Omaha. But anyway, I agree this...and I know some of the members that are on that board and they all say the same thing. You know, they're sitting there with a little bit of money and they're trying to put it here or there and everywhere, and usually they don't have enough to really finish a project at any one time unless it's long-term, so I understand where you're coming from with that. And I'm like Senator Carlson, you know, fine, but where do we go to find the money, so. [LR377]

MARLIN PETERMANN: These two projects, of course, are two that are in our district. But most of the projects on that list, and in that book that Paul Zillig were talking, are all across the state. [LR377]

SENATOR LOUDEN: Oh, yeah. [LR377]

MARLIN PETERMANN: And many of...you know, many of our NRDs. Well, so it's NRDs that have smaller populations and some have large. And so it's impacting all of them across the state and so it's something to keep in mind. But it's, I think, an issue of dealing with our water resources in the state and I think it's a good partnership that's

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been developed between the state and the NRDs, and we just encourage the state to make it a higher priority. [LR377]

SENATOR LOUDEN: Okay, thank you. Other questions for Marlin? I don't see none. Thank you for your testimony, Marlin. [LR377]

MARLIN PETERMANN: Thank you. [LR377]

SENATOR LOUDEN: Hi there, how are you today? [LR377]

KEITH REXROTH: Good. Good afternoon, Chairman Louden and members of the committee, my name is Keith Rexroth, that's K-e-i-t-h R-e-x-r-o-t-h. We'd like to thank you for your hearings. I did appear before the this committee in the North Platte hearing, and currently sit both as a commissioner for the Natural Resources Commission, also as chairman for the South Platte NRD board. And my function on the commission currently is chair of the legislative and budget and am here to add to the testimony that preceded me in regards to the issues that we have in front of us, both with the Natural Resource Development Fund, also with the interrelated water review funding. At issue and the question of where do these dollars come from, the return question is, where do the damages that are occurred through flooding events, where do those dollars come from in regards to what happened in Iowa and other locations that yes, we do have rain events. Those are always concern to a lot of the population. The earlier testimony included the state and the two entities of NRD and state. One of the other major projects that's in front of us right now is Wanahoo that is up at Wahoo. To give you idea there, we're also involved with both county, city and also federal dollars. And one of the challenges that has been ahead of a lot of these issues, are Army 404 permits, other permits that are out there. And so this is very much an uphill battle, but we do appreciate the funding that we are currently getting but trying to elevate the education for both the senate, and this afternoon there was also a meeting that...other commissioners will be meeting with Governor Heineman to try to express these same

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views. And so it is a major concern. We can look at Papio but we can also look at the Platte River. We can look at the choke points. We can look at a lot of different issues just on the flooding side. And so coming as a commissioner, it is very much a frustrating situation in regards to, we realize the dollars are limited but we also realize the needs that are there. And so with that, appreciate your attention and would offer for any questions. [LR377]

SENATOR LOUDEN: Any questions for Keith? Senator Wallman. [LR377]

SENATOR WALLMAN: Just one, thank you, Chairman Louden. Yes, this Wahoo project, is that funded partly by the Department of Roads or... [LR377]

KEITH REXROTH: The Department of Roads is involved because that road, the four-lane, will eventually cross that dam. [LR377]

SENATOR WALLMAN: Okay. Thanks. [LR377]

SENATOR LOUDEN: Okay. Yeah, well, thank you for coming in from Kimball today. Did that commission have a meeting today? [LR377]

KEITH REXROTH: We had a commission meeting this morning. A lot of the items are reports back from these projects that we both have funding but also oversight in regards to what those fundings are. And on our agenda today was the interrelated water review. How those decisions are made in regards to funding for the...basically, study or trying to put science to a lot of these policy decisions that are in front of us. And one of the challenges, I think, in both areas, and especially interrelated water review is, we're trying to make decisions sort of on the front line, a lot of times without good science. And so as a result there's...the groundwater in western Nebraska is a whole different animal than it is in the rest of the state. We're using some of the funding from the environmental trust, also some of our local funding for a helicopter electric imaging,

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which is to try to take a look at groundwater by flyovers. And this is technology military had used. But our next board meeting in December, we'll have a report coming back for both the North Platte, but in our area, it would be the Lodgepole Creek from Pines Bluff through Big Springs. [LR377]

SENATOR LOUDEN: Okay. Well, other questions? I see none, well, thank you for coming up, Keith, and thank you for serving on that board. [LR377]

KEITH REXROTH: Thank you. [LR377]

BRUCE KENNEDY: Senator Louden, members of the committee, my name is Bruce Kennedy, K-e-n-n-e-d-y. I'm representing Friends of the Niobrara. We have actually taken a neutral position on this particular legislative resolution, but we did want to speak to the qualifications of the new...of the new, what will be the new director of Department of Natural Resources. And I guess my presence here this afternoon would be to remind the committee that there are many interested people, organizations, and so on, that are very much interested in our natural resources. And as we discussed this among ourselves as to a position on this resolution, it came to light that it really wasn't, it really wasn't the qualifications that mattered, the degree or the lack of degree, but the particular individual that would land in this position as to his philosophy of working with all of the different organizations and individuals who were interested in natural resources, bearing in mind, that some of those interests are consumptive and some of them are nonconsumptive. So we thought the best qualifications for the new director would be a person who was fair minded and who would represent and look at all sides of the natural resource issues and so, a neutral position, I guess, on this. But looking at that and thinking that it really wasn't the degree that mattered, it wasn't whether or not the person had an engineering degree. I suppose some degree in natural resources would be helpful and probably expected, but not so much to the degree as the person. And I realize that's pretty general speaking, but that's what we came up with. And actually the truth of the matter is, we kind of liked the last director that we had, and hope

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that you can find one as good as that. [LR377]

SENATOR LOUDEN: Okay, thank you. Questions for Bruce? I guess the one I have, did you realize that in what, 1969, LB355 changed it from "should be a professional engineer" to "shall"? That's when it was changed. [LR377]

BRUCE KENNEDY: I didn't realize that, no sir. [LR377]

SENATOR LOUDEN: At one time it was "should be" so I'm wondering, you know, what those folks were thinking back then when they introduced that legislation. I haven't been able to find it yet, so. [LR377]

BRUCE KENNEDY: Well, like I say, we hope that, we hope that you can come up with another good one, whatever the qualifications be, and that that person will be a person who will look at, like I said, all of the different people that are interested, not just the development aspect, but the people who just enjoy the natural world, if you will, and then make decisions accordingly. [LR377]

SENATOR LOUDEN: Okay. They should be a good negotiator, probably? [LR377]

BRUCE KENNEDY: Yes. [LR377]

SENATOR LOUDEN: Okay, then should we get a...I said once then, if that's the case then we'd all be looking for a cattle trader. (Laughter) Thank you for your testimony. [LR377]

BRUCE KENNEDY: Very good. Thanks for the opportunity. [LR377]

SENATOR LOUDEN: You bet. Next testifier? [LR377]

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DAN SMITH: (Exhibit 9) Senator Louden, members of the Natural Resources Committee, my name is Dan Smith, D-a-n S-m-i-t-h. I'm the manager of the Middle Republican Natural Resources District and a member of the Water Policy Task Force. This testimony today is not offered on behalf of either of those organizations. This neutral testimony is on behalf of several individuals attempting to resolve differences of opinion on this matter. This group includes Ron Bishop, Kent Miller, Butch Koehlmoos, Brian Barels, Don Krause, Dennis Strauch, Tom Knutson and myself. Several of those members are Water Policy Task Force members. Following the first hearing on this issue in North Platte, this group comprised of NRD managers, irrigation district managers and surface water interests began meeting informally to try and determine where lay the roots of our difference with regard to the qualifications for the director of the Department of Natural Resources. As part of this group's discussions, we have contacted persons with direct past experience within the department to assist our group with understanding areas of problems or concerns in the past, and to get a better understanding of the current and potentially the future needs of the Department of Natural Resources to effectively execute department responsibilities and authorities. These discussions are an attempt to provide ourselves with the knowledge of those elements of technical expertise, professional expertise and experience needed to ensure that the department has the highest level of administrative, planning and regulatory leadership. We have discussed many ideas and while I cannot say we are ready to agree on the qualifications for the department director, we do agree that there must be an engineer on staff with enough responsibility and experience to administer surface water appropriations, adjudication of water rights, dam safety issues, stream gauging, just to name a few areas. We have also discussed, and we have had the liberty to discuss the reorganization of the department. How would we do it? And once again we can't say that we have come to an agreement, but we found a lot of common ground in that respect. While we're not prepared to make any recommendation and at this time we understand that whatever change is or could be made will have to pass the test of efficient use to personnel and cost effective operation. This group is committed to work diligently over the next few weeks in hopes of providing a recommendation to the

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committee that will address the issues and concerns of all parties involved, and still provide the state with strong leadership in the area of water management. Thank you, and I'd certainly try to answer questions. [LR377]

SENATOR LOUDEN: Questions? Senator Dubas. [LR377]

SENATOR DUBAS: Thank you, Senator Louden. Thank you very much, Dan, for this effort. I really do appreciate that. It's all too often we get caught in our personal preferences and we fail to try to find where that common ground is and that's how we move things forward. We can all have our strong opinions about certain things but if we really want to achieve the greater good, we need to find that common ground. So I really appreciate this group's efforts of trying to find, you know, what will best serve people of the state of Nebraska in regards to water issues and all other issues that the department deals with. So I just really compliment your efforts and I'll look forward to some of your future findings. So thank you, again. [LR377]

DAN SMITH: Thank you, Senator Dubas. [LR377]

SENATOR LOUDEN: Senator Christensen. [LR377]

SENATOR CHRISTENSEN: Thank you, Chairman Louden. Thank you, Dan, for coming and for your work. You mentioned professional engineering by your testimony. What about professional geologists? That's typically what our water hydrologist is. Did you guys discuss that or you just discuss the engineering side? [LR377]

DAN SMITH: I would say we've discussed almost, about every concept you could think of. We keep coming back to the engineering degree. There is a number of plans that need to be looked at. There are engineering works that come forward when the director of the department has to approve, for instance, the plans for a structure. So that engineering degree needs to be in there. Now that doesn't mean there shouldn't be a

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geologist. If you have the luxury of being able to fill that position, there should definitely be a hydrogeologist on the staff. [LR377]

SENATOR CHRISTENSEN: So it would be this group's synopsis, maybe, to say that it wouldn't be okay to have one of the top two positions, a PG if there wasn't an engineer there, is that what I'm understanding? We have to have an... [LR377]

DAN SMITH: We think it's... [LR377]

SENATOR CHRISTENSEN: ...an engineer present... [LR377]

DAN SMITH: Yeah, we're down to the... [LR377]

SENATOR CHRISTENSEN: ...if we have a geologist, great. If we don't that's okay. [LR377]

DAN SMITH: I think we're down to the point where we think it's very important that there be an engineer on staff. [LR377]

SENATOR CHRISTENSEN: Okay. [LR377]

DAN SMITH: Doesn't necessarily have to be the director, but there needs to be an engineer there that can take the responsibility for some of those plans, things that need to be approved of. [LR377]

SENATOR CHRISTENSEN: Okay. But a good department is definitely going to have that engineer on staff. I guess, my question was being on the top position or if you added the state hydrologist, do one of them two have to, with this group, have the PE, I guess is what I've come down to trying to ask? [LR377]

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DAN SMITH: Pretty much so, yes. Either the director or deputy director, however you choose to make that deputy position, whatever title you might give that, that's probably where that degree needs to lie. [LR377]

SENATOR CHRISTENSEN: Okay. Thank you. [LR377]

DAN SMITH: You bet, sir. [LR377]

SENATOR LOUDEN: Other questions for Dan? I guess I was, I would probably echo what Senator Christensen would ask about, you know, if we had...if there were people on the staff with those qualifications, does that director necessarily have to be the one to have those qualifications? Could you have a good manager type director with staff members taking care of the engineering and the dam safety and hydrologists and that sort of thing, I guess? [LR377]

DAN SMITH: Yes. This group hasn't come forward with that kind of a recommendation. You know, I testified on behalf of that issue that we felt that in North Platte that we needed a manager. If that manager happened to be an engineer, that was fine. But that wasn't our primary emphasis. This group hasn't gone that far yet, but we're close in a lot of respects of making a recommendation in that way. [LR377]

SENATOR LOUDEN: Then what do you think about, like that 1969, where they replace, should be a professional engineer. Should we go back to something like that? [LR377]

DAN SMITH: Sixty-nine date, and I have no idea what we were looking at that then. That would have predated...I'm just not sure what they were going at then, sir. You know, when the district, when the department and the commission were put together in whatever that was, '99, I'm not sure we ever looked at the responsibilities that were going to come in that department or the work that would come in that department with regard to LB962. So a previous action like that... [LR377]

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SENATOR LOUDEN: Yeah, this was in 1969, so that's 40, going to be 40 years ago...
[LR377]

DAN SMITH: Yeah. [LR377]

SENATOR LOUDEN: ...when they decided to go that route and like I say, I wondered what they were thinking about at that time, you know. And, of course, the original statute in 1957, they wanted to just...that's when it was put in the original one, it should be a professional engineer and have had at least five years experience in a position of responsibility in irrigation work. And that's kind of held through for quite a while. I don't know just what all responsibility in irrigation work means. [LR377]

DAN SMITH: Well, very easily, very easy that the language was carryover from, it used to be Department of Roads and Irrigation and they may have simply just copied that reference across. [LR377]

SENATOR LOUDEN: Yeah. Other questions for Dan? Seeing none, thank you for your testimony. [LR377]

DAN SMITH: Thank you. [LR377]

SENATOR LOUDEN: Next testifier, please. [LR377]

RANDY KAUK: I guess I'll start with they talked about, there was a gentleman earlier that testified about his voice being a little scratchy. Well, I don't have a cold but I'm just shaking like a leaf up here. (Laughter) [LR377]

SENATOR LOUDEN: Don't worry, we're just common folks. There's no fire comes out of our heels. [LR377]

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RANDY KAUK: (Exhibit 10) Very good. Mr. Chairman and members of the Natural Resources Committee, thank you for the opportunity to testify. My name is Randy Kauk, spelled K-a-u-k. I'm a board member on the Farwell Irrigation District. We are a surface water project that serves over 53,000 acres in Sherman and Howard Counties. Our project has been serving water to our users since the early 1960's. In November, 2002, our project was purchased from the federal government along with the Sargent project, and now is locally controlled by the irrigation districts and the Loup Basin Reclamation District. In addition to all the canals, laterals and diversion dams, the district owns the Sherman Reservoir, which stores over 69,000 acre feet of water. Along with owning the project comes the right to use and store the water from the Middle Loup River. For years we've been hearing about local control in regards to projects. We have local control now but for how long will that continue? The threat of our interest on our water supply continues to be a cloud over us. We all know what those interests are and they include urban needs, environmental needs, and even ideas of moving water from our river basin to other basins. When we hear about integrated water management, and we wonder if that means somebody else is after our water supply because those in charge did not take care of our own supply. Today's hearing on LR377 is on issues relating to the Department of Natural Resources. The issue that concerns us is, what about our spot at the table to discuss the so-called Integrated Management Plans. From what I understand, the Department of Natural Resources is supposed to represent us for some reason. As a local resident in Howard County, I sit on the zoning board for Howard County and serve on the Howard County Farm Bureau board. I will guarantee you that when issues arise, every citizen or group involved has a right to sit at the table and participate until the issue is resolved. Yet, Mr. Chairman, and members of the committee, our seat at the table to help us protect a project that we purchased and have bonds issued for millions of dollars is negated, because local control does not count due to some unknown reason to me. Again, I'd like to thank you for the opportunity for me to testify. I felt that it was important for me to come here. I'm still harvesting. My harvesting equipment is sitting still at home. I've taken the day off to come down here. (Laughter)

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I'm willing to answer, or try to answer any questions. [LR377]

SENATOR LOUDEN: Why thank you for coming, Randy. Questions for Randy? Senator Christensen. [LR377]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman. Thank you, Randy, for coming. How is your project doing? Do you maintain any water supplies? How has it been for you guys? [LR377]

RANDY KAUK: Very good. One thing that we have to our benefit is we're an off stream reservoir, so we do divert from the Middle Loup and we have our own reservoir and then serve our water users from there. So we're sitting in good shape right now. We have a winter pool that we're at a normal level and we'll recharge it come next spring. [LR377]

SENATOR CHRISTENSEN: So you haven't been having to swing to some of the irrigation districts like I represent then? [LR377]

RANDY KAUK: No, not yet, no, no. We just don't want that to happen. (inaudible) not to happen. [LR377]

SENATOR CHRISTENSEN: Right. I agree. And that's why I was asking if that was a problem why you wanted to sit at the table or if you just wanted to open access that... [LR377]

RANDY KAUK: Well, I just think we are being surface water users, that we'd just like to get a so-called a fair shake and let people know that we are so-called a force or something to deal with. Like our project, again, is 53,000 acres, and there's me plus every farmer in the area that serve it, and it seems like with this integrated management plan, we just want our input into it. [LR377]

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SENATOR CHRISTENSEN: Appreciate it. Thank you. [LR377]

SENATOR LOUDEN: Senator Wallman. [LR377]

SENATOR WALLMAN: Thanks, Senator Louden. Thank you for being here. [LR377]

RANDY KAUK: Thank you. [LR377]

SENATOR WALLMAN: I probably would be concerned also. How long are these bonds issued for, you know, for these canals and things, you know? [LR377]

RANDY KAUK: Well, I guess that's...I just, I'm not aware of it. I don't know. [LR377]

SENATOR WALLMAN: Okay. Thank you. [LR377]

SENATOR LOUDEN: Then when you talk about they're working on, your NRD is working on integrated management plan, is that what your telling me? [LR377]

RANDY KAUK: That's what we've been told in so many words. We just don't feel that they're good enough to represent us, in so many words, as surface water users. [LR377]

SENATOR LOUDEN: Now are any...how many board members do you have on your irrigation district? [LR377]

RANDY KAUK: Being Farwell, we only have three, and I'm one of the three. [LR377]

SENATOR LOUDEN: Oh, three of you manage the whole 60 some... [LR377]

RANDY KAUK: Well, not really manage it, we're just the board members. We have

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board...we're a...what do you want to call it...like you got a... [LR377]

_____ : It's a Loup Basin board which (inaudible) [LR377]

RANDY KAUK: Yeah. [LR377]

SENATOR LOUDEN: Okay, repeat that for the clerk. [LR377]

RANDY KAUK: The Loup Basin Board, which basically is included with Sargent and Farwell...there's a Loup Basin Board and I don't know how many board members are on that and then I'm actually just the Farwell irrigation board, which there are only three of us. [LR377]

SENATOR LOUDEN: Okay. And then there's some on the Sargent irrigation board? [LR377]

RANDY KAUK: That's correct, and again, I don't know how many for sure is there. [LR377]

SENATOR LOUDEN: Okay. And you're the people that set up the water allocations each year and you're the ones that decide how much you're going to charge for that water? [LR377]

RANDY KAUK: That's correct. [LR377]

SENATOR LOUDEN: And you're the ones that hire and fire the managers and that sort of stuff? [LR377]

RANDY KAUK: That's correct. [LR377]

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SENATOR LOUDEN: Okay. And then are there any of those same people that are on the NRD board in your area? [LR377]

RANDY KAUK: No, not that I'm aware of, no. [LR377]

SENATOR LOUDEN: Has any of them tried to run for the NRD board in your area? [LR377]

RANDY KAUK: No, not that I'm aware of. [LR377]

SENATOR LOUDEN: Do you...I mean, I'm not familiar with who the NRD is in that area there. [LR377]

RANDY KAUK: Well, we've got an office in St. Paul and one in Ord, and again, I'm not familiar with all the individuals. [LR377]

SENATOR LOUDEN: Okay, but do you have any contact with the manager of that NRD? [LR377]

RANDY KAUK: Well, I haven't personally. I know him because I have talked to him on other issues, in so many words, not pertaining to this, in so many words, but I'm aware of him, in so many words. [LR377]

SENATOR LOUDEN: Do you invite him to some of your business meetings or anything like that? [LR377]

RANDY KAUK: Actually, yeah, we did. We had an adjudication thing that we went through here a couple of years ago. We tried to get the NRDs and our assessor all together to just...we were talking about irrigated acres that we had in our project and we wanted to try to come with a common number. So yeah, we've been in contact with him.

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[LR377]

SENATOR LOUDEN: Then your NRD must not be fully appropriated? [LR377]

RANDY KAUK: We're in the process of trying to find that out. (Laugh) [LR377]

SENATOR LOUDEN: I see. [LR377]

RANDY KAUK: That's something that's going to happen here before the end of the year, I'm assuming. [LR377]

SENATOR LOUDEN: Okay. Because then somewhere along the line the NRD evidently hasn't certified the irrigated acres then in your district. [LR377]

RANDY KAUK: We have under our project, in so many words, again, that they're still trying to find those factual numbers and put them together to find out where we sit. I know we have a moratorium on wells, in so many words, but... [LR377]

SENATOR LOUDEN: Because I was just working off of what part of the country where I come from, it isn't all in my district but some of it, we had surface water irrigators around the Scottsbluff area and Morrill up there, and we also have ground water and we have an NRD and everything, and those people all pretty well worked together. In fact, they went together to form their wheat management association to get rid of vegetation in the North Platte River up there, and that's the reason I'm wondering why your irrigation district, surface water, and your NRDs aren't pretty closely, you know, kind of a brother-sister relationship here or something. [LR377]

RANDY KAUK: It just hasn't happened. I guess, we just, again, try to...that they recognize us is the biggest thing. We just want to... [LR377]

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SENATOR LOUDEN: Okay. Now, one other question I might have. You actually divert water from the Middle Loup into your reservoir, is that how you fill your reservoir?
[LR377]

RANDY KAUK: That's correct. [LR377]

SENATOR LOUDEN: And then once you fill it up and then you irrigate out of it and the river runs on by until your irrigation season is over or a certain time of year, then you...
[LR377]

RANDY KAUK: We divert through the whole season. But absolutely, if there's water in the river we divert it accordingly to maintain...we try to get as much water in our reservoir through the irrigation season as the river allows. [LR377]

SENATOR LOUDEN: Okay. Then you're not set at a certain cubic feet a minute to divert out of that Loup River into your reservoir? [LR377]

RANDY KAUK: Well, I think that we have some limits, because I know some water does have to go by, I believe. But, again, I'm not real familiar with on that end. I know that we take a lot of water out of the river. [LR377]

SENATOR LOUDEN: Okay. I was wondering if it was up by Whitney, northeast of Crawford. That's the way they divert...they don't divert water all of the time. They divert water in the wintertime when there's water running by and if they use it all up out of the lake, then they got a dry lake until more comes in. That's what I was wondering if you had a system similar to that, but... [LR377]

RANDY KAUK: We basically divert as, again, the river allows. Again, we are a winter pool. We are not diverting any water out of the river as we speak. We've quit that for a while now. We've got a winter pool that we'll maintain that through the winter and

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usually, I would guess, again I'm guessing, I want to say around the 15th of April or maybe it's even the first of April, we start diverting and bring our pool of our lake back to where it gets full, and usually try to get it full around Memorial weekend to make everybody happy. (Laugh) [LR377]

SENATOR LOUDEN: Okay. Well, thank you for your testimony. Thank you for being here today. [LR377]

RANDY KAUK: Again, thank you. [LR377]

SENATOR LOUDEN: And it wasn't so bad, was it? [LR377]

RANDY KAUK: No, you guys are good. [LR377]

SENATOR LOUDEN: Yeah. You'll be down here as soon as our session starts and give us another wrestling match. (Laughter) Yeah, we'll look for you. [LR377]

RANDY KAUK: Very good. Thank you. [LR377]

SENATOR LOUDEN: Thank you. Next testifier? Anymore testifiers then for LR377? If not, I'll close the hearing on LR377 and close the hearing for today, and thank you all for being here today. [LR377]