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Natural Resources Committee
February 05, 2009

[LB438 LB477]

The Committee on Natural Resources met at 1:30 p.m. on Thursday, February 5, 2009, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB477 and LB438. Senators present: Chris Langemeier, Chairperson; Annette Dubas, Vice Chairperson; Tom Carlson; Tanya Cook; Deb Fischer; Ken Haar; Beau McCoy; and Ken Schilz. Senators absent: None. []

SENATOR LANGEMEIER: Good afternoon, everyone, and welcome to the Natural Resources Committee. I'd like to welcome everybody that's in attendance here within the hearing room and I'd like to welcome all our people that watching it on closed-caption and those that are watching it on our new Internet live feed. I'm getting a lot of good feedback that people are watching it. So we'd like to welcome them all to the hearing. As you can tell, it's a very busy day for us as we introduce bills in other committees, so you're going to see our committee members come and go throughout the day as they are opening on their testimony on other committees. So no disrespect to you as a testifier but they will be, from time to time, have to leave and go introduce bills that they've introduced in other committees. So, with that, I am Chris Langemeier, I'm Chairman of the Natural Resources Committee. I'm going to introduce those of us that are here at this time: we have Barb Koehlmoos, who is the committee clerk, when you come up you'll hand your testifying sheet to her; we come around, Senator Tanya Cook will be here later; and then we have Senator Tom Carlson who has the first bill today, that's District 38; Senator Fischer is in another room, she'll be here momentarily after she does her introduction there; we have at my far left or your far right we have Senator Beau McCoy from Elkhorn, representing District 39; then we have Senator Ken Haar from District 21, northern Lancaster, southern Saunders County; Senator Ken Schilz from Ogallala will be joining us in a little while; and Vice Chair of the committee is Senator Annette Dubas who is coming in here--Senator Tanya Cook first and then Senator Dubas who is the Vice Chair of the committee; Laurie Lage is the legal counsel for the committee. Today we have two pages. As you prepare to hand stuff out, if you just hold it up our pages will assist you with that. We have first we have on the left there we have Melinda Frevert from Omaha and then we have Justin Escamilla from Scottsbluff, Nebraska, and they are more than happy to help you with that. Today we have two bills and we're going to hear them in this order: we're going to hear LB477, introduced by Senator Carlson first; and then we'll have LB438 to follow that. We ask that if you'd care to testify today and sit at the table, we ask that you fill out one of these green sheets; they're located in the corners of the room. We'd like you to make sure you fill out all the information on there. It helps us keep a good record of what is going on within the committee. And as you come up we would ask that you give this to the committee clerk, she'll take that from you, and then you will state your name and spell it, first and last, no matter how simple it is. We want to make sure our record is good so I want you to spell it for me. Then, if you're here and you're just monitoring things but you do have a position and you don't want to come up and testify, there's also this sheet in

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the corner tables that allow you to sign your name and address and your position on the bill. If you want to be on the record of being here and having a position but yet you're not going to testify, there is that available in the corners. With that, we would ask you to turn your cell phones off at this time so we don't interrupt our proceedings as we show respect to those that are testifying either in support, opposition, neutral, or introducing. We again, ask as you come up that you state your name and spell both first and last as clear as you can to make sure we have that done. With that, I am done. So we will move on and I will open the hearing on LB477. Senator Carlson, welcome. []

SENATOR CARLSON: Thank you, Senator Langemeier, and members of the committee. I am Tom Carlson, spelled C-a-r-l-s-o-n, representing District 38, here to introduce LB477. This bill would provide uniform and consistent treatment of transfers of certified irrigated lands or other certified water uses and for the transfer of groundwater rights through participation by a landowner or water user in an NRD financial incentive program. Specifically, LB477 requires a title report identifying existing lienholders and written consent from such lienholders before the land can be transferred. The bill also requires an NRD to record an instrument of transfer of water rights against the real estate from which a transfer of certified irrigated lands or certified water uses occurred. This bill is of concern to financial institutions. As significant areas of our state are fully appropriated or overappropriated, their organization anticipates future transfers of groundwater rights to occur with greater frequency. If a financial institution has taken irrigated land as collateral for a loan, a transfer which takes place without the knowledge and involvement of lienholders can adversely effect the value of land securing the loan. Along with the concern of financial people, people who buy land want to make sure they're buying land with water rights that they in fact have those rights. And people who sell land or sell, transfer water rights want to make sure that those rights in fact are transferred. My office has been involved in several meetings concerning this issue in an effort to bring together all interested parties. Many of them are here today to testify on the bill. I've also received e-mails, phone calls, and letters from people in the state in agreement with LB477. So thank you for listening to this introduction. Are there any questions? [LB477]

SENATOR LANGEMEIER: Are there any questions for Senator Carlson? Seeing none, thank you for your introduction. We will now move on to those wishing to support, testimony in support of LB477. Mr. Hallstrom, welcome. [LB477]

ROBERT J. HALLSTROM: (Exhibits 1, and 2) Thank you, Senator, Chairman Langemeier, members of the Natural Resources Committee. My name is Robert J. Hallstrom, R-o-b-e-r-t, middle initial J, Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as registered lobbyist for the Nebraska Bankers Association to testify in support of LB477. I've also been authorized by Bill Mueller and Kim Robak to express support of the Heartland Community Bankers Association for this legislation as well. Senator Carlson has gone over in some detail the mechanics or the basic substance of the bill.

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What I'd like to do is maybe give the committee a sense or a flavor for how we have gotten here. Historically, lenders have always been interested in water rights but like many others, until recently when we've been faced with areas of the state, significant areas of the state that are fully appropriated and overappropriated in their designations, the prospect of people transferring water rights, particularly those rights whether they be surface or groundwater interest for profit was not near as great. With the accompanying restrictions on well drilling and so forth that go with the designations of fully appropriated and overappropriated, water which has always been a valuable resource, has now taken on issue with regard to being a valuable commodity that can be transferred between lands between landowners and for compensation or reimbursement for the transfer of the right to use groundwater in particular as well as surface water. With that backdrop in mind, the lenders have become increasingly concerned that there will be, as Senator Carlson noted in his introductory remarks, a greater frequency of these types of transfers in the future. And looking at state law, the only reference to any type of specific protection, if you will, or notification of lenders came about as a result of the provisions of LB962 which was one of the first major water law pieces of legislation that we faced in Nebraska. But the only thing that exists to my knowledge, is that with regard to certain transfers of surface water rights, the lienholder upon application is required to identify lienholders and then those lienholders would be notified by the department in the process of considering the application for transfer of surface water rights, they'd be notified if there is a hearing, and in not all cases is there required to be a hearing. At the same time with regard to potential transfers of groundwater uses, there is nothing on the books with regard to state law to provide any type of notification and/or protection for lienholders. More recently, we became aware that the Central Platte NRD in implementing a water banking program for purposes of retiring or reducing water utilization in their particular NRD had put together a system that required notification or identification, excuse me, of lienholders and written consent before they would approve the water banking proposal. We clarified and verified that with the legal counsel of the Central Platte NRD and I have a copy of their response confirming the procedure or protocol that they had established. Subsequent to that, some of our bankers out in the Tri-Basin NRD had gone to the NRD in that particular area of the state and had raised some concerns likewise about the fact that if they were going to be approving transfers of certified irrigated acres or transfers of other certified uses of water that they, in fact, would like to be involved in the particular procedure. While nothing has been finalized, I also have attached to my testimony some proposed documentation that the Tri-Basin NRD has put together that would require again, identification of lienholders and consent from those lienholders before the irrigation rights or the irrigated acres would be transferred from one tract of land to another or from one landowner to another. So when we saw this type of procedure or protocol being adopted by some of the NRDs that are embarking on these different types of procedures, we felt that perhaps there ought to be something in state law so we would have a uniform and consistent treatment of those types of transfers that could, as you might imagine, be adverse to the interest of a lender in terms of collateral reducing in value and reducing in productivity. So that

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brought us to drafting LB477. It's been kind of an interesting ride bringing together, not working this area frequently, bringing together all of the various interest, passionate interest I might add, on the surface water and groundwater side of things. But in the process of putting together LB477, we came to the conclusion that for the moment we were not going to impose the lienholder consent requirement upon transfers of surface water rights. So as you'll see from the provisions of the bill and the clarifying amendments which have been distributed to the committee, we are going to do one specific direct thing with regard to surface water rights. Earlier in my testimony I had referenced the fact that we currently have an applicant for a surface water transfer required to notify, self-notify or identify lienholders. We have beefed up that requirement, if you will, by requiring a title report to be submitted at the time that an application for a transfer of surface water is submitted to the Department of Natural Resources. To my understanding and knowledge, and clearly our intent is that that will be the only direct impact on surface water transfers the enhancement of the identification of the lienholders and for the record, the lienholders are those who are consensual lienholders in nature, those who have filed their interest of record by way of a trust, deed, a mortgage, or a consensual equivalent security interest type of document. Having addressed surface water, then we turn to groundwater. Senator Carlson had indicated that we basically have a two-step process. Identification of the lienholders, again, through the same type of title report requirement that must be submitted to the NRDs upon the request for transfer of groundwater uses, certified irrigated acres, or other certified uses of water and the lienholder consent requirement as well. The other thing that we've done with regard to transfers of certified irrigated acres and other certified water uses is to put for the first time a requirement for an instrument to be recorded that will memorialize the fact that the water usage or the groundwater rights as they will be, have been transferred from one tract of land to another. As Senator Carlson alluded to, this will provide greater protection for not only lienholders, but also subsequent purchasers of the land who will have some record at least from this point forward of what the status of the water use relating to groundwater will be. So that kind of clarifies and verifies what we've done through the introduction of LB477. The amendments that I have in front of you, as I suggested, are meant to clarify that we are not addressing with regard to the lienholder consent provisions, the surface water transfers in any respect. Specifically for the committee's attention, on page 18, line 7 to 13, we define in state law perhaps for the first time in the green copy of the bill the term certified irrigated acres and certified water uses. The amendment clarifies that the term is certified irrigated land and with regard to both the definition of certified irrigated land and certified water uses we have clarified with the insertion of the word ground that it does apply solely to certifications relating to groundwater. We have also in the bill authorized the NRD to require landowners and others with control over uses of water to certify those uses. Again, we have clarified that those uses relate to groundwater uses and we have also in the bill added to the list of controls that an NRD can impose in a management area on page 22, lines 12 to 16, the certification of those water uses and certified irrigated acres. And finally, the amendment clarifies...

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referenced the recording, the evidence of the transfer, we have changed that from a transfer of water rights to a transfer of the right to use groundwater to again clarify that surface water is on one side of the fence and groundwater right is on the other side. I would be remiss not to thank both Senator Carlson and his staff for what they have done to get us to this point, but also the many groups that Senator Carlson and the bankers have involved in this issue, the Department of Natural Resources, the NRD representatives, the representatives of surface water interest, the cattlemen, and Farm Bureau. And with that I'd be happy to address any questions the committee may have and thank you for your indulgence. [LB477]

SENATOR LANGEMEIER: Are there any questions? Senator Haar. [LB477]

SENATOR HAAR: Thank you. For some of us, this is groundwater 101, Bob. So I'm going to have to ask some questions to clarify things. Tell me, for example, what would be some examples of lienholders that might be connected with farmland? [LB477]

ROBERT J. HALLSTROM: What you're going to have, Senator, is any type of financial institution or third party that finances either the acquisition of real estate or an operation of an ag undertaking will take a secured position back against that land. They will generally have either a trust deed or a mortgage to secure their interest in the land itself. There will also be provisions in that document and perhaps an accompanying security interest in financing statement to address issues or interest in personal property which can include proceeds, it can include whatever interest in water use or water rights may exist that are associated with that land. [LB477]

SENATOR HAAR: Okay. Okay. Why the difference in consent between surface and groundwater. [LB477]

ROBERT J. HALLSTROM: Senator, I had that question asked in the midst of some of our meetings with the interest groups. Part of the issue is that it is perhaps arguably a little bit easier and we can be more concise in addressing the types of groundwater transfers that we are interested in. Obviously, you know, if you have irrigation rights that are transferred whether the source of the water is surface or ground, it can have an equally adverse impact on the value of the underlying collateral. But for our purposes at this point, it...we can be more concise in being able to use commonly accepted terms and situations involving the transfer of certified irrigated acres, or as the bill defines certified land and other water uses so it's easier to capture the universe of transactions or transfers that we want to have coverage and protection for. I also failed to note in my earlier comments, the NRDs can also in terms of water banking programs, the statute refers to that as authorizing participation in a financial incentive program. So we've addressed that in the specific language of the statute as well. On the surface water, there are probably a greater array of types of transfers, some for storage, reservoir storage and so forth that we might not be as concerned or involved with and it may be

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that for the moment this is as far as we're going and we may continue to visit with the surface water interests to determine whether or not another day, another time we can come back to address the transfers on the surface water side. [LB477]

SENATOR HAAR: Okay. When you document, and so on, groundwater, is that in terms of gallons, is that in terms of potential or just saying it's irrigated land? [LB477]

ROBERT J. HALLSTROM: Senator, I may not completely understand your question but the certified irrigated acres is a process that, it is my understanding, that is undertaken by the NRDs when they are trying to determine the scope and extent of the amount of land that is subject to irrigation rights. I don't know that it has an impact on gallons of water, but the terminology or the term of art is certified irrigated acres or as we have defined certified irrigated land. [LB477]

SENATOR HAAR: Okay. Does consent for the groundwater, does it basically tie the hands, then, of the NRD if they don't get consent from the lien owners and the NRD cannot act? [LB477]

ROBERT J. HALLSTROM: That is my understanding of how the initial NRDs, the Central Platte and the proposed Tri-Basin NRD approach would have worked, and that is in fact the design and would be the effect of the legislation as well. It's a conditioned precedent, if you will, that the lienholder's consent must be provided along with the identification. I would note, Senator, and I've talked with a number of lenders, we do not envision that the financial community is going to be tying the hands of either the land holder that's...water rights party that's trying to transfer or the NRD in terms of the approval. So there could very well be some situations where based on the totality of the circumstances, the lender does not feel comfortable allowing the water to go from one landowner to another, but we would anticipate, speculate, if you will, that in most cases there's going to be a benefit derived and as long as the lienholder has been involved so that if there's compensation changing hands and the lender can protect their interest in the compensation that changes hands to provide as a payment down on the loan, that we would not envision that this would be used as a constant or even frequent impediment to proposed transfers. [LB477]

SENATOR HAAR: Okay. So it doesn't tie the NRDs up in knots in your opinion? [LB477]

ROBERT J. HALLSTROM: I don't think it will in practice. It could in theory, if you took the approach that a lienholder was never going to give consent but we certainly, from visiting with our lenders, don't see that as the posture that will be taken because there are very many good and beneficial reasons why these types of transfers...they may be between the same landowner, different parcels of land and in some cases the lienholder may have liens on both tracts of land so, a no-brainer in that term. [LB477]

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SENATOR HAAR: Yeah, and I mean I can certainly see your need for notification and for protection being a banker. So, okay, well I may have more questions but we have more testifiers too. [LB477]

ROBERT J. HALLSTROM: Certainly. [LB477]

SENATOR HAAR: Okay. Well, thank you very much. [LB477]

SENATOR LANGEMEIER: I have a question, Mr. Hallstrom. In your testimony you used certified acres on a very, very frequent basis both in your written and your statement there, but yet you want to take out acres in most of all the language here and put in the word land. [LB477]

ROBERT J. HALLSTROM: Senator, and that's...I prepared my testimony in view of the green copy of the bill since that's what the committee had in front of them. You could feel free to change all those uses of acres to land if in fact the committee adopts the amendment which is our preference. But that was only because I was writing the testimony as to the green copy. We are fully supportive of the amendment which would change that definition to certified irrigated land. [LB477]

SENATOR LANGEMEIER: Explain to me again, I know you just said it, but explain to me again why you want that change. [LB477]

ROBERT J. HALLSTROM: That change was one that in the course of our meetings, the NRDs had requested and suggested that the definition be certified irrigated land. [LB477]

SENATOR LANGEMEIER: I will ask them when they come up. [LB477]

ROBERT J. HALLSTROM: That will be fine. In most cases I would be ambivalent but they made the request and it seemed reasonable to me and. [LB477]

SENATOR LANGEMEIER: Other questions? Senator Carlson. [LB477]

SENATOR CARLSON: Senator Langemeier, I don't have a question, I want to make a statement. Bob Hallstrom has worked long and hard to try and bring parties together on this piece of legislation. I don't feel sorry for him, that's what he's paid for. (Laughter) But in a number of meetings that we've had there's been several representatives of NRDs and others interested in supporting that group. There have been several members interested in surface water irrigation and members from the Department of Natural Resources and there have been some spirited conversations that have taken place in meetings. We had a meeting last Friday morning in my office and some pretty frank discussion, and I thought Bob Hallstrom came up with one of the best lines I've heard in

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three years and that was he didn't realize this meeting was that of the Hatfields and the McCoys. But we made progress and then several of us met again on Friday noon, and the amendment is the result of that meeting. And so we'll see where the testimony goes from here, but there's been a lot of preparation into this. Thank you. [LB477]

SENATOR LANGEMEIER: Thank you very much for your testimony. [LB477]

ROBERT J. HALLSTROM: Thank you. [LB477]

SENATOR LANGEMEIER: Next testifier in support? [LB477]

SENATOR HAAR: Is Senator Carlson a member of the Hatfields or the McCoys? [LB477]

SENATOR CARLSON: He's a spectator. [LB477]

SENATOR LANGEMEIER: He's still in tractor driving school. Come on up. [LB477]

BOB DAHLGREN: (Exhibit 3) And I believe I'm neither the Hatfield or McCoy. Chairman Langemeier, members of the resources committee, my name is Bob Dahlgren, B-o-b, last name Dahlgren, D-a-h-l-g-r-e-n. I'm with the bank of Bertrand, I've been there 44 years. I appear today to express my support for LB477. For most of my life, and I grew up on a farm and irrigated most of my life, the word in the farm community was always that irrigation rights couldn't be transferred. But in the last four or five years we've found out that that must have been an incorrect myth. As both the previous speakers have said, most of the state is fully appropriated or overappropriated and we have moratoriums on new well drilling. So this water has become a very valuable commodity. As such, we expect these transfers to continue to grow in number. As you will note, towards the back of my written testimony there's an ad which appeared both in newspaper form and on the Internet, describing 80.5 certified acres for sale for \$1,400 per acre. That is an example of what is happening in the marketplace in our area. The ad is marketing the right and not the commodity, in my view, so it's hard to tell from the ad whether we are talking about groundwater or surface water. What we're talking about is the irrigated acre right. So, previously Senator Haar asked for some examples. You know, you could have an example of a person in financial trouble looking for a source of funds and if there's no control over the transfers of these acres, he could sell the water right, capture the money and pay bills or he could pay a short term lender and erode the value of the land that the long-term lender has. We are getting more transfers into our area than we have leaving. Most of what the transfers are being applied for in our area are pivot corners, small irrigated tracts and they are accumulating them and selling them to people that just want to buy and put together a whole quarter section or a half section of water rights. Now the ad specifies 80.5 acres, we're not sure if that's one tract or if that's a bunch of pivot corners or exactly what it is. But our most concern is if we

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make a loan to somebody and they are developing a dry land tract and they're acquiring these acres such as in this ad, we're not sure what they're getting. Are they buying, or are they getting what it says they're getting or are they getting something that they could lose by some first lender coming along and saying he signed those over to us when he signed the documents. We're not able to tell that, they're just assuming that those are free to be marketed, such as in this ad. But there's no real documentation yet at this time other than in these two NRDs. We also could lose if we had a second mortgage behind say Farm Credit made the first mortgage and we have a lender that's a little bit challenging to we file a second mortgage against a tract of real estate and the water rights are gone when we go to enforce the second mortgage and Metropolitan Life or Prudential Life or Farm Credit has the first mortgage and it sold and without the water on it, the value is way down, and so we would probably lose if we were relying on our second mortgage. And I think John Thorburn is right behind me and so we have a copy of his lienholders' consent form in there, but I think Bob also gave that to you. The provisions of LB477 are extremely important for the continued free flow of credit. It has not...there's been no harm in or effect on the credit flow at this time, but if this issue rears its head at some point, it will be. So this is to protect down the road is mostly what this--as I see this version of the bill. That concludes mine, does anybody have any questions? [LB477]

SENATOR LANGEMEIER: Very good. Thank you for your testimony. Are there any questions for? Senator Fischer. [LB477]

SENATOR FISCHER: Thank you, Chairman Langemeier. Mr. Dahlgren, thank you for being here today. What I'm, I guess, understanding from your testimony, you have concerns that perhaps someone who you have loaned money to a farmer that you've loaned money to who has a water right could possibly transfer that water right to an NRD so they can bank it and then you would, it would lower the value of the land since they no longer had that water right on it, which means you loaned them money on a piece of land at a certain value that it has now be devalued because they transferred that water right to a bank with an NRD, to bank it with an NRD so it...for whatever reason. [LB477]

BOB DAHLGREN: It's not necessarily to a bank. It's...they're transferring from one farmer to another farmer. So if we had a...say we made a loan on a quarter section at \$2,500 an acre and the land sells for \$3,500, we made the loan for \$2,500. The water was sold to another farmer that would devalue the land to about half, so then our \$2,500 loan would be short. [LB477]

SENATOR FISCHER: Okay. In your written testimony, you talked about the bank with the Central Platte NRD is why I gave that as an example. [LB477]

BOB DAHLGREN: They are doing that in the Central Platte. [LB477]

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SENATOR FISCHER: Exactly. And I said, for various reasons. I can understand your frustration with it because you have signed loan agreements with these farmers based on a land value. Correct? [LB477]

BOB DAHLGREN: Correct. [LB477]

SENATOR FISCHER: Correct. But you haven't seen this happen too often yet? This is a bill you're looking at maybe to forestall it happening in the future where a farmer will sell their water right to an NRD to bank or else sell it to a neighbor to get cash and leave you short. [LB477]

BOB DAHLGREN: Or else we'll make a loan that is to the purchaser of the water right. And we're not sure when they got that water right, if they got it correctly from the other party that they purchased it from. They may buy 6 acres here, 10 acres there, 15 over there, bring them all in and if there's somebody in that chain that says we've got a claim to those 6 acres we want them back, then we lose the 6 acres. [LB477]

SENATOR FISCHER: Okay. Thank you. [LB477]

BOB DAHLGREN: Or we could lose the whole if everybody says it was not done right, put everything back. [LB477]

SENATOR FISCHER: Thank you very much. [LB477]

SENATOR LANGEMEIER: I have one question. When you're making a loan for 160 acres, if I'm the borrower from you and I have it for a year and I borrow the money from you and I have it for a year and I go sell it, what happens to your loan? [LB477]

BOB DAHLGREN: You sell the land? [LB477]

SENATOR LANGEMEIER: I decide to go sell my land. [LB477]

BOB DAHLGREN: It goes...the new purchaser does a trust. [LB477]

SENATOR LANGEMEIER: You're going to foreclose. You're going to foreclose, I can't just sell it. [LB477]

BOB DAHLGREN: No, you're not going to sell it because we've filed a mortgage and the new buyer is going to say we're not closing on the loan until we make provisions to get you paid off. [LB477]

SENATOR LANGEMEIER: Let's say they do. Let's say they'll take it and leave your loan

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there. What are you going to do as a bank? [LB477]

BOB DAHLGREN: We're going to permit it. We might permit the transfer of this water. All we're asking for is to be contacted and say, yeah, it's okay to sell the water. We're not saying we're not going to, we're just saying ask us before it transfers. [LB477]

SENATOR LANGEMEIER: Okay. Thank you. Senator Carlson. [LB477]

SENATOR CARLSON: Senator Langemeier. I think Mr. Dahlgren and his example with Senator Fischer brings out another important point here and that is you use the example if somebody buys a water right and then comes to you for a loan and you make the loan based on that water right. It's important to you, it's also important to the one that bought the land that they in fact have that water right. [LB477]

BOB DAHLGREN: It's more important to them, really, than it is to us. [LB477]

SENATOR CARLSON: Thank you. [LB477]

SENATOR LANGEMEIER: Senator Haar. [LB477]

SENATOR HAAR: Thank you. So what I'm hearing is there's been no standard way to really track water rights and who owns them and when they're transferred and so on. [LB477]

BOB DAHLGREN: Correct. [LB477]

SENATOR HAAR: Okay. So are we modeling off of someone else's work or are we sort of plowing new ground here? [LB477]

BOB DAHLGREN: I think we're plowing new ground, but the testimony right behind me should be the one to ask. [LB477]

SENATOR HAAR: Okay. Thank you. [LB477]

SENATOR LANGEMEIER: Okay. Thank you very much, thank you for your testimony. Further testimony in support? Come on up. Welcome to the committee. [LB477]

JOHN THORBURN: (Exhibit 4) Thank you, Mr. Chairman. Good afternoon, Mr. Chairman, Senators. I'm John Thorburn, J-o-h-n T-h-o-r-b-u-r-n, and I'm the manager of Tri-Basin NRD in Holdrege. I would like to testify on behalf of my district and the Nebraska Association of Resources Districts in support of LB477. LB477 accomplishes two important tasks. Number one, it clarifies certain sections of statutes in relation to the authority for NRDs to certify irrigated land, as well as our authority to enable landowners

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to transfer certified irrigated land from one parcel to another to improve their irrigation efficiency. And second, it creates a process for notification of and consent by lienholders when landowners transfer certified irrigated land or surface water rights away from parcels that are mortgaged. This process is needed for protection, not only of banks, but for all parties involved in certified irrigated land transactions. Otherwise, a recipient of certified irrigated land could find that the transfer could be rescinded as a result of a lawsuit by a lienholder attempting to recover value for mortgaged properties. We recognize that the limited title search requirement will add expense and time to the process of transferring certified irrigated land. We believe that the additional time and expense is justified in order to ensure that transfers are conducted in a manner that minimizes conflict and controversy and helps ensure the desired result for all the parties involved. We also believe that as a matter of equity and consistency, it would be appropriate for holders of surface water rights to be subject to the same lienholder notification and consent process when surface water rights are permanently transferred from one point of use to another. We do, however, acknowledge that in the interest of advancing this important bill, we're willing to wait for another day to have those discussions. Thank you for allowing me to testify about this important legislation. I will be happy to attempt to answer any questions you may have. [LB477]

SENATOR LANGEMEIER: Are there any questions? Senator Haar. [LB477]

SENATOR HAAR: Thank you. I can certainly understand the notification parts of this bill. The question I'd have for you is the thing that requires consent of lienholders, how does that affect you as an NRD? [LB477]

JOHN THORBURN: Well, it's another step in the application process for someone seeking a transfer, Senator. The way we look at it just as they have to fill out a form put in their name and address, and the legal description, we also require them to fill out another form that has the signature of the lienholder consenting to allow such a transfer. So those signatures, those consent forms are part of the application process for a transfer. My board of directors still approves transfers on their merits, not based on the financial status of a landowner. But we do recognize that these banks have an interest in the property and we want to help them protect that. And just to clarify, we do require that already in my district as part of a transfer. [LB477]

SENATOR HAAR: Would, and I understand that part of it, would this in any way get in the way of what you would like to do as an NRD? Would there be times where you need to see a transfer happen or banking or whatever and this would mean you couldn't do what you needed to do? [LB477]

JOHN THORBURN: Well, I think inevitably by requiring the title search and the process that is required to do those searches, it will slow down the process but improving irrigation efficiency is a long-term proposition. [LB477]

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SENATOR HAAR: Sure. [LB477]

JOHN THORBURN: And so I think it is a trade-off in that it slows down the transfers but it also puts them on a little firmer legal footing as well so I think that's a good compromise. [LB477]

SENATOR HAAR: Okay. And I understand that and I agree. It's kind of amazing that there isn't a way to certify irrigation and stuff right now, irrigated land. Do you...but I'm still not quite clear or maybe my question isn't right. Would this in any way impede your ability as an NRD to do something you needed to get done? [LB477]

JOHN THORBURN: I don't believe so, Senator, I mean the purpose of certifying land in the first place, we want to know where and how many irrigated acres each farmer has and we do that when either for purposes of protecting stream flows or protecting groundwater supplies we need to limit irrigated acres. And so that process is not really impeded by this bill. It's only after the certification is complete and landowners...and the common example is they have gravity gated pipe irrigation and want to convert to center pivot irrigation they need to move some acres from one parcel to another. In that case, it would slow down that process for the individual landowner. I do not believe it's going to interfere with our objects to conserve groundwater or surface water. [LB477]

SENATOR HAAR: Okay. Thank you. [LB477]

SENATOR LANGEMEIER: Senator Fischer. [LB477]

SENATOR FISCHER: Thank you, Senator Langemeier. Thank you, Mr. Thorburn. I'm glad this bill's before this committee but I've never served on the Banking Committee so I have some questions on it. First of all, with Senator Haar's comment, your NRD currently certifies irrigated acres, correct? [LB477]

JOHN THORBURN: In fact we've completed certification for our district. [LB477]

SENATOR FISCHER: So this isn't something new for you to do? [LB477]

JOHN THORBURN: No, and we've been allowing transfers of certified acres for about three years now. The lienholder consent we've only been doing that for, oh, about eight months. Mr. Dahlgren brought to our attention his concerns, my board was receptive to that, and we developed a process. [LB477]

SENATOR FISCHER: With this bill the NRDs would still have to approve a transfer, would that be correct? [LB477]

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JOHN THORBURN: Yes, yes. [LB477]

SENATOR FISCHER: But the lienholder, which...first of all, in most cases is the lienholder a bank? [LB477]

JOHN THORBURN: Yes, and as Mr. Hallstrom pointed out, they're consensual lienholder which in most cases is going to be a bank. I think there are probably processes where it could be a relative or another landowner. [LB477]

SENATOR FISCHER: So we're...under this bill we're saying that the lienholder, a bank, would have to consent to allowing a transfer. Is that correct? [LB477]

JOHN THORBURN: I believe that's correct. [LB477]

SENATOR FISCHER: So the bank has to allow the transfer and then if it's groundwater the NRD would have to approve. I see a conflict there. [LB477]

JOHN THORBURN: Okay. And I guess maybe in the use of the term consent, they are agreeing that it's acceptable to them. [LB477]

SENATOR FISCHER: What if they don't agree that it's acceptable to them? [LB477]

JOHN THORBURN: Then the NRD would not consider the application for transfer to be complete. [LB477]

SENATOR FISCHER: So in effect, the bank has veto power over what an NRD does with groundwater and what I assume what the Department of Natural Resources is doing with surface water transfers. Are we giving banks veto power over what NRDs are doing with groundwater and what the Department of Natural Resources is doing with surface water in this state? [LB477]

JOHN THORBURN: Senator, I guess I don't see it that way. I just see this as a way of ensuring that the process works smoothly so that, and we don't have to deal with objections or as I said in my testimony, potentially lawsuits after the fact, which would be an undesirable situation for all the parties involved in the transfer. [LB477]

SENATOR FISCHER: Well I can sympathize, I can sympathize with any lender who is loaning money on the value of land or whatever and then to find out that value has been decreased, usually substantially when you're talking about water rights on it, but I think we'll have to talk about it a little more so I can understand. And I'm not real comfortable with the idea that a bank's going to veto what the DNR and NRDs are doing in regards to surface and groundwater in the state. [LB477]

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JOHN THORBURN: Yes, Senator. [LB477]

SENATOR FISCHER: So hopefully we can talk about that and as I said, I have never served on the Banking Committee and I'm sure they'll be happy to visit with me too. Thank you. [LB477]

SENATOR LANGEMEIER: Mr. Thorburn I have one question. Well, maybe, we're going to start with one. When you certify the acres, where is that record? Do you file if I have a quarter of ground and now you've certified that I have so many irrigated acres on it, is that filed in the records with the deed or is that just in your office? Where would that discovery take place? [LB477]

JOHN THORBURN: Well, Senator, this does vary by district. I'll just describe the process that my district uses. When we certified irrigated land in my district, we based that certification on the taxed irrigated land, the irrigated acres on record with the county assessors. And we've been striving to keep our records in line with the county assessors as we've needed to correct certified acres. If a landowner believed he had a different number of irrigated acres than what was on the tax records, he needed to provide us with some independent verification, which typically is an FSA record of certification of land. And then we...if they could show through independent verification that they were irrigating a different number of acres, we would correct the certification but then they also had to have that same number of irrigated acres recorded on the tax rolls. And so the certification is held by the NRD, it's in a file in my office. But in my district's case, at least in 99.9 percent of the instances, the certified acres are the same as the taxed irrigated land. [LB477]

SENATOR LANGEMEIER: So, should we have a provision in law that says that if, let's say I have 80 acres, I'm gravity irrigating it and for some reason it doesn't lay quite right and so I'm only irrigating 65. And I go talk my assessor into putting that up to 80 acres irrigated, which doesn't match your records anymore, and you don't know it, and I go sell it as 80 irrigated acres. Do we need to add a provision in there that says the assessor can't change those numbers without notifying you or do we need to have you file your...I'm seeing more of a problem than what we're trying to do with this bill. Is how you handle these rights. You know, mineral rights, you have them unless we find as an appraiser, unless I find somewhere in the records where you've sold them off or you've placed them off in some fashion. Do we need to come up with a mechanism that puts your certified acres against that ground so when I do go sell them to Joe Blow I give him a quick claim deed for certified acres and then I file that against my 80 as I've lost them as well I've put them on the new 80 that gained them. I mean, is this bigger? We need to address that kind of ownership other than making you part of the...my problem is making you part of the discovery process. Is if I have to go into the courthouse and look up and it says there's 80 coming to you, and heck, maybe I don't get the right secretary or the right person at the NRD office that day and she doesn't find the exact form that

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says how many acres I have, and you say I don't have any or I have 65 or some odd number. I guess I'm trying to figure out how you can make that, taking you out of the discovery process of that after you've certified them. [LB477]

JOHN THORBURN: Right. Senator, I agree, this is a new process for most natural resources districts and we tried to make it as uniform between districts as we can. We've had very good cooperation certainly in my district from our county assessors and they are very careful not to make the changes like you described without notifying us. The potential certainly does exist that a county assessor either mistakenly or just in trying to accommodate a landowner may change irrigated land without the knowledge of the NRD. We based our certification process on taxable irrigated land simply because my board of directors believed as a matter of fairness it was important not to allow people to certify land that was not being taxed as irrigated land. And so we feel that's an appropriate basis for certification and that may also prove to be a good way of keeping the record of what is certified as irrigated land. There are differences in the capabilities of counties. Some county assessors don't have all their records computerized yet and so it's difficult sometimes for them and the NRDs to work together and as I'm sure you well know, many NRDs cross county boundaries as well and so some county assessors may be working with multiple NRDs. So there certainly are structural issues in terms of both the process of certification and keeping certification current. This bill does not attempt to address that but it's a topic that I believe does deserve discussion, yes. [LB477]

SENATOR LANGEMEIER: All right. I'm not arguing the way you certify, I've seen that, I don't have an issue with that. My point is once we have that certified and that official number that got us in this fully appropriated, overappropriated is how can we handle that in some organized form where people are going to know where the official record is. So that's my only thought. Senator Haar I think has a question. [LB477]

SENATOR HAAR: Yes, thank you. What I'm trying to explore in my mind are the consequences of this, because I can certainly see the usefulness and why banks would want to know. I mean, that makes a lot of sense. But in some cases NRDs have to remedy over allocation and so on. Would this stand in the way of that process? [LB477]

JOHN THORBURN: No, Senator. I think in fact, as Mr. Hallstrom referred, effectively certified acres are becoming a commodity. They are becoming an article of commerce. [LB477]

SENATOR HAAR: Sure. [LB477]

JOHN THORBURN: And to the extent there are sales or trades or financial transactions associated with certified acres, that simply helps define the market and the NRD as a potential customer, a potential buyer of certified acres is helped by that because it

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ensures that we're not...we're paying for certified acres within the bounds of what the market is asking for them. This is a market that is really just starting to become defined and is still in the crawling stages. I think it is, as you say, a necessity for NRDs in the Platte Basin, the portion of the Platte Basin that is overappropriated to be able to reduce irrigation water consumption and often that's going to be done by retiring irrigated uses. For other NRDs across the state which aren't required to reduce irrigated uses but will at least have to limit irrigated uses, certification and transfer of certified acres is still a useful tool. [LB477]

SENATOR HAAR: Okay. [LB477]

JOHN THORBURN: And enables them to help their farmers use their water efficiently and also for water to be brought to the best highest use. As for instance an industry like an ethanol plant moves into an area, they would be able to acquire those certified acres and be able to use the water that they need to do their processes. [LB477]

SENATOR HAAR: If you had to reduce the allocation, on let's say of some irrigated land, could these lienholders step in and say no you can't? [LB477]

JOHN THORBURN: No, Senator, allocation is a separate process and it's done for different reasons. Typically, at least so far in the history of NRDs, allocation has usually been used as a tool to protect groundwater supplies. As groundwater levels drop we limit pumping so that we arrest those declines. There have been some instances in the Republican Basin where NRDs are using allocation as a tool now to protect surface water uses. But that allocation is based on scientific models, geologic information, it's a decision that's done to protect the resource and it is applied across certified acres within a district, so one farmer's certified acres don't necessarily have a higher allocation than another's. [LB477]

SENATOR HAAR: Wouldn't that effect the value of land though, if you decertified, I don't know what the correct term is, but if you took, if you cut down the amount of irrigation that could happen, would that affect the value of land? [LB477]

JOHN THORBURN: Oh, potentially, depending on how far you reduce an allocation. That affects the farmers' ability to maximize yields from his crops which affects the production potential of a piece of land. [LB477]

SENATOR HAAR: So, and the banks of course would have a concern of that if you reduce the allocation because it's effecting the value of the land, again. [LB477]

JOHN THORBURN: Oh, I'm sure that all interests that want to see the greatest value produced from a parcel of land would be interested in that but hopefully they also understand that we're doing that to protect the long-term value of the land. [LB477]

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SENATOR HAAR: Right. So under this process, though, could a lienholder step in and say you cannot decrease that amount? [LB477]

JOHN THORBURN: No, Senator, I don't believe so because as I say, allocations are applied on a uniform basins to, for instance, all certified acres not just a particular parcel here and there. [LB477]

SENATOR HAAR: And this just applies to the transfer of, okay. [LB477]

JOHN THORBURN: Yeah, and just to make sure we're clear on this, it was mentioned earlier, certification is certifying that you have the right to use groundwater on a particular piece of property. There may be other limitations on that right such as an allocation. [LB477]

SENATOR HAAR: Okay. And that wouldn't be affected by this? [LB477]

JOHN THORBURN: I don't believe so. [LB477]

SENATOR HAAR: Okay. [LB477]

SENATOR LANGEMEIER: Seeing no other questions, thank you very much for your testimony. Very good. Further testimony in support of LB477? Welcome. [LB477]

TOM KNUTSON: Good afternoon, Senator Langemeier, members of the committee. My name is Tom Knutson, T-o-m K-n-u-t-s-o-n. Professionally, I'm general manager of the Farwell and Sargent Irrigation Districts and the Loup Basin Reclamation District out of Farwell, Nebraska. I come before you today as president of the Nebraska State Irrigation Association in support of LB477 with the amendments that have been offered by Bob Hallstrom. I commend Senator Carlson as I did last week Senator Fischer in regard to working with the groups to make sure that we get a bill that's workable for all of us as we go back home and go to work with these things. As was already indicated, protections are there in regard to surface water. The Department of Natural Resources already does the things that we're trying to do here with this bill for groundwater. They do that for surface water. They notify the lienholders and that's been going on for years. We support, though, the effort of what the bankers are up to and we think that it's definitely necessary and we support all those who have been working to make sure that this bill does what it should do. We think it makes good sense. And we'd be more than happy to work with the Senator Carlson as well as others to make sure if there's anything else we need to brush up on this bill, we will. But with that, I'll be happy to answer questions. I think the guy ahead of me answered most of them so hopefully I get off easy. [LB477]

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SENATOR LANGEMEIER: Thank you, Mr. Knutson. Are there questions? Senator Dubas. [LB477]

SENATOR DUBAS: Thank you, Senator Langemeier. Thank you, Mr. Knutson. You did allude to the fact that very similar type treatment is done with surface water now. [LB477]

TOM KNUTSON: Yes. [LB477]

SENATOR DUBAS: Is there any real difference between what this proposal is and what's done with surface water now? [LB477]

TOM KNUTSON: I'm not exactly sure the technical differences. All I know is that when we transfer water with our district we basically provide the information to the Department of Natural Resources and they go ahead and contact the lienholders involved because of the landowners names that are submitted and it goes from there. The process takes care of itself. [LB477]

SENATOR DUBAS: So it hasn't caused any hardships for your producers as far as. [LB477]

TOM KNUTSON: Not that I'm aware of. [LB477]

SENATOR DUBAS: Okay. All right, thank you. [LB477]

SENATOR LANGEMEIER: Any other questions? Seeing none, thank you very much for your testimony. That was pretty easy. [LB477]

TOM KNUTSON: Thank you. [LB477]

SENATOR LANGEMEIER: Further testimony in support? Don't be bashful, come on up. There's chairs up front if you want to come up and wait. Welcome. [LB477]

DUANE GANGWISH: Senator Langemeier, members of the committee, my name is Duane Gangwish, D-u-a-n-e G-a-n-g-w-i-s-h. I appear before you as a registered lobbyist for the Nebraska Cattlemen. We appreciate the invitation of all the stakeholders that have worked on this. We have been asked to be involved and we have participated. We're in support of the principle and the process involved of the lenders being notified as be appropriate. And it is short and simple, we just wanted to lend our support. Thank you. [LB477]

SENATOR LANGEMEIER: Very good. Are there any questions for Mr. Gangwish? Seeing none, you're even easier to get off the hook. Thank you. Any other testimony in

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support? Seeing none, is there any testimony in opposition? This is opposition. Okay, we're ready when you are, Director. [LB477]

BRIAN DUNNIGAN: (Exhibit 5) Good afternoon, Chairman Langemeier and members of the Natural Resources Committee. My name is Brian Dunnigan, B-r-i-a-n D-u-n-n-i-g-a-n and I'm the director of the Department of Natural Resources. The department opposes LB477 as introduced. First I offer some background. The department was invited by the Nebraska Bankers Association to discuss the association's proposal prior to introduction of the bill. At that time we voiced our concerns about creating confusion in Nebraska's already complex statutory system for water resources. The bill as introduced gives certain authorities to natural resources districts over surface water that have historically been authorities of the Department of Natural Resources and will cause conflicts and complexities that are not necessary. We do not want to imply that our concerns were not addressed by either the Bankers Association or by Senator Carlson. Upon receiving a draft from the Bankers Association, the department responded with comments but unfortunately our letter to Mr. Hallstrom of the Bankers Association did not get to him or to Senator Carlson prior to the bill being completed by the bill drafter. A copy of that letter is included in this testimony for the committee's consideration, as it is descriptive of some basic concepts of our water law and the structures that it relies on. Subsequently, Senator Carlson was kind enough to call a meeting of all parties after receiving our letter and Mr. Hallstrom held another meeting at which time possible amendments to the introduced bill were worked on that the department agreed to. We appreciate both Senator Carlson's and Mr. Hallstrom's initiative to work with the department on this bill. Nevertheless, we must address the bill on the table, the green copy. Our opposition is focused on some basic premises of Nebraska water law as it currently exists, that the department is the preferred regulator of surface water and the natural resources districts are the preferred regulators of groundwater. This bill alters that basic jurisdictional organization, yet does not state that as intent and is in a bill intended only to protect creditor interest. This bill may cause the surface water user confusion because it is possible that a surface water user may have the local natural resources district and the Department of Natural Resources giving them different answers on what lands they can irrigate. In addition, the bill may cause confusion between jurisdictional issues for the NRDs and the department. The portions of LB477 that will cause conflicts are the definition of certified irrigated acres and certified water uses. The department does not see a need for giving the NRDs the authority to certify acres irrigated with surface water or other surface water uses. All surface water rights for irrigation are associated with a particular piece of land called appurtenant land. The department has orders setting out what these lands are. Other surface water uses are also specifically described in the order granting the appropriation. We do not believe it is useful for the NRDs to certify acres irrigated with surface water or other surface water uses using their own set of criteria. We do not understand how these definitions are needed to address the bankers' stated intent. Again in closing, I wish to express our appreciation to Senator Carlson for his efforts in

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bringing the different viewpoints together. We believe that we cannot support the bill as introduced, but if the bill goes forward we hope that the proposed amendments agreed to at our last meeting with the Banker's Association be included in the final legislation so that there is no change in the basic jurisdictional distinctions in Nebraska's water law without much more discussion. I'd be happy to try to answer any questions you may have. [LB477]

SENATOR LANGEMEIER: Thank you, Director Dunnigan. Are there any questions? Senator Haar. [LB477]

SENATOR HAAR: Thank you. On the letter, the third paragraph the department and the natural resources districts have committed to complying with the program by retiring water use in the Platte River Basin through acquisition and transfer of water rights. Delays caused by lienholders may impeded our ability to meet the program's goals. Could you amplify on that just a little bit? [LB477]

BRIAN DUNNIGAN: There will be some delay. Overall, though, I would say much like Mr. Thorburn said that the intent with the amendments is better than without. [LB477]

SENATOR HAAR: Okay. [LB477]

BRIAN DUNNIGAN: And the delay would be something that we could live with. [LB477]

SENATOR HAAR: Okay. Thank you very much. [LB477]

SENATOR LANGEMEIER: Senator Carlson. [LB477]

SENATOR CARLSON: Senator Langemeier. Director Dunnigan, your letter and your testimony here was and you indicated is geared to the green copy? [LB477]

BRIAN DUNNIGAN: Yes. [LB477]

SENATOR CARLSON: And you have seen and are aware of the amendment. [LB477]

BRIAN DUNNIGAN: Somewhat, yes, Senator. [LB477]

SENATOR CARLSON: And you're in agreement with the amendment? [LB477]

BRIAN DUNNIGAN: We would study it a little bit, but I believe yes, we are in total agreement with that amendment. [LB477]

SENATOR CARLSON: Okay because I had the opinion in our meeting last Friday noon that following that meeting that things were pretty well in agreement. I feel a little bit

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confused in that your letter addressed the green copy and the amendment has been done following at least two different discussions with representatives from the department. And I don't want to have you leave the table with the impression that nothing has been addressed because I believe it has. [LB477]

BRIAN DUNNIGAN: And we just wanted to make sure that that amendment was something before the committee. [LB477]

SENATOR CARLSON: Okay. Thank you. [LB477]

SENATOR LANGEMEIER: Director Dunnigan, I have one question. In this changing of acres to land, does that...to me that's blowing up more discussion in all our water law, not everything we do and everything we've done within the Republican and LB701 and everything has been tied to acres, certified acres, but yet now we want to introduce a new word and take out acres. I find that problematic. What does...does the department have a thought on that or, you like the amendment so you must have some thought. [LB477]

BRIAN DUNNIGAN: We don't think it would make any difference, Senator. [LB477]

SENATOR LANGEMEIER: Very good. Any other questions? Seeing none, thank you very much for your testimony. [LB477]

BRIAN DUNNIGAN: Thank you. [LB477]

SENATOR LANGEMEIER: Further testimony in opposition of LB477? Any neutral testimony? Mr. Barels, welcome. [LB477]

BRIAN BARELS: Good afternoon, Chairman Langemeier and members of the committee. My name is Brian Barels, B-r-i-a-n B-a-r-e-l-s. I'm the water resources manager for Nebraska Public Power District. I'm here testifying in a neutral position to add some additional potential items that we might want to consider for clarification. I, too, appreciate the work that the various groups have done and the bankers have done in working with folks but as you know, the testimony we've heard this afternoon has focused a lot on the transfer of certified groundwater acres. As has been explained, also in the bill is a definition on certified water uses, and if you turn to page 18 of the bill on line 11, you'll see that definition. The certified water uses means beneficial uses of water for purposes other than identified by the district pursuant to rules adopted by the district. I assume that this is intended to cover industrial groundwater uses, municipal groundwater uses. All of those uses are permitted in some form or another and similar to Mr. Dunnigan's previous testimony, the language as it's included here, at least on the draft I have just says water uses, it doesn't say groundwater uses. And second of all, industrial uses can be permitted in different ways through industrial transfer permits

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through the Department of Natural Resources, municipal water rights can be granted through the Department of Natural Resources, and I would urge the committee and I would volunteer to work on this from an industrial perspective. I think some additional clarification would be good as to how and what is a certified groundwater use and how transfers would be administered. I would suggest, for example, that when it comes to groundwater use for the generation at our power plants...we don't have mortgages and liens as they would be associated with the intent as I understand this bill to be. So maybe they don't need to go through this process or maybe they do. But I think it's something that needs some additional clarification. I have one other item that I would point out and that has to do with some of the language on page 2 of the bill, and that is on line 16. It calls for "approval shall be accompanied by a report of title." In looking at this language over the last couple days in a little more detail, I have found that under the Abstractor's Act, report of title is a defined term within the Abstractor's Act in 76-537. I have not had time to fully research what that means or contact the Board of Abstractors, but I wonder if we have chosen language within this bill that was or was not intended to be chosen and what that might mean as far as who has to do it, how it's done, what it costs, and how long it might take, because it is more or less a term of art as identified in 76-537, paragraph 11. So those are a couple of items that...technical issues maybe, not necessarily opposed to the intent, in fact, we would support the intent but some additional work and clarification, we might want to take some time and do with regarding the bill. That would end my testimony. I'd be glad to answer any questions you might have. [LB477]

SENATOR LANGEMEIER: Any questions? Senator Carlson. [LB477]

SENATOR CARLSON: Senator Langemeier. Have you seen the amendment? [LB477]

BRIAN BARELS: I have seen the amendments but the one I saw, Senator Carlson, I don't believe addressed paragraph 31. Or has there been an amendment that does? [LB477]

SENATOR CARLSON: Well, the two you referred to page 2 and you referred to page 18, and I think those two concerns have been...are in the. [LB477]

BRIAN BARELS: Right. They have been resolved, see? [LB477]

SENATOR CARLSON: I think they are. [LB477]

BRIAN BARELS: On an earlier draft of the amendments that were discussed, I did not see those being addressed. That's the reason I brought them to the attention of the committee. [LB477]

SENATOR CARLSON: Okay. Well, I'd be glad to show it to you. [LB477]

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BRIAN BARELS: And I'd be glad to work with you or any of the others but. [LB477]

SENATOR LANGEMEIER: I don't see in the amendment that that report of title is addressed, but I'm sure we'll get some opportunity to work on that. Any other questions? Seeing none. Thank you, Mr. Barels, for your testimony. [LB477]

BRIAN BARELS: Thank you. [LB477]

SENATOR LANGEMEIER: Welcome, further testimony in opposition. No, excuse me, you're neutral. We're neutral. [LB477]

JASPER FANNING: I'm still neutral. [LB477]

SENATOR LANGEMEIER: We're still neutral. [LB477]

JASPER FANNING: I haven't gotten to oppose it yet, Senator. Thank you, my name is Jasper Fanning. That's J-a-s-p-e-r F-a-n-n-i-n-g, and I am the general manager of the Upper Republican Natural Resources District. And I won't take much of the committee's time but I did hear some questions from committee members that I thought I should address. We've had certified acres beginning since 1978 in our natural resources district. The certification of acres is simply an initial control in groundwater management. That's one of the first things you do, essentially, to implement many of the other controls that NRDs have available to them and it simply establishes a baseline, if you will, of what is irrigated. In today's environment, once a basin has been declared fully appropriated, there is essentially a moratorium on development or increase in irrigated acres so you have to establish what acres had been irrigated historically so that you don't allow any growth beyond that. We've been transferring certified acres in our district essentially since we began certifying irrigated acres in 1978. The process here is of good intent, to protect the lienholders. I see their, what they're trying to accomplish, I don't disagree with that. I would note though, I spoke to many of the bankers in our district and asked them if they'd ever had a problem in 28 years and none of them do, and only one of the banks actually has a clause in their contractual agreement with the borrower that says they will not transfer any right or entitlement to use water on the property that is secured. So it's an issue, it's a potential problem but in the grand scope of things, I really don't know if it's a large enough problem to make a big fuss about. With respect to some questions that were asked about natural resources districts, and would it impact us and the things that we're doing, and the short answer is no, it will not. In fact, all of the irrigation retirement programs or irrigation reduction programs that the districts have used such as CREP and EQIP and some other conservation easements that we're associated with districts individual retirement programs, we do a lien search or a title search to make sure that we don't run into problems down the road. We want to know that we have a water right that we've retired that won't be questioned by anyone

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who may have had an interest in that, so that's something we're doing already in those programs. We see, you know, probably 90 percent of our transfers are a handful of acres, like a pivot corner or something where maybe the new pivot that they put up irrigates a few acres different than what the old pivot did and they transfer those maybe to across the road to another field where the new pivot is a little bit bigger or something like that. And it's kind of a wash in the end, it's really a small item. There just really aren't that many big time transfers out there now. Maybe in today's world that's going to change and certainly I can see why the bankers would want some protection in the changing environment. I'd answer any additional questions that committee members might have. [LB477]

SENATOR LANGEMEIER: Very good. Senator Haar. [LB477]

SENATOR HAAR: Thank you. Would this change the way you do business in any way? [LB477]

JASPER FANNING: Well, it would be one more step in a transfer process. In other words, we would require the person transferring acres to submit to us a lien search or they would have to essentially perform that, but that's the only thing that it would change. [LB477]

SENATOR HAAR: Okay. Thank you. [LB477]

SENATOR LANGEMEIER: Senator Fischer. [LB477]

SENATOR FISCHER: Thank you, Senator Langemeier. Thank you, Dr. Fanning for being here. When you're discussing what you've done in your NRD district for the past 30 years? [LB477]

JASPER FANNING: Twenty-eight. [LB477]

SENATOR FISCHER: Twenty-eight years, and you said that this wouldn't change anything in any way except for the lien search, correct? [LB477]

JASPER FANNING: Correct. [LB477]

SENATOR FISCHER: So you've already been working with the local bankers in your area on this? [LB477]

JASPER FANNING: We actually haven't. It just hasn't been an issue. [LB477]

SENATOR FISCHER: Do you think it will be an issue? You know, I assume you set your baseline 28 years ago when you certified your acres. Your baseline's been set, so

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you have no new wells unless you've done offsets. Have you done offsets? [LB477]

JASPER FANNING: We haven't actually done any. Well, there have been offsets that we have required not by state statute, necessarily, but within our own district for some industrial development with an ethanol plant, so yes, we have done some offsets. [LB477]

SENATOR FISCHER: Okay. So you see no problem if this bill would be passed with amendments that you may or may not have seen. You don't foresee that this is going to be any big change or big problem for NRDs and landholders and bankers and anyone else involved? [LB477]

JASPER FANNING: I don't see this as being a big obstacle for anyone involved. [LB477]

SENATOR FISCHER: Okay. Thank you very much. [LB477]

JASPER FANNING: You're welcome. [LB477]

SENATOR LANGEMEIER: Senator Dubas. [LB477]

SENATOR DUBAS: Thank you, Senator Langemeier. Thank you, Dr. Fanning. You made a comment in your testimony about to your knowledge, some banks are already including this in their loan documents, including some kind of language in their loan documents. Is that something that they're doing a lot of or? [LB477]

JASPER FANNING: I think it's actually, it's a bank that does business in both Nebraska and Colorado. And given the nature of Colorado's water law and some of the things that they do in Colorado with water, they have that in their contracts from business that they've done in Colorado for that reason. And once they moved to Nebraska they incorporated that into their new contracts when they made loans in Nebraska. And essentially, all they do is basically within the loan document, the borrower agrees that they will not transfer any right to apply water to the land off of that land or to any other interest without their approval. And that's essentially what this legislation asks of the NRDs is to assure that the lenders give their approval to transferring that right off the land. [LB477]

SENATOR DUBAS: So I guess that was my question, then. The banks could already be doing this just through their loan documents rather than going this route. [LB477]

JASPER FANNING: They could do it through their loan documents. Now that's obviously the party being the NRDs that have the ability to approve those transfers has no part in seeing that they are notified when it happens and so this is an additional

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protection for them. [LB477]

SENATOR DUBAS: Okay. Thank you. [LB477]

SENATOR LANGEMEIER: Dr. Fanning, I'm going to ask you one question that I think I already know the answer to. But if I put a well down, how far can I put a pipe in the ditch and take it? How far can I take it to another field? In law is there any stipulation that says you can't take it? [LB477]

JASPER FANNING: Well there are some transfer permits, if you will, if you're taking it off of...actually, if you own all of the contiguous land, I'm not sure that you have to have a transfer permit from the Department of Natural Resources. [LB477]

SENATOR LANGEMEIER: What if I don't? [LB477]

JASPER FANNING: It's by. [LB477]

SENATOR LANGEMEIER: I just want to lay it in the ditch, in the right-of-way if there's no traps in the ditch, I'd lay it down that ditch and go to the next field. [LB477]

JASPER FANNING: Well, assuming you don't need an industrial transfer permit, and I can't remember if crossing a roadway I'm not going to say for sure if crossing a roadway requires you to have an industrial transfer permit. Assuming you don't have to have one of those, that would be by district rules. Each district would be able to set its limitations on where the wells are. Typically, I can't think of an instance where someone drills a well that it doesn't irrigate land that it's either on top of or right across the road from. Now there...anyway, I won't...go any further. [LB477]

SENATOR LANGEMEIER: That's good. That's good. You confirmed what I said. Thank you. Thank you very much for your testimony. [LB477]

JASPER FANNING: Thank you. [LB477]

SENATOR LANGEMEIER: Is there any other testimony in a neutral capacity? Seeing none, Senator Carlson, would you like to close? [LB477]

SENATOR CARLSON: Simply close by saying we've had a number of testifiers that have testified on this bill. Many of them have come from a long distance and I appreciate their participation and those that have attended the session and thank the committee for your consideration of this bill. [LB477]

SENATOR LANGEMEIER: Very good. Thank you, you have heard the closing on LB477 and we'd like to thank everyone. We will now move on to the next bill for the day,

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which is LB438. Senator Fischer is here and she is recognized to open when she's ready. [LB477]

SENATOR FISCHER: Thank you, Senator Langemeier and members of the committee. For the record, my name is Deb Fischer, F-i-s-c-h-e-r. And I am the senator representing the 43rd District here in the Nebraska Unicameral. I appear before you today to introduce LB438. LB438 makes it clear that the Department of Natural Resources cannot approve an application for an instream flow appropriation when a river basin, subbasin or reach has been declared fully or overappropriated. This provision for an instream flow appropriation established in LB438 is consistent with the characterization of a fully or overappropriated determination. A fully appropriated designation directly asserts that existing uses of both surface water and hydrologically connected groundwater supplies are equal to but do not exceed the available water supplies over the long term. An overappropriated designation maintains that the existing uses exceed the supply and surface water flows cannot be expected, excuse me, can be expected to decline and groundwater table elevations can be expected to drop until either there is no water to use or the cost of using the water is too great to result in beneficial use. Either determination plainly affirms that there is no more water available for an appropriation. DNR does not grant a water appropriation to an irrigator; NRDs do not new wells. Therefore, LB438 clarifies that if a basin is, in fact, fully or overappropriated then there is not water to appropriate including and instream flow appropriation. There are many misconceptions as to the definition of instream flow. An instream flow is not a minimum flow requirement in a stream. An instream appropriation is the undiverted application of surface water for recreation or fish and wildlife. Only the Game and Parks Commission and the natural resources districts have the statutory authority to acquire an instream flow appropriation. Instream flow appropriations are administrated like any other water appropriation and the Department of Natural Resources grants that appropriation. Current statute requires that in order to grant an instream flow right, the director of DNR must find that in order to allow for future beneficial uses, there is unappropriated water available to provide the approved instream flow rate at least 20 percent of the time during the period requested. Secondly, the appropriation is necessary to maintain the existing recreational uses or needs of existing fish and wildlife species. Third, the appropriation will not interfere with any senior surface water appropriation. Fourth, the rate and timing of the flow is the minimum necessary to maintain the existing recreational uses or needs of existing fish and wildlife species. And finally, that the application is in the public interest. LB438 adds an additional finding clarifying that an instream flow appropriation cannot be granted in a fully or overappropriated basin. The constitutional standard has been that water rights are only granted when unappropriated water is available. While LB962, the legislation passed that establishes the principles surrounding fully and overappropriated basins allows for a variance in basins designated as fully appropriated, no such variance can circumvent the substantive requirements of 46-2,115(1), that being that there is unappropriated water available to provide the approved instream flow rate at least 20

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percent of the time during the period requested. Even if it were legally possible that an instream appropriation could be granted, such an appropriation would not offer any additional protection since fully appropriated designation prevents the DNR from granting any new surface water applications and prevents the NRD from granting any new groundwater uses that go above the baseline set at the time of the fully appropriated determination in the basin. Thank you, Mr. Chairman. [LB438]

SENATOR LANGEMEIER: Thank you. [LB438]

SENATOR FISCHER: That was not my phone. [LB438]

SENATOR LANGEMEIER: Trust me, I'll find out whose it is. [LB438]

SENATOR FISCHER: I will too. [LB438]

SENATOR LANGEMEIER: That won't happen again. Any questions for Senator Fischer? Seeing none, thank you very much. [LB438]

SENATOR FISCHER: Thank you. [LB438]

SENATOR LANGEMEIER: Now we will move to testimony in support of LB438. Don't be bashful, come on up. Mr. Edson, welcome. [LB438]

DEAN EDSON: (Exhibit 6) Yes, thank you, Senator Langemeier and members of the committee. My name is Dean Edson, D-e-a-n E-d-s-o-n, and I'm the executive director of the Nebraska Association of Resources Districts. I have printed copies of a letter I'd like to submit for the record. The Middle Niobrara NRD had intended to come down and testify today but was unable to make it in due to some schedule conflicts so they faxed a letter into my office this morning and I'm submitting that as part of the record of my testimony on their behalf. I would like to point out right up front so everybody understands the NRDs are not opposed to instream flow rights. As a matter of fact, the Central Platte NRD holds an instream flow in the Central Platte area in Nebraska of about 1,200 CFS. We worked real hard to obtain that instream flow and had a lot of opposition to that and finally we were able to acquire that right. What I wanted to applaud Senator Fischer for introducing this bill because this points out an issue that I don't think anybody thought about when they were really pushing hard for to get LB962 passed. There's a lot of folks, maybe a few in this room, that were probably pretty excited to maybe stop irrigation and stop new uses of water across the state. And sometimes we need to be cautious about what we ask for because sometimes you have some unintended consequences and this may be one of them. That once you declare a basin fully appropriated, there is no unappropriated water available to grant such a right. And I know there's a lot of folks in the state that would like to see maybe some instream flow right or reasonable instream flow right but right now we're not able to do that. And

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so, again, Senator Fischer brought this issue up and we had some discussions with her over the summer and we talked with the Attorney General's Office about this to try and figure out some other way but apparently there isn't right now. I know, Senator, there's one section, subsection 3c on page 4, that there has been some discussion about maybe coming up with some clarifying language. There are some concerns raised by some surface water interests and maybe some issues that may be going on the Platte River. I do not have the appropriate language to offer for the committee today. I know some other parties have been working on that and maybe come forward with some language that would allow for and clarify in statute that a transfer from one use to an instream flow use would be permitted in certain circumstances. But I don't have that language today and we would be supportive of looking at that language. Again, as Senator Fischer said with once a basin is declared fully appropriated there are no new appropriations allowed and the districts have to impose moratoriums on new wells and new irrigated acres. And we have a lot of people that are upset with us because they want to add another 80 acres and they don't want these determinations made. Well this 80 acres may result in maybe one-tenth of a CFS impact to the stream. It doesn't matter. They can't get that new one and we deny those. The same with a surface water diversion. I only want a quarter CFS, and it's not going to impact the stream that much. Well, I'm sorry, you can't get it because the basin is fully appropriated. So when you start looking at somebody coming in and saying we'd like to get a 1,500 CFS instream flow right and you are denying these that have minimal impacts, it makes it hard to justify making those initial denials to those that just want a little bit more. So with that, I will close and try to answer any questions you may have and again, I want to thank Senator Fischer for bringing the issue to surface so that we can discuss it. [LB438]

SENATOR LANGEMEIER: Thank you, Mr. Edson, are there questions? Senator Haar. [LB438]

SENATOR HAAR: Again, I apologize but this is instream flow 101 for me. [LB438]

DEAN EDSON: Okay. [LB438]

SENATOR HAAR: I think now I understand the concept of fully appropriated and overappropriated, we've heard enough on that. You said if there were an instream flow right. What would that mean? I know we don't have one, but what would an instream flow right mean? [LB438]

DEAN EDSON: What does an instream flow right mean? [LB438]

SENATOR HAAR: Yeah, yeah. [LB438]

DEAN EDSON: Well, we do have them and they do exist. The Central Platte NRD has an instream flow right. [LB438]

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SENATOR HAAR: Explain what that means. [LB438]

DEAN EDSON: I'll try to simplify the best I can. You pick a stretch of the river and you pick a point that says at this particular point we would like to have 1,200 cubic feet per second flowing by this for wildlife and recreation purposes. And you go to the department and request that and interested parties can either oppose you or support you on that and the department makes a final determination. In the case of the Central Platte, we have a 1,200 CFS water right, instream flow right... [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: ...on the Central Platte River. [LB438]

SENATOR HAAR: And how would this bill dance with that instream flow right? [LB438]

DEAN EDSON: It would not impact that instream flow right at all. [LB438]

SENATOR HAAR: The current...the existing one? [LB438]

DEAN EDSON: The existing ones it would not impact. What this...what Senator Fischer has pointed out here is that for new applications. [LB438]

SENATOR HAAR: For new applications, okay. [LB438]

DEAN EDSON: That's where you run into the dilemma and that's what is pointed out here. [LB438]

SENATOR HAAR: Gotcha. [LB438]

DEAN EDSON: So somebody comes in after the fact now and wants a new instream flow right in the Central Platte, or in the Niobrara River that has been declared fully appropriated, we can't provide it because there's no unappropriated water available. [LB438]

SENATOR HAAR: Gotcha, thank you very much. [LB438]

SENATOR LANGEMEIER: Senator Carlson. [LB438]

SENATOR CARLSON: Senator Langemeier. Mr. Edson is...I'm going to state it a little bit differently, but if I'm right this helps me understand it better. If you're fully appropriated, you're using all the water that you have available. And being fully appropriated you can't drill a new well unless you offset it with an existing well. You

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can't have any new surface water irrigation expansion unless you shut off some existing surface water expansion. So you couldn't have a new instream flow unless you reduced an existing one. And that's the purpose of this bill. [LB438]

DEAN EDSON: Yes. [LB438]

SENATOR CARLSON: Make it consistent across the various possible uses of water. [LB438]

DEAN EDSON: Correct. It treats everybody equally. [LB438]

SENATOR CARLSON: Okay. Thank you. [LB438]

SENATOR LANGEMEIER: Senator Haar. [LB438]

SENATOR HAAR: I have another question, thank you. Do these instream flow rights carry a time, number of years with them or anything like that? [LB438]

DEAN EDSON: Yeah, there's a...if you're granted the right and... [LB438]

SENATOR HAAR: By the way, who is granted the right, is it the NRD or the people of Nebraska, or who is granted the right? [LB438]

DEAN EDSON: The NRDs can hold the right or the Nebraska Game and Parks. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: Okay. And both...the NRD holds an instream flow right and so does the Game and Parks. And the Game and Parks has one in different stretches of the Platte River... [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: ...and in some cases they overlap. But they're pretty close to the same volume of water. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: Let's say that the Central Platte...I can't remember the date but the date the application goes in is the priority date you had. So let's say for example, on January 1, 1991, Central Platte came in and filed their application with DNR. If that right is granted, that becomes the priority date for that instream flow right. [LB438]

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SENATOR HAAR: Okay. So the DNR issues these. [LB438]

DEAN EDSON: DNR issues that permit, then any new user that comes in behind that would then become junior. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: So those users could be regulated to meet that instream flow right but nobody prior to that date could be regulated. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: To try to meet those flows. [LB438]

SENATOR HAAR: And then how many years does it go for, does that? [LB438]

DEAN EDSON: There's a provision in law that they are to be review every 15 years. [LB438]

SENATOR HAAR: Okay, and so if after 15 years has come and gone, do I maintain my senior right to...if I'm the Game and Parks, do I maintain the senior rights? [LB438]

DEAN EDSON: Yes. If that 15 years goes by and there's no issues at hand and the department says that they're good to go for another 15 years, you keep that 1991 date. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: You keep that until that water right is terminated or transferred. [LB438]

SENATOR HAAR: Now do I have that right, let's say if the 15 years work and can the DNR step in and revoke that right, do you know? [LB438]

DEAN EDSON: I don't believe. [LB438]

SENATOR HAAR: I'm just trying to understand what the right means. [LB438]

DEAN EDSON: I don't believe they can revoke that right without a hearing on an instream flow, but I think maybe the department might come up later and I'd rather have them answer that question. [LB438]

SENATOR HAAR: Okay, well I can ask that question of them. Thank you. Yeah, thank you very much. [LB438]

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DEAN EDSON: They administer that so. [LB438]

SENATOR HAAR: Okay. [LB438]

DEAN EDSON: I don't want to answer and be wrong, for them. [LB438]

SENATOR LANGEMEIER: Seeing no other questions, thank you, Mr. Edson. [LB438]

DEAN EDSON: Thank you. [LB438]

SENATOR LANGEMEIER: Further testimony in support of LB438? Welcome. [LB438]

DUANE SUGDEN: Senator Langemeier and members of the Natural Resource Committee, I am Duane Sugden, that's D-u-a-n-e S-u-g-d-e-n. I farm near Sterling, Nebraska. I currently serve on the Nebraska Farm Bureau board of directors and I'm here today on behalf of Nebraska Farm Bureau in support of LB438. I might also add I currently serve on the Nemaha NRD board as well. LB438 in our view makes perfect sense. It simply states that in basins declared to be fully or overappropriated, instream flow appropriations cannot be granted. Today in order for DNR to grant an instream flow appropriation, it must find unappropriated water is available. By virtue of its finding a basin fully or overappropriated, DNR has determined existing use equal existing supply or use has outpaced supply. In other words, there is no water available for appropriation. Some will argue an instream flow is not a consumptive use of water, therefore instream flows should still be allowed in fully or overappropriated basins. The granting of an instream flow does take water off the table for other uses. It has the same effect as other uses. It is a water protected and not allowed to be consumed by others, thus to other users in a basin it has the same effect as a consumptive use. We have also heard suggestions that instream flows should be granted to ensure protections are in place in the event DNR decides a basin is no longer fully or overappropriated. While DNR certainly has the discretion to find a basin is no longer fully appropriated, we question why instream flows should be afforded differently treated from other water uses. Those applying for additional groundwater uses or other surface water uses while a basin is fully appropriated if they increased the total use in a basin. And instream flows should not be treated any differently. If a basin's status is changed, instream flow applications can be filed similar to other uses. For these reasons, Nebraska Farm Bureau supports LB438. And thank you and I would be happy to answer questions you might have. [LB438]

SENATOR LANGEMEIER: Thank you. Very good. Senator Haar. [LB438]

SENATOR HAAR: Thank you. Again I'm trying to learn the subject, so. Right now, what would happen, do you know if DNR granted instream flow rights and an area was fully

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appropriated. [LB438]

DUANE SUGDEN: I'm probably not the one to answer that question, I'm really. [LB438]

SENATOR HAAR: Okay. I can ask that later to see what would happen, yeah. Now, in your discussion if all of a sudden this stream becomes...or there's sufficient water now and that would change, would you see the instream flow rights going to the top of the list or just getting in line with everybody who applied for it? [LB438]

DUANE SUGDEN: Well I, you'd probably have to put them in order, I would assume. I'm not sure what you mean by that but. [LB438]

SENATOR HAAR: Does the DNR directive take precedence over other people applying for that water use, then. [LB438]

DUANE SUGDEN: Again... [LB438]

SENATOR HAAR: Maybe I'm not being clear. [LB438]

DUANE SUGDEN: Well, again, I think you'd probably have to ask the DNR that question, I'm really not familiar with those... [LB438]

SENATOR HAAR: Sure. No, I thank you. [LB438]

DUANE SUGDEN: ...questions, so. [LB438]

SENATOR LANGEMEIER: Seeing no other questions, thank you very much for your testimony. [LB438]

DUANE SUGDEN: Thank you. [LB438]

SENATOR LANGEMEIER: Very good. Other testimony in support? Welcome back. [LB438]

TOM KNUTSON: Thank you, Senator Langemeier, members of the committee. Again, my name is Tom Knutson, T-o-m K-n-u-t-s-o-n, and I'm president of the Nebraska State Irrigation Association and we're here to support the bill with a change, restoring the original language on page 4, line 17. And the reason for that in many river basins in Nebraska we're working hard to improve stream flow for compliance with interstate compacts and agreements and the needs of integrated ground and surface water management programs such as CREP, Conservation Reserve Enhancement Program and Platte River Recovery Implementation Program require improvements in stream flow to meet the goals of the objectives of these programs. Without the ability to transfer

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lease appropriations to the instream use and protect the instream benefits it would be impossible for these programs to be successful. We thank the senator for introducing the bill and we do support the bill if we could go back to the original language on page 4. [LB438]

SENATOR LANGEMEIER: Thank you very much, I have a question. Do you have a copy of the bill? [LB438]

TOM KNUTSON: Yes. [LB438]

SENATOR LANGEMEIER: You said page 4, line 17, there's nothing there. Would it be a different page, different? [LB438]

TOM KNUTSON: I'm the messenger. (Laughter) [LB438]

SENATOR LANGEMEIER: So you can provide that to us at a later date, then. Would that be fair to say? You can provide us the right page. [LB438]

TOM KNUTSON: Yeah, I kind of limped up here but I'll certainly try to find it. [LB438]

SENATOR LANGEMEIER: Okay. I'm just making sure I heard you right because I thought you said 4, 17. [LB438]

TOM KNUTSON: Yes. [LB438]

SENATOR LANGEMEIER: Any other questions? Yes, Senator Haar. [LB438]

SENATOR HAAR: Does this instream flow have any bearing on what's happening, I'll wait for the question. [LB438]

TOM KNUTSON: I'm being told it's there. [LB438]

SENATOR LANGEMEIER: We add a five, you don't want the five in parenthesis? Maybe you can come up and testify, next, not right now but we might let you off the hook. [LB438]

SENATOR HAAR: Well then I'll complete my question, yeah. And again, maybe this...this may or may not be a question for you in particular but does this have anything to do with the instream flow rights to do with what's going on the in Republican River right now, in the Republican River basin? [LB438]

TOM KNUTSON: I don't know that there's any instream flow applications down there in regard to Game and Parks or NRDs. [LB438]

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SENATOR HAAR: Okay. And the flow there has to do with other. [LB438]

TOM KNUTSON: It has to do with the irrigation districts that have flow rights. [LB438]

SENATOR HAAR: Okay. Um-hum. Thank you. [LB438]

SENATOR LANGEMEIER: Okay. Thank you very much. [LB438]

TOM KNUTSON: Did we find it? [LB438]

SENATOR LANGEMEIER: Yeah. I find a line out of an and, but I don't understand why that's significant so we're going to get that in the next testifier I see. Thank you. [LB438]

TOM KNUTSON: Thank you, Mr. Chairman and members of the committee. [LB438]

SENATOR LANGEMEIER: Next testifier in support of LB438 and I'm going to get educated, which is a daily event for me. [LB438]

LEE ORTON: That's probably questionable on both accounts, Senator. Senator Langemeier, members of the committee my name is Lee Orton. I am the executive director for the Nebraska State Irrigation Association. You asked the question about the change which is on line 17, page 4. It proposes to strike a little bit and add and (5). What we want is the original language restored which means that the and goes back in between three and four and the new language and (5) goes out. So that means it does not cross reference that particular section of the statutes to the new language which appears on page 8 of the bill, and would not set that standard as part of the imposition of the requirements necessary to comply with the obligations back on the provisions on page 4. [LB438]

SENATOR LANGEMEIER: Very clear. [LB438]

LEE ORTON: That's the only purpose of it, frankly. And I think that takes care of the problem. We have discussed that subject with the several irrigation districts who have some responsibilities to put water back into the river to satisfy Platte River Recovery Program needs and for other purposes and they believe that will solve the problem. [LB438]

SENATOR LANGEMEIER: Okay. [LB438]

LEE ORTON: Any other questions? I'd be happy to try to answer them if I can. [LB438]

SENATOR LANGEMEIER: You've answered mine. Are there any others? Senator Haar.

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Since you're here. [LB438]

SENATOR HAAR: Well okay. I'm learning, thank you. Is this a matter of clarifying the law or is this to get the upper hand in some kind of argument going on? [LB438]

LEE ORTON: I think it's an attempt to try and clarify the law. [LB438]

SENATOR HAAR: Okay. [LB438]

LEE ORTON: I can't imagine that it would be anything else and that certainly, Senator, is not our intent in supporting legislation if that's somebody else's purpose. [LB438]

SENATOR HAAR: Well I'm just curious. It seems to be bubbling up other things. [LB438]

LEE ORTON: Well, you know, instream flows have always been a controversial subject and so I suspect it's possible that people suspicion things that are not necessarily there as an intent. Maybe that's the case here. But it is just as simple as it has been described by other testifiers. The purpose here is to make certain that all water rights are protected on an equal basis in a basin where that basin is either fully or overappropriated. [LB438]

SENATOR HAAR: Okay. [LB438]

LEE ORTON: And if in fact the basin is shut off to all other uses, then it makes logical sense to conclude that it should be shut off to this use as well other than what is there now in the stream. [LB438]

SENATOR HAAR: Okay. Okay, thank you. [LB438]

LEE ORTON: I think that's all the intention is. [LB438]

SENATOR HAAR: Okay. [LB438]

SENATOR LANGEMEIER: Very good. Thank you for educating me. [LB438]

LEE ORTON: Thank you. [LB438]

SENATOR LANGEMEIER: Further support testimony? Welcome. [LB438]

BOB HEINZ: Thank you. Good afternoon, Chairman Langemeier and members of the committee. My name is Bob Heinz, H-e-i-n-z. I'm the general manager of Dawson Public Power District headquartered in Lexington, Nebraska. I am here representing the

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Nebraska Rural Electric Association and I'm here to testify in favor of LB438. I have just some very brief comments. The NREA member systems provide or serve electrically farms, ranches, irrigators, municipalities, and businesses who all depend on Nebraska's water resources. We approve of a process to manage our water resources for all stakeholders in a river basin which is addressed in this legislation. And we support the concept of providing no additional instream appropriations in a fully or over allocated river basin. We believe that these are just common sense issues and we are in support of the legislation as provided. I would stand any questions. [LB438]

SENATOR LANGEMEIER: Thank you very much. Are there any questions for Mr. Heinz? Seeing none, thank you very much for your testimony. [LB438]

BOB HEINZ: Thank you. [LB438]

SENATOR LANGEMEIER: Further testimony in support? [LB438]

JIM PAPPAS: Mr. Chairman and committee members my name is Jim Pappas, P-a-p-p-a-s. I represent the Independent Cattlemen of Nebraska. I'm the registered lobbyist. We're here in favor of LB438, particularly for its clarification of the existing law and I don't want to answer any questions. (Laughter) [LB438]

SENATOR LANGEMEIER: That doesn't mean we can't ask them. Are there any questions? They're taking you serious; you're off the hook. Thank you Mr. Pappas. Further testimony in support. It's good everybody's got a sense of humor this time of day. More cattlemen, welcome. [LB438]

DUANE GANGWISH: Good afternoon, Senator. My name's Duane Gangwish, D-u-a-n-e G-a-n-g-w-i-s-h, registered lobbyist for Nebraska Cattlemen. We too, want to lend our support to this. Our board reviewed this and agree in principle of the intent of the legislation and also as amended, so thank you. [LB438]

SENATOR LANGEMEIER: Thank you. Are there any questions? Okay, they let you off too. Very good. Other testimony in support of LB438? Okay, seeing none we'll move to opposition. Those that would like to testify in opposition to LB438. Don't be bashful, come on up, you'll all get a chance. Welcome. [LB438]

DUANE HOVORKA: (Exhibit 7) Thank you. Good afternoon, my name's Duane, D-u-a-n-e Hovorka, H-o-v-o-r-k-a, from Elmwood, Nebraska, and I'm here on behalf of the National Wildlife Federation, the Nebraska Wildlife Federation, the Nebraska League of Conservation Voters to testify in opposition to LB438. I've got some written testimony that I'm passing around. I'm going to shorten a couple of those sections because I think other people can cover them better. But we have primarily three objections to LB438. The first is that it could endanger the Platte River Recovery

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Program. You've heard a little bit of that already and I think you're going to hear more later. But the bottom line is that if as it appears, the legislation would prohibit the transfer of water rights leased or otherwise obtained in the Platte Basin to instream flow purposes, that could make it very difficult to protect that water downstream and thus to implement the Platte River Recovery Program. The third section of my testimony deals with another unintentional result of this legislation, which is that we believe it could ultimately result in federally reserved water rights on the Niobrara River, and others with more expertise are going to talk about that later today. So just let me summarize by saying that to date the federal agencies on the Niobrara, the National Park Service and the Fish and Wildlife Service have indicated a strong preference to have a state agency protect fish, wildlife, and recreational flows under Nebraska law. However, should LB438 be enacted and should state protection of those flows become impossible both federal agencies have, in our view, a duty to federal taxpayers to press their case for federally recognized water rights that will date to the establishment of the refuge and the establishment of the scenic river. And in those cases federal reserved water rights, unlike state water rights, cannot be transferred for other uses. So let me focus on the second section of my testimony which discusses how, exactly, LB438 would defeat the multiuse purpose of LB962. Now, when Nebraska updated its water laws by passing LB962 in 2004 it adopted a philosophy that compatible the use of river flows should be allowed and encouraged when it can be done without harming existing users. The critical issue raised in this bill is what surface water rights are going to be allowed in a fully appropriated basin and which ones...and will all the beneficial uses of water under Nebraska law be allowed to be protected or only some of them. LB962 did not simply provide a permanent end to any new surface or groundwater use in a watershed declared fully or overappropriated. Instead, the bill put in place a temporary stay on some but not all new surface water rights and groundwater well permits during the time needed for the natural resources district involved, and the Department of Natural Resources to develop an integrated management plan. The period of those stays is limited by statute to three years unless the NRD and the DNR agree to extend them and at the end of that three years or at the time the integrated management plan is put in place those stays...too close? [LB438]

SENATOR LANGEMEIER: It picks it up better if the mic is out...for the record. [LB438]

DUANE HOVORKA: Okay. At the end of those three years or when the integrated management plan is in place those stays on new surface water applications and groundwater permits ends. And those, at that time then, would have to be done in a way that was in compliance with the integrated management plan. LB962 provided a long list of 15 different exceptions to those three-year stays and in general, those exceptions are provided or either the new use would do no harm to existing water rights or permits or where the water is needed for a priority domestic use, essentially for humans or livestock. And among that list of exceptions is one for surface water uses for which a variance is granted by the department for good cause shown. The new law, LB962, also

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put in place a process, the integrated management plans, to find ways to meet future new beneficial uses of water by finding water offsets, where a new use would otherwise harm an existing surface or groundwater user. That integrated management plan by law may or may not include restrictions on additional surface water rights and it may or may not include restrictions on the drilling of additional groundwater wells. But the plan must ensure that existing surface water rights and groundwater permits are respected. I urge you to give LB962 a chance to work, to give those integrated management plans a chance to be put in place and to see how they work before you make this kind of substantial revision to the law. Since 1984, instream flows for fish, wildlife, and recreation have been recognized beneficial uses of Nebraska surface water. Instream flows are not consumptive use of water, they take no water out of the stream, they simply protect water in the stream that is relied upon for fish, wildlife, or recreation. Because they do no harm to other existing water users, instream flow water rights can and should be allowed and encouraged as being compatible with other existing beneficial water uses. I'd remind you that the Governor's task force developed and recommended LB962 was dominated by surface water irrigators, groundwater irrigators, and natural resources district representatives, yet that task force had the wisdom to recognize the important role that instream flow water rights play in protecting our state's natural resources and they chose not to weaken the law in that respect. Instream flow applications are not automatic, the Department of Natural Resources must find that the appropriation is necessary, that the water is there, that the flows requested are the minimum necessary to maintain the existing recreational uses or needs of existing fish and wildlife species and the application must also meet a public interest test. To pass LB438 would be to deny the opportunity to protect the water needed for compatible use of fish, wildlife or recreation, and that do not consume water while allowing it for uses that do consume water. It would forever prohibit an instream flow water right in a fully appropriated basin while not denying to consumptive users of surface or groundwater the right to obtain appropriations or permits in that same basin. With some two-thirds of Nebraska now in fully or overappropriated watersheds, this bill would apply to more than just the Niobrara River, it would apply to most of our state. The bill would turn the multiple use philosophy of LB962 on its head. It would be a radical rollback of Nebraska's instream flow law. It would do a great disservice to the canoe outfitters, hunting and fishing guides, hotel and restaurant owners, and others whose businesses depend upon having water in Nebraska's streams. Their only means of protection is to have instream flow water rights in place to protect their interests. For all three of these reasons, we ask you to oppose LB438 and I'd be glad to try and answer any questions. [LB438]

SENATOR LANGEMEIER: Are there any questions? Let's start with Senator Schilz. [LB438]

SENATOR SCHILZ: Thank you. Mr. Hovorka, is that right? [LB438]

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DUANE HOVORKA: Yes. [LB438]

SENATOR SCHILZ: Welcome, today and thanks for taking the time. I guess one of the questions I would have is LB962, as it was presented, as it was passed, would you describe that as a huge rollback for all of water law in the state of Nebraska and what we did before was definitely different than how we're going forward? [LB438]

DUANE HOVORKA: Oh, quite the contrary. I think LB962 modernized our state's water laws. [LB438]

SENATOR SCHILZ: Right. But it did change, and turn it on its ear. We were heading in a completely different direction as we were headed before, correct? [LB438]

DUANE HOVORKA: That's true. [LB438]

SENATOR SCHILZ: Absolutely. Okay, and you're right. I shouldn't call it a rollback because I think that it...I agree with you in that sense. Thank you. [LB438]

SENATOR LANGEMEIER: Senator Haar. [LB438]

SENATOR HAAR: To follow up on Ken's question, how did it change that? And this is having me try to understand where we've been and where we're going. [LB438]

DUANE HOVORKA: Right. [LB438]

SENATOR HAAR: If you agree that it changed. [LB438]

DUANE HOVORKA: Well it changed it fundamentally because it recognized that you can in a watershed get to the point where you're essentially using all the resources that are available. [LB438]

SENATOR HAAR: Okay. [LB438]

DUANE HOVORKA: Or in some cases more than the water resources that are available. It recognized that we need to find ways to meet future new water uses in a way that does not further harm those existing water uses that are already in place as a result of either surface water rights or groundwater permits. [LB438]

SENATOR HAAR: So, in the old system or what you're proposing, would water rights then, instream water rights, take precedence in a way? Do you see that as over this appropriated or not appropriated? [LB438]

DUANE HOVORKA: No, the only thing that an instream flow water right takes

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precedence over is a later water right. So, in the Niobrara or any other watershed if you already have a right to the water in the river, that instream flow application doesn't effect you. It would only effect somebody who came in with a new use and said I want to build an ethanol plant, or I want to irrigation more acres, or I want to use the water somehow else. And to me that's a fundamentally important philosophy that people who want to do that have a duty to the people who are already making beneficial use of that water that they don't harm them. That they find a way whether it's buying out somebody's water right or doing something else that would maintain them as whole, not to inflict harm on those people who are making beneficial uses of that water. And for most people, what gives you that protection is your groundwater well permit or your surface water right. But the people along the Niobrara, the outfitters who depend just as much on that water as a farmer does who is irrigating his corn, don't have that protection because under Nebraska law you can't get an instream flow water right for yourself. So the only way they can protect that water, the only way they can protect millions of dollars of investment in those businesses and all the jobs they create is for the Game and Parks Commission or a natural resources district to go in and ask for legal protection for that water so at least the minimum flows needed to continue to float those canoes and kayaks will be there for the future. [LB438]

SENATOR HAAR: Okay. So under what you're proposing...what the bill proposes is that the minute a stream is labeled as appropriated or overappropriated that's it. No more water rights of any kind can be assigned until it's worked out. [LB438]

DUANE HOVORKA: Well, what...the current law does not provide that. What the bill only says is once it's fully appropriated, you cannot get an instream flow right. [LB438]

SENATOR HAAR: Right. [LB438]

DUANE HOVORKA: It doesn't say you can't get other kinds of water rights. [LB438]

SENATOR HAAR: Okay. And at least from your testimony you implied that that should at least wait until an integrated management plan is in place? That this prohibition? [LB438]

DUANE HOVORKA: Well, the way that the law works right now is if your use does not harm other existing rights or permits then whether it's a water right or a permit, it can still be granted before those integrated management plans are in place. [LB438]

SENATOR HAAR: Okay. Okay. Senator Langemeier, I apologize for using...I'm still having trouble with titles. [LB438]

SENATOR LANGEMEIER: You're doing good. Senator Schilz, did you have another question? [LB438]

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SENATOR SCHILZ: Yes. I guess my question is, is that when we did, even before LB962 but when LB962 was put in place, at that time if I...and you can correct me if I'm wrong...but didn't we say...didn't we agree and put it down that there would be no new surface water appropriations and a stay on all new groundwater development? [LB438]

DUANE HOVORKA: Well, what we did...and I've got LB962 with me if you'd like to see it, and I can probably find the section here. What we did is we said until those integrated management plans are in place, we're not going to issue any new wells or any new surface water rights that would effect those existing users. What we also left open the option that once those integrated management plans were in place we could again start granting those rights and those permits but it would have to be done in a way that followed the management plan. And so you could get a new water right by buying out somebody else's water right or...that was the philosophy. [LB438]

SENATOR SCHILZ: You're right and so and as far as I know in my situation on my farm, if I want to expand irrigated acres or if I want to do another thing or provide...or if a community...or I should say, excuse me, let me back off of the community for a second, or if somebody wants to do new development they have to mitigate for that. [LB438]

DUANE HOVORKA: Right. [LB438]

SENATOR SCHILZ: Is that correct? [LB438]

DUANE HOVORKA: Right. [LB438]

SENATOR SCHILZ: Okay. And so is that a problem for instream flows? [LB438]

DUANE HOVORKA: No I think instream flows would be held to the same standard that if an instream flow application did harm to another person with a water permit or a water right that they would have to find a way to mitigate whatever that harm is. [LB438]

SENATOR SCHILZ: So what you would say is that an instream flow is a new use, and whether you are consumptively using that for crops or not, it is consumptively used to the system going forward. [LB438]

DUANE HOVORKA: Well, I don't think it's...well, as you defined consumptive use, I guess, is the question. The instream flow doesn't actually consume water, so it's still in the river. [LB438]

SENATOR SCHILZ: But you understand where I'm going with that? [LB438]

DUANE HOVORKA: Yeah, and I understand the point that others have made that it

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takes the water off the table for future development. [LB438]

SENATOR SCHILZ: Right. [LB438]

DUANE HOVORKA: And that's very true, and to me that's very justified because what you are doing is protecting that water and the existing businesses that already depend on having that water in the stream. [LB438]

SENATOR SCHILZ: Right. Sure. Absolutely, okay, thank you. [LB438]

SENATOR LANGEMEIER: Senator Carlson. [LB438]

SENATOR CARLSON: Senator Langemeier. Help me understand how an instream flow is not, does not involve, I'd like to agree with you, does not involve any consumptive use. [LB438]

DUANE HOVORKA: Well, what you're protecting is the flow in the stream. So if the stream...if the water is in the stream and you're simply saying, legally we're not going to allow people to take that chunk of water out of the stream, there's no additional consumption of the water. It's not like you're taking it on, you know, growing plants with it or something, or they're not taking it out of the stream. A consumptive use is one that actually uses up the water. An instream use doesn't use up the water, it keeps it in place. Does that answer your question? [LB438]

SENATOR CARLSON: Well, you did. And I'm not arguing with you, it's kind of a convenient definition because I hear other people say that water flowing down the stream evaporates and disappears, so. And then I would argue that vegetation in the stream bed uses water and there's consumptive use. But I'd just as soon take your definition and that would help me out a little bit in terms of vegetation removal as well. But let me ask another question, on your second point here, in the third to the last paragraph because you say there in your first sentence that "protect water needed...compatible use for fish, wildlife, or recreation and that do not consume the water while allowing it for uses that consume water." It would prohibit forever an instream flow right in a fully appropriated basin. And I guess your answer to that will be in quoting a portion of LB962. [LB438]

DUANE HOVORKA: No. That's what LB438 says. It says that the director shall not approve an instream flow application in a fully appropriated watershed. [LB438]

SENATOR CARLSON: Well, but you're reading from LB962 that there could be additional water rights granted even in a fully or overappropriated basin by LB962? [LB438]

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DUANE HOVORKA: Yes. [LB438]

SENATOR CARLSON: And I would really argue with that, but that's a distinction there. Thank you. [LB438]

SENATOR LANGEMEIER: Senator Haar. [LB438]

SENATOR HAAR: Thank you. Since you're testifying in opposition, you're saying that basically this bill threatens instream flow rights. Okay. Explain that to me again. [LB438]

DUANE HOVORKA: It doesn't threaten the instream flow rights that are already in place on the Platte and I think it's Nine Mile Creek. Those are already in place. What it does, in one section at least, is it may interfere with the ability to transfer water in an overappropriated use to those rights. So that's one instance but in general, what it does is prohibit the use of instream flow water protection in the roughly two-thirds of the state that's currently fully or overappropriated. [LB438]

SENATOR HAAR: So it's new instream rights could not be assigned. [LB438]

DUANE HOVORKA: Right. [LB438]

SENATOR HAAR: Okay. It's sinking in, thank you. [LB438]

SENATOR LANGEMEIER: I have one question. With LB962 and fully appropriated and the 1050 line, the argument is that we've hit this point to where with the lag effect and everything that's out there that if we continue to pump or have additional pumping we're going to effect stream flow. Okay. So in theory, if we're fully appropriated, we should know what that stream flow effect is going to be. So if we stay at the current level of pumping or surface irrigation that we have, there should be no change in stream flow. [LB438]

DUANE HOVORKA: Okay. [LB438]

SENATOR LANGEMEIER: That's the whole purpose of LB962. Okay. We can only pump so much out with lag effect. So now, so in theory we shouldn't need instream flows because that shouldn't change because we're fully appropriated and we have this lag effect so we should not need any more instream flow designation. Now, if we give an instream flow to this portion of water that's out there flowing and for some reason we have a drought and that would decrease and your outfitters can't get their canoes down whatever river you're trying to go on, what's the pressure on the system over here to restrict the use of irrigation either in surface or the amount of pumping? Because we've lowered it, not by our pumping because we're fully appropriated so we have no more lag effect, our lag effect is accounted for so we haven't addressed that, except we don't

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have rainfall. Would not additional instream flows demand back a reduction on pumping and surface? [LB438]

DUANE HOVORKA: No, I don't think so. [LB438]

SENATOR LANGEMEIER: Isn't that the whole purpose of wanting an instream flow? [LB438]

DUANE HOVORKA: Well, it would only do that in the case of permits or in case of water rights that came after the instream flow application. So if you weren't granting anymore...the instream flow only protects water that's there under the right. [LB438]

SENATOR LANGEMEIER: But if that water that's flowing is 100 percent associated with the lag...preparing for the lag effect of the wells and the surface over here, okay? If that's the case, there's nothing to give you an instream flow on, except that you then want to reassure that that water in the instream flow stays there for some other purpose. And if you say it's only for future development, there is no future development because we're fully appropriated. What good is an instream flow? If there's no wells after you, and you think your right went somewhere...well, it didn't go to the pumpers or the surface because they're in fully appropriated. So they're balanced, they can't be held liable and you want this instream flow that changed something and there's no new wells going in because we're fully appropriated, what good does it do you? [LB438]

DUANE HOVORKA: Well, yeah, that's a good question. And let me see if I can try to explain it. The instream flow right only protects the water that's there in the stream from future users. So if you're under your management plan you are not granting any more new uses and to me, the whole purpose of the integrated management plan is to find ways to grant those new uses in ways that don't harm existing users. But as long as that's all you're doing then you're not...then the instream flow law doesn't shut off anybody else who had a past water right. But let me give you a stark example directly on the Niobrara because one reason that the Niobrara is fully appropriated is that NPPD has Spencer Dam downstream and they have rights to run a designated amount of water through that dam. I'm assuming that the DNR and the NRD are going to come up with a management plan that says you can do any water right or permit but you have to show us that you're going to hold all the other permit holders harmless. Okay. So I can go down by Spencer Dam, put in several high capacity wells, groundwater wells, pump that water into the river, NPPD is going to be fine because they've got the water they said they have under their right to run it through their dam and I can go pretty far upstream, take a whole bunch of water out of the river to meet my beneficial use, whatever it is. And under a logical integrated management plan, that would be fine because what we're doing is we're protecting everybody who's got an existing right. We're protecting NPPD's dam, we're protecting the folks upstream because we leave enough water for their consumptive use and if you think that's a wild-eyed idea, we're

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using that--or we're planning to use that under the Platte River Recovery Program out in the Central Platte where we're going to put high capacity wells in the Lexington area to pump water out of the groundwater mound to put it in the river to benefit fish and wildlife. And it's a fairly economical way to get water for the Platte Recovery Program. Now, under LB438 there would be no way to protect all those canoe outfitters who have water...who depend on that water in the river. But under that scenario you could pump the river at least low enough so that you basically would destroy the ability to float canoes down that river and that is why we think LB438 is wrong. That you ought to be able to provide protection to those existing businesses through those existing beneficial uses of water under LB962 and under those integrated management plans. [LB438]

SENATOR LANGEMEIER: Very good. That was the best part of your whole testimony right there. [LB438]

SENATOR HAAR: Another question for you. [LB438]

SENATOR LANGEMEIER: Senator Haar. [LB438]

SENATOR HAAR: Okay, so if a river is fully appropriated, or an area is fully appropriated this would prevent granting an instream right. Okay. Are there other things that could be done and I think maybe you've answered this already, but are there other kinds...let's say if there's going to be a manufacturing plant or something. Could allowance be made for that in an appropriated area or is everything just put on hold? [LB438]

DUANE HOVORKA: Well, everything is not put on hold and in fact the law, LB962, specifically allows if you want to put a well in to water your cattle, you can do that, even in a fully appropriated basin. If you want to have a temporary use of water for some sort of construction project, you can do that under a fully appropriated basin even without an integrated management plan. If you want to do, as you described, to put a new plant in if it's going to have an impact on other water users and it's not a temporary use then you would need to find a way under that integrated management plan, whatever it was, to make sure you're not harming other users in the basin. [LB438]

SENATOR HAAR: Okay. So then if you substitute instream flow for the plant that's going in, this would eliminate what you can do for that plant? You can find other ways to mitigate the situation. For the plant you can do that, for instream flow under this bill you couldn't do that. Is that accurate? [LB438]

DUANE HOVORKA: Right because you would not be able to get an instream flow permit at all. [LB438]

SENATOR HAAR: Okay. [LB438]

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SENATOR LANGEMEIER: Seeing no other questions, very good. Thank you very much for your testimony. [LB438]

DUANE HOVORKA: Thanks. [LB438]

SENATOR LANGEMEIER: Just for a kind of mental sake here, how many testifiers to we have yet. Oh, wow. We've got another function we have to go to so maybe we'll ask less questions. Welcome. Welcome. [LB438]

SANDRA ZELLMER: (Exhibit 8) Thank you, Chairman Langemeier and committee members for the opportunity to comment on LB438. My name is Sandra Zellmer, S-a-n-d-r-a, Zellmer Z-e-l-l-m-e-r, and I'm a professor of law at the University of Nebraska College of Law. As a lawyer, I'd be remiss if I didn't say all appropriate disclaimers apply to wit these remarks are my own personal opinions and do not express a official position of the University of Nebraska. I have taught water law for over 10 years, I've studied it for nearly 20 years but I'm a relative newcomer to Nebraska water law. When I moved here five years ago, the Legislature was about to adopt one of the most visionary water reform bills in the west, and that is of course LB962. This bill, LB438 has to potential to undermine some of the good work that's only just begun under LB962 and the integrated management plans that we're seeing come online. Let me explain why I think that is so. By prohibiting instream appropriations in fully appropriated watersheds, LB438 would leave our most treasured rivers and streams vulnerable to depletion. The statement of Legislative intent accompanying the bill provides that such a restriction would be consistent with the designation of fully appropriated and overappropriated given that such determinations indicate that there is no water available to appropriate. This is not so. The integrated water management provisions of LB962 enacted back in 2004 impose a stay on the issuance of surface water permits when a basin is declared fully appropriated. However, exceptions as Mr. Hovorka mentioned are authorized for transfers to new uses such as dedications to instream flow protection and for good cause, which includes nonconsumptive uses such as preserving flows. These existing provisions aspire to keep at least some water in Nebraska's streams for fish, wildlife, recreation, and the well being of both present and future generations of Nebraskans. In the past, too many western states and Nebraska and beyond set upon a path of development that left their stream beds virtually empty. In part, this was because we just didn't have the data necessary to determine how much available supply we had in between surface water flows and groundwater. Historically, though, any water that was left in the stream in the west was considered wasted. Without protection, streams became little more than concrete ditches all throughout the western United States. Citizens demanded that the law protect the streams they loved. Today, the majority of western states including Nebraska, as of 1984, have adopted some form of instream flow legislation. Why? Because streams are vital to this state's economic vitality as well as human and environmental health. Adequate flows are the essence of a stream. It's

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what makes a stream a stream. Streams aren't simply water delivery structures, ditches. Healthy streams maintain land values, meet the needs of fish and wildlife, support recreation of all types such as fishing, hunting, and boating. We rely on them as well to perform many essential ecosystem services, livestock watering, groundwater recharge, and dilution of sewage and other pollutants. Nebraska's economic vitality could well be threatened if our streams' needs, their instream flow needs, were ignored. This might be why over 80 percent of Nebraskans support protecting instream flows for fish and wildlife resources while 69 percent support protection for canoeing, swimming, and other recreational uses according to a 2008 survey done by the UNL's Bureau of Sociological Research. If this bill were passed, the state's ability to protect the beauty and integrity of rivers like the Niobrara and the Platte would be jeopardized. On the Niobrara, the ability to protect quantities of water needed to keep the river alive and functioning could help NRDs and the DNR develop integrated management plans pursuant to LB962. Note, however, that LB962 does not require IMPs, integrated management plans, to include instream flow protections. In fact, as far as I know there are four that have been adopted thus far and not a one of them actually explicitly includes instream flow protections, although that is a tool currently available to those basins. Rather, far from being mandatory, an instream flow appropriation is authorized as a management tool among many if, and only if, the natural resources district or in some instances the Game and Parks Commission requests it and if and only if the DNR grants it. LB438 would tie the hands of the local natural resources districts and the DNR to determine which tools are best to include in their integrated management plan. Moreover, this bill could put the Platte River Recovery Plan at risk because program managers may be unable to acquire water through transfers or otherwise to increase flows in the Central Platte. Mr. Hovorka mentioned that and I won't spend any more time discussing it unless you have questions. But the result could well be our ability to protect whooping cranes, least terns, and piping plovers and thus our compliance with federal laws such as the Endangered Species Act as well as the Nebraska Nongame Endangered Species Conservation Act would be in question. People might worry that instream appropriations are running rampant and locking up the state's water resources. Since the passage of its instream flow law back in 1984, though, only around 280 miles of Nebraska's some 12,400 miles of fishable streams have actually received protection. That's about 2 percent; we're not using this tool to excess as it is. And this is because there are strict limitations placed on instream appropriations under current law. Far more so than there are placed on other kinds of appropriations and this is under Nebraska Revised Statute 46-2115. First, instream flows may be appropriated only to maintain existing recreational uses or existing fish and wildlife species. Second, only the Game and Parks Commission and the natural resources districts may hold instream flow rights. Third, there is a public interest review requirement for instream flow applications and this is similar to all new applications for water appropriations, this public interest review. However, for instream flow appropriations the Department of Natural Resources is explicitly directed to weigh those types of applications--instream applications that is, against specified enumerated economic and social values and to

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deny such applications if they are not consistent with those values and therefore not in the public interest of Nebraskans' present and future generations. Fourth, unlike appropriations for diversions and consumptive uses once granted, instream appropriations are reviewed periodically by the DNR, every 15 years to ensure that they remain in the public interest. And indeed, the DNR has explicit authority to cancel those applications if indeed it finds after 15 years that they are no longer in the public interest. Other types of appropriation are granted in perpetuity, so this is a key restriction that's imposed only on instream flow applications. Fifth, instream appropriations cannot interfere with senior appropriators. They can only safeguard a stream against diversions by more junior users. And existing instream appropriations, for the most part, are recent vintage, post 1984. So they tend to be last in line and therefore cannot upset the apple cart. Finally, instream flow appropriations apply only to the stream segment covered in the application. Once the water passes through that segment, it can be put to use by downstream appropriators. As it is, with these restrictions, Nebraska instream flow laws are among the most restrictive among the western states. It should not be made more so by the adoption of this bill. Now in sum, on its face, LB438 appears to be an effort to come to grips with water scarcity. A laudable initiative. And no doubt it's difficult for all of us to cope with the idea that our demands have met and in at least many of our basins and in some cases have exceeded our supply. But eliminating the ability to maintain some water in the stream cannot create, magically, more water. Rather, if this bill passes it kills the use of instream appropriations in exactly those basins where they are most needed. In doing so, it would defeat the most important demand that we make of our streams and that is that they be streams. And I would be happy to take any further questions. [LB438]

SENATOR LANGEMEIER: Very good. Are there any questions? Seeing none, thank you very much. [LB438]

SANDRA ZELLMER: Well, you were serious about needing to get out of here in a timely fashion. [LB438]

SENATOR LANGEMEIER: No. No, you just did a really good job. Plus we got to read along. Welcome, Mr. Winston. I also want to say welcome to Nebraska. We like it when people move to Nebraska. Mr. Winston, welcome back. [LB438]

KEN WINSTON: (Exhibit 9) Thank you, Senator Langemeier and members of the Natural Resources Committee. I'm appearing...first of all, let me spell my name. My name's 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 Nebraska Sierra Club and I'm appearing in opposition to LB438. The main reason that we're opposed to LB438 is due to the fact that we believe that there is a perception and a viewpoint that...or a premise that instream flow rights are negative and that somehow should be opposed. And we believe that the opposite viewpoint should prevail and that we believe that instream flow rights are beneficial and

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should be supported. I've set up four reasons, the first one is that they are beneficial to Nebraska's rural economy and I found some statistics from the Nebraska Department of Economic Development which indicated that more than 54,000 visitors to the Niobrara in the year 2000, to the Valentine area in 2000 who came there for the specific reason of going on the Niobrara River. This influx provides revenue for numerous people in that area including outfitters and motels and restaurants. If the river no longer flowed, then if you will pardon the pun, their revenue would also dry up. In 1996, a survey of visitors to the Middle Platte area to watch birds concluded that they generated \$25 to \$50 million per year in spending and that was in 1996. I'm presuming that the spending is considerably higher than that in 2009. Instream flow rights benefit thousands of people. As indicated above, thousands of people use the Niobrara, thousands of people go to the Platte to look at birds. This is in our democratic ideals. We tend to favor those things that benefit to the largest number of people. Instream flow rights also benefit downstream users. Downstream domestic and agricultural users often depend on the flow to meet their needs including naturally occurring subsurface irrigation or stock watering. And then the final one is that instream flow rights help maintain Nebraska's control over their own waterways and I think that both Mr. Hovorka and Ms. Zellmer described that. So I won't discuss that further except to say that if there is litigation it's often expensive and we would hope that Nebraska taxpayers wouldn't be obligated to pay taxes for the purposes of litigation in this area. For these reasons we are opposed to LB438. I'd be glad to answer questions. [LB438]

SENATOR DUBAS: Thank you, Mr. Winston. Do we have any questions for Mr. Winston? Seeing none, thank you. [LB438]

KEN WINSTON: Thank you. [LB438]

SENATOR DUBAS: Next opponent. [LB438]

TIM KNOTT: (Exhibit 10, 11, 12, 13) My name is Tim Knott, that's spelled T-i-m K-n-o-t-t, and I'm representing the Wachiska Audubon Society, that's the local Audubon chapter in southeast Nebraska. And I'm going to try to summarize my testimony and allow some more time for people who are real experts on water issues because I'm not an expert on water issues. But I would like to have you take a look at several items that I passed out, I guess for people who are not familiar with the issue. One of them is a map of the state of Nebraska that shows how many watersheds or river basins are fully appropriated or expecting fully appropriated. It looks to me just from a visual estimate about 75 to 80 percent of the state is now fully appropriated, overappropriated, or soon will be, which means that in effect, LB438 makes the state instream flow a dead issue. It basically repeals the law. And I don't think that's what the state Legislature had intended when they passed the law some 25 years ago. Like I say, I'm going to try to summarize this. The second thing I'm handing out is a list of the water appropriators who have applied for appropriations to divert water west of Valentine in the 25 mile stretch west of

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Valentine. And the purpose of that is to show that from about 2004 to 2007 there was what amounts to a gold rush, people applying for water rights in large numbers, particularly one individual which I'm sure you know who that is. Once that individual started applying for these water rights to divert water from the Niobrara that gave other folks in the neighborhood the idea that they'd better start applying for water rights too or they were not going to get theirs. And that leads to a very dangerous situation and that's we think why it became clear to the Department of the Natural Resources that they had to put a fully appropriated designation on the river. So these so called gold rushes, or that's what I call them, happened and about the only way to stop that is making use of the instream flow law. One reason for protecting, for making use of the instream flow law that is a little different, and I'm going try to explain what one water expert in the Lincoln are told me and that is we need some kind of a benchmark on the most valuable streams in the state to show how much water is necessary to protect the fish and wildlife and the recreation. We need an instream flow on those streams so that in the future if we go to something like a market system where water rights are sold back and forth, more or less an open market system, it will be clear how much water is needed to satisfy fish and wildlife and the recreation needs in that stretch of river. If we don't have an instream flow amount, let's say either a permanent instream flow or a permanent instream flow on a particular river, it will be very difficult to make use of this open market buying and selling of water rights to satisfy the needs of that particular branch of the stream. And finally, I guess I passed out a lot of the tools and guides that the state puts out and this one has to do with the area around Valentine, it's got some pretty pictures on the cover and it shows how important having a river in the Valentine and northeastern Cherry County is to the economy of that area. They get a lot of benefits from that and you can see all the advertisements for motels, restaurants, and other types of money making activities in the Valentine area and it's something we need to protect. So I think I'm going to close now and let you look that material over. [LB438]

SENATOR LANGEMEIER: Very good, Mr. Knott. Are there questions? Senator Haar. [LB438]

SENATOR HAAR: Thank you. You said everybody knows who we're talking about and I'm sorry, I don't. [LB438]

TIM KNOTT: Well I'm not sure that I should. [LB438]

SENATOR HAAR: Can we mention names here? I just have to look at...okay, we'll just forget the question. I don't know who it is so. [LB438]

SENATOR LANGEMEIER: They'll come see you afterwards, I think. [LB438]

SENATOR HAAR: Okay. [LB438]

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SENATOR LANGEMEIER: Any other questions? Seeing none, thank you Mr. Knott for your testimony. Very good. Further testimony in opposition? Welcome. [LB438]

BRUCE TOMES: (Exhibit 14) Hello. My name is Bruce Tomes, B-r-u-c-e T-o-m-e-s. I'm here representing the American Canoe Association and also the Missouri River Valley Paddlers. I want to keep this very short and sweet because a lot of the points I wanted to make have already been covered probably by people more qualified to make them. So I'm just going to kind of introduce the emotional element here I guess. I've been canoeing the Niobrara River since 1976 on average two to three times a year. One of the things that hasn't changed in the last 33 years with that passion that I developed for the river was that for the last 33 years and prior to that someone has been trying to dam or drain this river almost constantly. In 1986 after a lot of people got involved including national environmental agencies we were able to deauthorize, or I should say the Norden Dam project was deauthorized, which threatened to basically steal this gem from our state for all time. Last May I was involved in an instream flow study on the Niobrara conducted by the National Park Service which included many other people you've heard speak here today, the Audubon Society, the Sierra Club, the National Park Service, American Canoe Association and American Rivers. And the reason that there's so much focus on that study by all those groups is because not only is the Niobrara River a Nebraska treasure, it's also a national treasure. It's rated as one of the top ten canoeing rivers in the country which is one of the reasons in 1991 it was finally designated as a wild and scenic river. I could share a lot of facts and figures about just how delicate the balance of the instream flow is in the Niobrara. I can tell you that right now or as of last May there was enough applications under consideration for other appropriations of the water from that basin to basically make the river unboatable, is the term that we use in the American Canoe Association. In other words, completely divested of its recreational values. What we had hoped with the wild and scenic designation was that we wouldn't have to continue to fight these battles to save the river. And again, I'm going to summarize here very quickly and get on to some of the other people that want to speak. But again, just to underscore the comments that I made earlier, the Niobrara River is the most beautiful place in the state of Nebraska. If you've never been up there, I suggest you go up before you render a decision on this bill. There's nothing quite like it anywhere else. It's been called a mountain stream in the plains and there's a reason for that. We need to protect this not only for current Nebraskans, but for future generations of Nebraskans because it is not only a state treasure, but a national treasure. If we allow LB438 to pass it basically allows circumvention of the guidelines, the federal guidelines of the Wild and Scenic River Act that maintain a free flowing condition in that river. In other words, the river will disappear. At least the potential is there for that to happen. So, again, in closing I'd just like to say please consider the impact of this law and also the fact that there are already laws in place. LB962 which, quite frankly, you made a comment earlier is this an ability to circumvent that existing law or get an upper hand in another argument, obviously there is a motivation with the introduction of this bill that goes beyond what's being

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stated here. And again, to one of the earlier comments, all water applications and all users should be considered on a level playing field and equal basis. I do have some sympathy to that point of view having been raised in a farming family, in a farming community. I actually also worked in the irrigation industry for a number of years so I'm not unsympathetic to those needs. However, and as was mentioned by one of the earlier speakers, this is a democratic society, this is a state treasure, it belongs to all of the people in the state. So just for example, if say I wanted to irrigate 80 acres that I don't currently irrigate and to do so I want to sink a well, I want to run a center pivot irrigation. Now everybody says it's only going to take such a small percentage of the flow that it really doesn't matter but think about that statement, you know, it's very easy to say the cup of water I'm pulling out of the pitcher doesn't really amount to much as a sum total. But if everybody lines up and takes a cup the pitcher is going to be empty pretty quick. Is it more appropriate to preserve the instream flows in that river and preserve the recreational aspect as well as the wildlife that is supported by the flow conditions in the Niobrara, is it more appropriate to delegate that water to that use as opposed to someone who just wants to make money with it for themselves. And that's what I'm going to ask you to consider because what this bill, LB438 is doing is creating the opportunity for that to happen. In other words, I'm going to benefit my business at the cost of all other users and all other businesses that depend on the water in the river to support them as well. That's really all I have to say and again, most of what I wanted to cover has already been mentioned so I'd be happy to take any questions and I thank you for allowing me to appear. [LB438]

SENATOR LANGEMEIER: Very good. Are there any questions? I'm going to ask one just because I'm curious. [LB438]

BRUCE TOMES: Sure. [LB438]

SENATOR LANGEMEIER: Missouri River Valley Paddlers, I like that name. Where is that headquartered out of? [LB438]

BRUCE TOMES: Actually Omaha, we have members in Nebraska and Iowa. We've got quite a few members in the Lincoln area and also west into actually Colorado. So it's a pretty large group. [LB438]

SENATOR LANGEMEIER: Okay. Thank you very much. [LB438]

BRUCE TOMES: Certainly. [LB438]

SENATOR LANGEMEIER: Thank you for your testimony and everyone's patience to wait this long. And they're still smiling, that's good. Feel free to come on up to the front chairs while you're waiting to testify. We're ready when you are, go ahead. [LB438]

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MELVIN THORNTON: (Exhibit 15) My name is Melvin Thornton, T-h-o-r-n-t-o-n. I am having the pages distribute this page with the approval of Ms. Zellmer. This is what I read with a great deal of pleasure this morning in the Lincoln Journal Star and it very nicely summarizes some of her testimony. My wife and I live in two different places; you can do that when you're retired, near Sparks close to the Niobrara and in Lincoln. We are landowners in southwest Keya Paha County and kayak on the Niobrara 10 to 12 times a year. So I'll be speaking to you as an individual and as a user. I'm also president of Friends of the Niobrara, Inc. which is a 501(c)3 nonprofit. This organization is what became of the original Save the Niobrara Association that successfully stopped the construction of the Norden Dam, what is it, 30 years ago or so. So I am speaking for myself as a landowner and for the Friends of the Niobrara and, I believe, for over 1 million citizens of Nebraska. I'm also a mathematician. Let me explain where that claim comes from. According to this editorial that you now have in front of you, a recent study showed that 69 percent of Nebraskans support the instream protection for canoeing and recreation. So I will be expressing the wishes of 69 percent of Nebraska's latest population, which according to the web this morning is 1,711,263. So, essentially I'm giving you the views of about 1.18 million Nebraskans. More specifically I'm bringing this message from the over 1,200 persons that signed an open letter to the Governor in 2007 and over 800 persons who signed an open letter to the Game and Parks Commission and the director of the Department of Natural Resources. And the message in both was we need the instream flow now and not in the future. [LB438]

SENATOR LANGEMEIER: It's not picking you up, we've got to lift it up so it picks you up. [LB438]

MELVIN THORNTON: Oh, okay. Now, I might be paranoid but it seems to me that LB438 right now is specifically directed toward the application of the Game and Parks Commission for an instream flow right on 76 miles of the Niobrara east, that is downstream from Valentine. I would like to add that is the national scenic river reach. I would like to give three reasons why this part of the Niobrara needs instream flow protection and needs it now, but not in the future. First, is a reason for fairness and common sense. The water in all the streams of Nebraska belong to the state. All Nebraskans have equal ownership and interest in our water. The water does not belong to the adjacent landowners, it doesn't belong to me, nor to the counties nor to the NRDs. Our water laws give authority to the NRDs to administer groundwater in their districts and the authority to the Department of Natural Resources to administer the surface water. And all of this is required to be, as we heard earlier, in the public interest. An instream flow appropriation granted to the Game and Parks Commission or an NRD is the only way almost all Nebraskans can have any stake in the flow in our streams. And since instream flows are not consumptive, they do not take any water out of the river. Instream flows are nonconsumptive. Now I paid a great deal of attention to the previous testimony and from 2:55 until 3:25 the word consumptive only appeared once, and that was just in passing, nonconsumptive. And now you realize when the opponents

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of this bill are speaking you are hearing the word consumptive, nonconsumptive much more often. Okay, unfortunately instream flows cannot put any more water back in the river. An instream flow, as we've heard, would not affect any present pumping rights and it would actually assist the pumping rights for those folks downstream. In other words, the lower half of the Niobrara River. Now, when I get to fairness, I think of this. There are 12--at least 12 maybe more--there were 12 listed in the pamphlet last year, 12 canoe outfitters in the Valentine area. Many of these folks have been absolutely dependent on the water for decades, yet they have no legal claim at all to use the water in the river. On the other hand, an investor who helped run the Republican River dry set up shop a few years ago upstream from the Niobrara, and we've already heard this individual referred to before, and he presently holds eight water rights and has five more pending. This is a total of 39.12 cubic feet per second. Now, how much water is that? We've heard cubic feet per second earlier when someone mentioned that somebody wanted to add about 80 acres, it would only take about one tenth of a cubic foot. It turns out when you get surface water rights, I don't know what the groundwater rights are, but surface water rights for irrigation, you get 1 cubic foot per second water right for every 70 acres that you wish to irrigate. So to irrigate 80 acres it's going to take more than 1 cubic foot per second. Now, how much is one cubic foot per second? It turns out that's a lot of water. That will pump almost three quarters of a million gallons per day. And on a surface right, how much water can you pump? The equivalent of 36 inches of rain. When you have an approved water right you are able to pump up to 3 acre feet per acre. That's a lot of water. Now, there was also a mention that...well, when I was listening to the testimony the thing that really struck me is everything ought to be treated equally. And I wish that were so, pumping rights and instream flow rights. What does it take to get a pumping right? In an afternoon you can fill out the application, send it in, when it gets there it automatically gets the seniority date when it's accepted, and it then would be pending if they still accept water rights and they probably don't now because of full appropriation. What does it take to get an instream water right? Oh, I ought to pay for that, the fee is \$200 and that gives you a water right to irrigate up to 1,000 acres of corn or of anything, up to 1,000 acres. What does it take to get an instream water right? A long list was read to you, the Game and Parks has started almost two and a half, almost three years ago. They...when that water right application is ready to go in, the cost will have been over \$1 million. I really wish everything was treated equally but it's not. Sorry, I get off my track here. Now, we were thinking about this one irrigator that has rights to irrigate 2,383 acres. That is a little over four square miles upstream from the Niobrara Scenic River. Now, certainly in the name of justice and fairness, the outfitters who have been doing this for decades really need to get in line to legally have some say about using that water. It's their livelihood for them and their families, and it's also a tremendous economic benefit for the whole area around Valentine. Now, the only line they can get in is an instream water right. That's the only line that any of you can get in either, an instream water right. Now that has to be done by the Game and Parks Commission. It would be unfair to ask the local NRDs to do that because the cost is so prohibitive and that cost would then go off on the local taxpayers by their taxing

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authority. So Game and Parks is really the only game in town for this. Now, protection of local control is the second reason we need an instream flow. The Niobrara National Scenic River is also a National Park. It's an unusual National Park in my view because almost all of the land is privately owned. However it's a National Park there and it's been a National Park by an act of Congress since 1991. So there is an implied federal reserve water right there. I'm afraid that if we don't have some kind of a basic flow assured for the National Scenic River, that if necessary, the National Park Service will jump in and use their federal reserve water right and then this control is out of the state of Nebraska and it's somewhere else. Also, it may very well date back to 1991 which could be a severe problem to the people who got the water rights between 1991 and the present time. Finally, there are strong economic reasons why an instream flow is necessary. If you look at the Cherry County lodging tax collections alone last year were well over \$60,000. That's just the taxes, so you can see the economic impact. And it turns out about 97 percent of the users of the river are not from the area. So those are the people that are putting this money into Valentine's economy. So even if there are minimal flows on the river, if people think there's no water there they're not going to come to that area. An instream flow water right on the scenic river is a clear message to everyone saying come, there's lots of water here and you'll have a wonderful time. Let me end by quoting the manager of the Middle Niobrara Natural Resources District, Mike Murphy, and I'm sorry he couldn't be here today. "The Niobrara is special, but it's not broken and we need to keep it that way." And I certainly agree with that and I've never met anybody who didn't agree with that. It isn't broken, it's not too late to act to make sure we don't have another major catastrophe like the Platte and the Republican. But we have to act and I'm pleased that the Game and Parks is acting. And I'm tempted to add, not if we build it but if we legally protect it and then they will come. Thank you. [LB438]

SENATOR LANGEMEIER: Very good. Are there any questions? Seeing none, thank you for your testimony. Further testimony in opposition. Welcome. [LB438]

DAN FOSTER: (Exhibit 16) Thank you. I am Dan, that's D-a-n Foster, F-o-s-t-e-r, and I am the superintendent at Niobrara National Scenic River. Mr. Chairman, thank you for allowing me the opportunity to present the views of the National Park Service on LB438. I have also submitted some written testimony. The National Park Service is concerned about maintaining instream flows necessary to protect the Niobrara National Scenic River. Existing and future demands may tax the Niobrara beyond its ability to sustain current agriculture, recreation or fish and wildlife which depend upon its presence. In 1991, Congress designated 76 miles of the Niobrara River in north central Nebraska as Niobrara National Scenic River under public law 102-50 and included it as a component of the National Wild and Scenic Rivers system under the Wild and Scenic Rivers Act of 1968. The designation of the Niobrara National Scenic River also established a federal reserved water right to preserve the free flowing condition, water quality, and outstandingly remarkable values of the river. The Wild and Scenic Rivers Act charges

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the Secretary of the Interior and participating entities with protecting designated rivers free flowing condition, water quality and outstandingly remarkable values, which, for the Niobrara have been identified as scenic, recreation, fish and wildlife, geology and paleontology. The National Park Service has statutory responsibilities to establish instream flows for the scenic river and declare it its intent to do so in the Niobrara National Scenic River General Management Plan and Environmental Impact Statement of 2007. Instream flows are vital to protecting resources not protected by appropriation alone, such as wildlife and recreation. Wildlife, habitat, and their ecology are a responsibility we must not disregard. With respect to recreation, approximately 70,300 people visited the Niobrara National Scenic River in 2008 and over 90 percent of these were from outside the local area. This represents a substantial economic offset to the decline or stagnation in other economic sectors. If enacted, LB438 could impede the progress the Nebraska Game and Parks Commission, the National Park Service, and other cooperators have made in pursuing the necessary scientific information needed to quantify instream flows to meet the statutory and legislative requirements to protect free flowing conditions, water quality, and outstandingly remarkable values of the Niobrara River. The National Park Service is opposed to the passage of this bill. May I answer any questions? [LB438]

SENATOR LANGEMEIER: Very good. Thank you, it's nice to meet you. [LB438]

DAN FOSTER: Thank you. [LB438]

SENATOR LANGEMEIER: Senator Haar, you have a question. [LB438]

SENATOR HAAR: Thank you. So does the National Park Service have a stick in this case? [LB438]

DAN FOSTER: We do. [LB438]

SENATOR HAAR: What would happen? [LB438]

DAN FOSTER: We don't want to think about that. [LB438]

SENATOR HAAR: Okay. [LB438]

DAN FOSTER: We prefer to work with the state and state based instream flow designation... [LB438]

SENATOR HAAR: Okay. [LB438]

DAN FOSTER: ...to protect the river and we don't even want to really think about swinging this way. [LB438]

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SENATOR HAAR: Yeah, I can appreciate that so. [LB438]

DAN FOSTER: We'd rather work with the state on that. [LB438]

SENATOR HAAR: Thank you. [LB438]

SENATOR LANGEMEIER: Senator Schilz. [LB438]

SENATOR SCHILZ: Thank you. So and thanks for coming today. And so by that what you're saying is that you're willing to sit and let the LB962 and IMP processes work to come up with the solutions that Nebraska needs to handle their water situation? [LB438]

DAN FOSTER: Yes, Senator Schilz, we are willing to work with the state of Nebraska, in fact, we have. We've been cooperating with Nebraska Game and Parks Commission in doing necessary studies to get the information to establish instream flows. [LB438]

SENATOR SCHILZ: Okay. [LB438]

DAN FOSTER: So we are very much interested in working with the state. [LB438]

SENATOR SCHILZ: Okay, thanks. [LB438]

SENATOR LANGEMEIER: Thank you. Are there any other questions? Thank you very much for your testimony. [LB438]

DAN FOSTER: Thank you. [LB438]

SENATOR LANGEMEIER: And making the trip all the way down here. Thank you. Further testimony in opposition? Okay. [LB438]

BRIAN DUNNIGAN: Chairman Langemeier and members of the Natural Resources Committee, my name is Brian Dunnigan, B-r-i-a-n D-u-n-n-i-g-a-n. And I'm the director of the Department of Natural Resources. I'm appearing here today in opposition to the passage of LB438 as introduced. The bill as drafted will prevent the department from approving transfers of existing appropriations to instream flow appropriations. These types of transfers are one tool that the state and natural resources districts may use for compliance with the Platte River Recovery and Implementation Program. The bill also would not allow new appropriations for instream flow in the Platte River, which is another tool. Passage of this bill will be a setback for the state of Nebraska. The Platte River Recovery and Implementation Program is a joint endeavor by the states of Wyoming, Colorado, Nebraska, and the United States to increase flows in the Platte River to enhance habitat for endangered whooping crane and other threatened and

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endangered species. Due to the existence of the program, many large reservoir projects are able to comply with the federal Endangered Species Act and there's no need for federal intervention in Nebraska's agricultural programs or a regulation of groundwater and surface water to comply with the ESA. The reservoir projects that depend on the program for ESA compliance include the U.S. Bureau of Reclamation's North Platte Project which applies irrigation water to over 310,000 acres of land in Nebraska and return flow that fills Lake McConaughy. Lake McConaughy in the Central Platte, in the Central Nebraska Public Power and Irrigation District's, Federal Energy Regulatory Commission license which supplies irrigation water to over 200,000 acres of land in Nebraska, generates power for four hydroplants, and provides cooling water for Gerald Gentlemen Station and Basin Electric's Grayrocks Hydroplant which supplies most of the city of Lincoln's electricity. The program's water action plan anticipates transferring existing surface water rights as well as other sources of water to an instream flow appropriation or to augmentation of an instream flow use in order to generate increased flows at the critical habitat area. Not having this tool available limits the potential water protection mechanisms available to the program. The department, the Game and Parks Commission, and the North Platte, Twin Platte, Central Platte, South Platte, and Tri-Basin Natural Resources Districts are collaborating on the Platte Basin Habitat Enhancement Program to meet a number of goals including complying with the Groundwater Management Protection Act, the terms of the PRRIP, and enhancement of the Natural Legacy Program. One of the options available through the Platte Basin Habitat Enhancement Program is the transfer of an existing surface water right to an instream flow appropriation. If this bill passes that option won't be available to that program's collaborators. We're prepared to work with the committee and Senator Fischer for developing an amendment to meet the PRRIP needs but because of the complexities of the instream flow statutes and the fact that an effective PRRIP plan is still involving, with input from all parties at the table there is sufficient ambiguity to be cautious in changing this area of the law. I'd be glad to answer any questions you may have, or try to answer any questions. [LB438]

SENATOR LANGEMEIER: Very good. I think we have some from earlier today, so I'm glad to see you. Senator Haar. [LB438]

SENATOR HAAR: Thank you. We heard earlier testimony that LB438 would clarify the current law. Is the current law unclear about instream? [LB438]

BRIAN DUNNIGAN: I don't think it would clarify it, I think it would change it. [LB438]

SENATOR HAAR: Okay, and explain that. [LB438]

BRIAN DUNNIGAN: The green copy of the law right now would prohibit transfers in a fully appropriated or overappropriated basin and would prohibit new instream flow appropriations in a fully appropriated or overappropriated basin. [LB438]

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SENATOR HAAR: Okay. To use an overused analogy, the NRDs have a tool box full of tools to use in an appropriated or overappropriated area. Could you just quickly go through those tools for me? [LB438]

BRIAN DUNNIGAN: There would be a number of tools. Some of those tools would be offsets, augmentation plans, vegetative management, all kinds of things that could be in that tool box for integrated management planning and how they might offset new uses. [LB438]

SENATOR HAAR: Okay. And what are the new uses that would be covered by offsets, augmented plans and so on? [LB438]

BRIAN DUNNIGAN: It could be a new application for any type of use. [LB438]

SENATOR HAAR: Okay, and this particular bill would remove one of those new uses. [LB438]

BRIAN DUNNIGAN: This particular bill only looks at the instream flow portion of that. [LB438]

SENATOR HAAR: Okay. But other new uses would be allowed if they were properly mitigated. [LB438]

BRIAN DUNNIGAN: Yes. [LB438]

SENATOR HAAR: Okay. All, right I'm starting to get it. [LB438]

BRIAN DUNNIGAN: I understand your question now, Senator Haar, I'm sorry. [LB438]

SENATOR HAAR: Yeah, okay. Thanks for the education. [LB438]

BRIAN DUNNIGAN: Thanks. [LB438]

SENATOR LANGEMEIER: Senator Dubas. [LB438]

SENATOR DUBAS: Thank you, Senator Langemeier. How would this--if it was passed into law--how would it impact the implementation of the Platte River Recovery Plan? [LB438]

BRIAN DUNNIGAN: Some of the things that are being discussed there would be to transfer existing appropriations to an instream flow appropriation in the critical habitat area and this, the way the green bill currently is wouldn't allow that. [LB438]

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SENATOR DUBAS: So if we passed this, we'd have to go back and revisit the Platte River? Is it... [LB438]

BRIAN DUNNIGAN: There would be a tool in our toolbox that would be unavailable if this was passed and we would just as soon have as many tools as we could to address those issues with the PRRIP. [LB438]

SENATOR DUBAS: Okay. All right. Thank you. [LB438]

SENATOR LANGEMEIER: Senator Schilz. [LB438]

SENATOR SCHILZ: Thank you. And most of that question was just answered right there. And I think my desire here is in seeing something happen here is to make sure instream flow laws are following the same sort of path as any other new appropriation. And so my question to you would be if we could change this so that to make sure that if an instream flow...like you said, you know, provide offsets so that that transfers basically offsets so that that can "reclaimed water" can become an instream flow. As far as I'm concerned, I'm okay with that as long as we're following the process that everybody else has to and I think that's what everybody thinks when they talk about clarifying and maybe the wording is not quite right but you would look for offsets to accomplish? [LB438]

BRIAN DUNNIGAN: Absolutely. [LB438]

SENATOR SCHILZ: You aren't just going to go out. [LB438]

BRIAN DUNNIGAN: It would be treated like any other appropriation. [LB438]

SENATOR SCHILZ: I appreciate that, thank you. [LB438]

SENATOR LANGEMEIER: Senator Haar. [LB438]

SENATOR HAAR: Go ahead, I've been asking, go ahead with your questions. [LB438]

SENATOR LANGEMEIER: Senator Fischer. [LB438]

SENATOR FISCHER: Thank you, Chairman Langemeier. Director Dunnigan, if the needs of the Platte River Recovery Program are addressed with an amendment and working with you, which I've been discussing this, would you be more comfortable then with the bill? [LB438]

BRIAN DUNNIGAN: Absolutely. [LB438]

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SENATOR FISCHER: And can you tell me in a fully appropriated basin, is there unappropriated water available? [LB438]

BRIAN DUNNIGAN: There could be. [LB438]

SENATOR FISCHER: Explain that please. [LB438]

BRIAN DUNNIGAN: What I mean by there could be, I'm not trying to be ambiguous I'm trying to say that the applicant would have to demonstrate that there is unappropriated water. It would be the burden of the applicant to show the department that. [LB438]

SENATOR FISCHER: Correct, thank you. [LB438]

SENATOR HAAR: Yeah, go ahead. [LB438]

SENATOR LANGEMEIER: We're going to work our way to you. Okay, now you opened a whole new can of worms. If they can prove that there's unappropriated water, doesn't that blow your theory of fully appropriated? [LB438]

BRIAN DUNNIGAN: No, it really doesn't. They would either have to offset or somehow show that appropriations were...water was available at a different point in time for appropriations. It would be kind of...I think the most general way would be to describe it as providing a equal offset for a new use. [LB438]

SENATOR LANGEMEIER: So they really wouldn't be proving that there's unallocated water. They would be proving to you they can get an offset somewhere to get the water. [LB438]

BRIAN DUNNIGAN: Yes, that they could make unappropriated water available. [LB438]

SENATOR LANGEMEIER: Right. So it wouldn't be. Senator Haar. [LB438]

SENATOR HAAR: Okay, I have to work from concrete examples. So let's say that for example the Platte River by Grand Island where we always go to see the cranes and stuff is the area I'm thinking about. So if a determination was made that more water...and right now I see that's fully appropriated, I think. [LB438]

BRIAN DUNNIGAN: Yes. [LB438]

SENATOR HAAR: So if a determination was made by the Game and Parks Department that we needed more water in the Platte to sustain the cranes, under this bill they couldn't do that. [LB438]

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BRIAN DUNNIGAN: That's true, they couldn't get...there already are two instream flow appropriations there but a new one would not be permitted. [LB438]

SENATOR HAAR: Right, but let's say again that there wasn't enough water and they determined there had to be more water, they'd still have to go through some kind of mitigation process. [LB438]

BRIAN DUNNIGAN: That's correct, under the existing law. [LB438]

SENATOR HAAR: Under the existing law. Right. Okay. [LB438]

BRIAN DUNNIGAN: Yes. And they would have an appropriation date for new appropriation today so they would be the most junior in line. [LB438]

SENATOR HAAR: Okay, explain that last part to me. [LB438]

BRIAN DUNNIGAN: Their right to water would come last. [LB438]

SENATOR HAAR: Okay. So that if there were, I don't know, some city needed water or whatever and they'd come beforehand... [LB438]

BRIAN DUNNIGAN: That need would have to be satisfied before the new instream flow would be administered or gained. [LB438]

SENATOR HAAR: Okay. And if in some of these arguments you come into conflict with the feds, what happens? How big a stick is it? [LB438]

BRIAN DUNNIGAN: I think we like to do business in the state, ourselves. [LB438]

SENATOR HAAR: Yeah, yeah. [LB438]

BRIAN DUNNIGAN: I think that's the best answer I can give. [LB438]

SENATOR HAAR: Well I feel a little bit like there's a stick over my head and I don't understand it. Anyway, thank you. [LB438]

SENATOR SCHILZ: Get used to it. [LB438]

BRIAN DUNNIGAN: Thank you. [LB438]

SENATOR HAAR: It's a big stick. [LB438]

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SENATOR LANGEMEIER: Director, I have one more question. Okay we...before this bill, yesterday...I want to word this right, so I'll think about it. If someone comes in and applies for an instream flow in a fully appropriated area, is there anything in your mind that requires them to have an offset? Could you grant that without them proving an offset? [LB438]

BRIAN DUNNIGAN: They would have to get an exception or a variance in the fully or overappropriated area first and then that applicant would have to demonstrate to the department and to the director that there's water available for what they're asking for along with all of the other things that Senator Fischer listed in her introductory comments. [LB438]

SENATOR LANGEMEIER: So could we just, in theory to get to the idea that's behind this but not have the negative impacts, could you just require before you issue an instream flow that they retire an equivalent offset, make it mandatory? [LB438]

BRIAN DUNNIGAN: That would be up to them to demonstrate how they're going to comply with the law in a fully or overappropriated basin. [LB438]

SENATOR LANGEMEIER: Okay. Any other questions? Seeing none, thank you. [LB438]

BRIAN DUNNIGAN: Thank you. [LB438]

SENATOR LANGEMEIER: Oh, one more. Senator Haar. [LB438]

SENATOR HAAR: Does the NRD...do the NRDs or...is there any ability...I'm almost thinking of similar to eminent domain to say hey, you're the fifth junior but we're going to move you to first. Does anybody have that ability? [LB438]

BRIAN DUNNIGAN: No. [LB438]

SENATOR HAAR: Okay. [LB438]

SENATOR LANGEMEIER: Are there any other questions? Thank you Director Dunnigan. Very good. Thank you for being here. [LB438]

BRIAN DUNNIGAN: Thank you. [LB438]

SENATOR LANGEMEIER: (Exhibits 17, 18, 19, and 20) Further testimony in opposition? Seeing none I have a number of letters to read into the record. I have Ted Thieman, Edward--I apologize we'll have these right in the record, but--Heinert, and Jerry Kenny with the Plate River Recovery Implementation Program and we just got an

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e-mail for the record from Megan Estep who is the chief division of water resources region six with the U.S. Fish and Wildlife Service, but it says this is her testimony but it doesn't really say whether she's for or against, but we'll put it in the record and it'll be there. She doesn't say. It doesn't say that either. Any neutral testimony? Seeing none, Senator Fischer, you are recognized to close. [LB438]

SENATOR FISCHER: Thank you, Chairman Langemeier and members of the committee. I appreciate everyone's patience with this today, I think we had a very good discussion. I do appreciate the gentleman who brought the "Explore Valentine" brochure, my hometown, and I happened to serve on the Cherry County Tourism Board for a number of years so I'm very cognizant of our outfitters. I appreciate our outfitters and I am in communication with them on a regular basis on issues dealing with the Niobrara River. To begin on this, I guess when my motivation for this bill was questioned by some people I was very offended by that. So I thought I might start my closing by maybe telling you who I am. I'm a rancher, I'm a conservationist and my family has been recognized by a number of organizations for our environmental stewardship. We've received the State Grassland Award, we've received our NRD award, we've received the Holistic Resource Management Awards, so when my motivation is questioned, that bothers me. Next, my intent on this law is to clarify it. And it's to clarify what people believe is an instream flow appropriation. We heard testimony today from a number of opponents saying that LB438 eliminates the ability to maintain some water in the stream. We heard testimony in opposition today that said the river no longer would flow. We heard testimony today in opposition saying the river will disappear. In a fully appropriated basin there are no new uses of water that are granted. We've had that discussion a number of times. We are not going to see any more surface water rights granted, we are not going to see any more wells drilled unless that comes out in the management plan, the integrated management plan. I don't know how many IMPs that have been written so far have allowed any new uses of water, surface water or groundwater. We need to look into that, but I don't know how many plans offer that unless an offset takes place. So to say the river will disappear is not correct because there will be, as Senator Langemeier commented, there will be no new uses. The fully appropriated designation came about on the Niobrara not because of wells being put in. We heard that in the testimony; that is not true. The designation came about when NPPD made a call on Spencer Dam. That's a nonconsumptive use but yet it triggered a fully appropriated status in the Niobrara River. And I would like you to keep in mind that this bill is not just addressing the Niobrara River. It happens to be the area that I am most familiar with and that we seem to have heard a lot of testimony on. Again, we heard about the federal water rights on the Niobrara River and how the federal government will jump in and use that right. We heard the National Park Service superintendent say that the declaration of the wild and scenic river established a federal reserve water right. This committee, in previous years has had briefings on that and I would say that only one federal reserved water right has ever been recognized using a Wild and Scenic Rivers Act. And that was in the state of Idaho that took place after state

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adjudication, and it was located wholly within a federal enclave that had never left federal ownership. So while the federal government may be able to claim reserved water rights on the Niobrara River at some point in the future, no such rights can be said to exist today. Those rights would have to be adjudicated and if you look at the Niobrara River you will see that only six miles of that wild and scenic river designation have remained in federal hands. So I believe that needed to be clarified. Also, I would say that it is not my intent in any way to affect the Platte River Recovery Program. As I said with the director, we will work on that. Mr. Orton, when he was up, had an amendment that we can look at and I think of course that has to be protected. And last, I would agree that the Niobrara is not broken. We may be in a fully appropriated status and a fully appropriated designation, but it's not broken. There are high stream flows, we want people to come and canoe as Mr. Thornton said, we want them to come. And the groundwater tables which this committee has heard for the last two, three years that I've been on it, the groundwater tables continue to remain static or increase in the basin. So with that I would said I hope we can work out some amendments on this bill to address concerns and I also hope that we look at the facts when dealing with the issue. Thank you, Mr. Chairman. [LB438]

SENATOR LANGEMEIER: Thank you, Senator Fischer. Are there any final questions?
Senator Haar. [LB438]

SENATOR HAAR: On this map that he handed out, the Niobrara, I should know where it is exactly, but where, oh, okay it's up in. [LB438]

SENATOR FISCHER: It's along the northern tier counties. [LB438]

SENATOR HAAR: Okay. And it's beautiful, I hear. [LB438]

SENATOR FISCHER: It is lovely, I live there, that's my home. [LB438]

SENATOR HAAR: Yeah, good for you. Thank you. [LB438]

SENATOR LANGEMEIER: Thank you very much. That concludes the hearing today on LB438. I'd like to thank everybody for taking their time to testify; you all did a great job. And for that, we're done for today. (See also exhibit 21) [LB438]

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Disposition of Bills:

LB438 - Held in committee.

LB477 - Placed on General File with amendments.

Chairperson

Committee Clerk