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Natural Resources Committee
February 18, 2010

[LB785 LB1016 LB1025]

The Committee on Natural Resources met at 1:30 p.m. on Thursday, February 18, 2010, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1016, LB785, and LB1025. 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 and welcome to the Natural Resources Committee. My name is Chris Langemeier, I'm the Chairman of the committee. I'd like to introduce our committee that's with us here today, more will join us as we get going; but starting to my far right or your far left we have Barb Koehlmoos, the committee clerk. Then we have Senator Tanya Cook from Omaha. We have Senator Tom Carlson from Holdrege, Nebraska; then we have Senator Deb Fischer from Valentine. To my immediate left we have Laurie Lage is the legal counsel for the Natural Resources Committee. We have Senator Annette Dubas from Fullerton and she is the Vice Chair of the Natural Resources Committee. Then we have Senator Ken Schilz from Ogallala, Nebraska. And then missing we have Senator Ken Haar from Malcolm will be joining us in a little bit. But then out to my far left we have Senator Beau McCoy from the Elkhorn/Omaha area. We have today we have two pages that will be helping the committee through this process. If you have something to hand out, they will handle that. We have Tony Pastrana from Colorado and he is a freshman at Union College and then we also have Kiana Mathews and I think she's out making some copies, but she'll be back; she's from Omaha and she's a sophomore at UNL. For those of you that are here to testify today we ask that in the corner of each room there's a little green sheet like this; we ask that you fill it out in its entirety and when you come up to testify if you'd give that to our committee clerk, Miss Koehlmoos, we would appreciate it. Now if you're here today and you're not going to testify, but you want to be in the record as being here, there's another little grid sheet that's back in those same corners on those tables that you can write your information on and tell us whether you oppose or support and then you will be in the record of being here without testimony. So those of you that care to take that method, we appreciate that. As you come up to testify, we ask that if you're going to hand things out we ask that you have 12 copies. If you don't have 12 copies and you know it right now, raise your hands and Tony will come over and make you a few copies to get that made out to 12. If you have something you want us to see and you hand it to the committee, just so you know it, we are going to keep it. We're going to keep it and make it part of the official record so if it's something you have, sometimes we see photos, if you give it to us, we're going to keep it. If you'd like to keep it yourself, just show it to us when you're at the table like Senator Christensen has as he's sitting there. We ask that when you come up to testify we ask that you spell your name, no matter how simple it is, please state it and spell it; helps us keep an accurate record of today's hearings. We also ask at this time that you turn your cell phones off so not to disrupt the individual that's testifying. As you come up in Natural Resources Committee,

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as you come up to testify, you'll see the little light bar in front. We allow ten...or excuse me, five minutes of testimony and then you'll have the green light for four minutes; it will turn yellow for a minute; and then when it goes red we ask that you stop and open yourself up for questions. And don't worry, if you're midst a thought when it goes to red when you stop, there's a good chance that somebody will ask you a question to help you finish your idea. With that, we...those are all the instructions. We're going to take these bills in the order they're posted on the doors; we're going to do LB1016, then LB785, and then LB1025. And so with no further ado, Senator Christensen is here and you are recognized and welcome and you're recognized to open on LB1016. []

SENATOR CHRISTENSEN: Thank you, Mr. Chairman, members of the Natural Resources Committee, I'm Senator Mark Christensen C-h-r-i-s-t-e-n-s-e-n, represent the 44th Legislative District. I'm here today to introduce LB1016. LB1016 creates the Nebraska Statewide Water Planning Commission. It would remove the Planning and Assistance Division from the Department of Natural Resources to create a new and more independent commission dedicated to developing statewide water plans. The goal for this commission would be to develop statewide plans for future water use, maintaining and maximizing water use, creating a plan to manage water resources to encourage economic health and prosperity and to make recommendations to the Governor and Legislature. Since water is supposed to be the issue of the decade, it seems right for me to bring...to bring a bill that would begin our discussions on how we can develop statewide strategies and plans to use our water resources wisely instead of just regulation and curtailment. I'd like this bill to be used as a springboard for an interim study which would help Nebraska design an independent and forward thinking entity solely focused on planning the management of our water resources. If you look at the second page of the fiscal note, you will see the second paragraph that the current Planning and Assistance Division at the Department of Natural Resources is using over half their employees for things other than planning. Planning is obviously not seen as a priority and a proper investment of time and funds is not occurring. However, I believe it is time that we do invest in the issue of the decade by creating an independent and forward-thinking body to develop plans and ideas so we can thrive economically, take care of our water resources, and comply with compacts and agreements. I do not believe we have to choose one or the other. Moreover, because Nebraska has no plan for success, it leads to excess waste and missed economic opportunities. I've said in the past, states like Colorado, Nevada, Wyoming, and California all move water from areas of excess to areas of need maximizing the use of their water. They have made plans, invested in them for the good of the people of their state. Our plan is not going to be their plan, but we need to start investing our time and effort to develop one. Is this the best approach to creating a water-planning entity? I don't know, but I'm anxious to hear other opinions. One concern with LB1016 expressed to me prior to the hearing pertains to the makeup of the board. This is an important aspect of the bill which I'm willing to look at in any future study. Another way to appoint the board could be by using Natural Resources Commission or other means. I'm open to any suggestions. If you

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have areas we can improve, please let me know. If this is the wrong approach, please let me know what you believe the right one is. Testimony today will help further the interim study that I plan to introduce. Thanks for your consideration to LB1016. I urge the committee to commit to studying this very important issue this interim. I would be glad to answer any questions you may have. [LB1016]

SENATOR LANGEMEIER: Thank you very much. Are there any questions for Senator Christensen? I do, Senator Christensen. Just so you know it. We did an interim study this year and we talked about water planning; and I believe you came to one of those, I'm not sure whether you were in Kearney or Ogallala. [LB1016]

SENATOR CHRISTENSEN: Was it Kearney, Ogallala, both. [LB1016]

SENATOR LANGEMEIER: Or maybe both. And the overwhelming thing we heard from the people is is we don't really want a plan. We just want money, which is their right. Do you think if we did another interim study on the same topic we would get different results or do you think the way you've...I didn't seek...when I introduced to do an interim study on planning was is to start to define what a water plan might be. Do you think maybe the way you wrote this and started creating a commission or an act with people might spark them to think differently? [LB1016]

SENATOR CHRISTENSEN: I do. I think if you go back and even look at how we had two water departments at one point in time that molded into one; if you go back there, you'll see more plans. I've asked some people in the department to show me some plans that we are making for the future use of water, what we're looking forward. Typically what I find is regulation. And that was confirmed on that second page of the plan. So I think if we structured that we tell people, hey, how can we best use the water of the state for the benefit of the state, we would have a place to start with that when we were just asking previously in the previous study, we found out that, well, people didn't know what to suggest; they just wanted to get money to handle the situations. Well I think there's a forward thinking plan that could move water to increase flows for endangered species in the Platte, water that would meet the needs of the lakes for making electricity, cooling and Gerald Gentleman, places that we could add water in Republican River district to recharge the aquifer. I think if we sit down with some objectives that we're going to look at meeting the needs of the area, and the needs isn't just money; the needs is how can it become sustainable. And like for the Republican to be sustainable, we're either going to take very low allocations regulation or we're going to move water into that area, allow it to soak in, recharge the aquifer which benefits surface and groundwater. And we have an opportunity in the Platte also to move water back up; send it down the river so that we can also keep all them acres irrigating instead of retiring as phase 1 and 2 in the Cooperative Agreement would do. [LB1016]

SENATOR LANGEMEIER: Okay. Very good. Are there any other questions? Seeing

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none, thank you very much. [LB1016]

SENATOR CHRISTENSEN: Thank you. [LB1016]

SENATOR LANGEMEIER: You've heard the opening on LB1016. Now we'll go to the hearing process for the people who get to apply their thoughts. Those in support, is there anyone that would like to testify in support of LB1016? Seeing...oh, maybe one. Welcome. [LB1016]

TOM KNUTSON: (Exhibit 1, Exhibit 2, Exhibit 3) Thank you. Good afternoon, Mr. Chairman and members of the committee. My name is Tom Knutson, T-o-m K-n-u-t-s-o-n. Mr. Chairman and members of the committee, thank you for the opportunity to testify. My name is Tom Knutson and I'm general manager of the Loup Basin Reclamation District, Farwell Irrigation District, and Sargent Irrigation District in Farwell, Nebraska. Today, I'm representing the water coalition of NWRA and NSIA and we are in support of the concept of LB1016. Our coalition believes that water planning is very essential in the state and that a planning division within the Department of Natural Resources needs to happen at some point in time. We recognize that now is not the time to suggest the ideas that might increase spending because of state budget issues. However, maybe what we think we may have saved in the past on spending for water planning has not really been a savings. Mr. Chairman and members of the committee, I would like to expand on that thought, but I'd like to do so under a different hat. That hat is my own; not representing anybody but Tom Knutson. Over 27 years ago I came to the state because of a job that I was offered in Omaha, Nebraska, working for the Missouri River Basin Commission. I was there two years and later I became general manager of Farwell. However, my career started out as a water resources planner working on a state water plan in the state of South Dakota. I later was supervisor of the planning division within the state that completed the state water plan in 1978. In my opinion, it wasn't complicated. The plan was done by river basins. There were 16 river basins and early in my job and my career I was doing research for those basins. The research included populations for basins by towns, counties, soil types, and the amount of groundwater and surface water that was available for development and I utilized the state's hydrologist folks from the department to get that information. Also we provided detailed information about water rights that had been obtained by the state by river basin. The state of South Dakota does have a priority system for both groundwater and surface water. Then after that we looked at planned projects in each river basin and hydrologists provided us their professional estimate on whether certain projects would be built and how much water was available to do so. After that the Legislature set up a program for funding projects in the state, as well as creating seven water development districts to handle the local development projects. Those districts have five to nine locally elected board members. The state has a seven-member board of directors for their water resources and they're all appointed by the Governor. The amount of funds they normally have annually is about \$8 million. In addition, the state funnels or passes

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through federal funds for waste management and has a loan program for clean water activities. Nearly two years ago, four NRD managers and four irrigation district managers created a work group, we'll call it groundwater/surface water group, to work on solutions for water issues in the state. We progressed to the point where funding becomes the issue. In that process, we've concluded that a planning division with a planning director in the department is essential to the long term success of water planning in the state. We are now working on funding issues, in fact, we had a meeting this morning that I left early so that I could get here, and we will come back at a later time to discuss the findings that we will come up with from the standpoint of tackling the issue. Now let me expand on my thought I discussed earlier in my testimony. The state-water plan is not in place in Nebraska and had we moved forward with one, say 25 to 35 years ago, maybe we wouldn't have had a need for LB962. I just say maybe, I don't know. I believe there are some that feel, probably, LB962 was not in our best interest and now we do patchwork to try to improve upon that law. Senator Fischer introduced LB764 to improve the IMP process by allowing river basins that are not fully appropriated to proceed with that process. I support that effort and I applaud the senator for introducing that bill. In addition, I applaud Senator Carlson for introducing his bills this session because I believe he is showing me courage, guts and true grit for those things that need to be discussed in a public forum. We cannot continue as a state to walk away from those issues that need to be aired so that we can find a solution. We cannot legislate more water to flow in any river basin, but nor should we legislate how much water should flow in another river basin based upon the shortages in one. I see that in this state and I'm opposed to it. Your bill, Senator Carlson, on the task force for the Republican River Basin needs strong consideration and I support that. The theme on what I'm saying here is water planning by river basin. We have 23 natural resource districts handling groundwater with no real direct super...with no real direct state oversight; 63 irrigation districts, public power district, reclamation districts and companies managing surface water with state oversight and probably a thousand opinions on what or how we should legislate to make water flow to meet the state needs including compacts. [LB1016]

SENATOR LANGEMEIER: I'm going to stop you there. We've been red for quite awhile. [LB1016]

TOM KNUTSON: I'm sorry. [LB1016]

SENATOR LANGEMEIER: So are there any questions for Mr. Knutson? Senator Carlson. [LB1016]

SENATOR CARLSON: Thank you, Senator Langemeier. Tom, on the second paragraph up there, two years ago four NRD managers and four irrigation district managers created the work group; how often have you met? How often do you meet? [LB1016]

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TOM KNUTSON: We were meeting every month in 2008 and in 2009; this was our first meeting this year based upon scheduling problems. [LB1016]

SENATOR CARLSON: And the outcomes of your meetings, are those in print or reported; you're getting together to discuss things; that's not reporting to anybody is it? [LB1016]

TOM KNUTSON: No. [LB1016]

SENATOR CARLSON: Okay. [LB1016]

TOM KNUTSON: We report to ourselves and our boards. [LB1016]

SENATOR CARLSON: Okay. And are those meetings beneficial? [LB1016]

TOM KNUTSON: Yes. [LB1016]

SENATOR CARLSON: Okay. Thank you. [LB1016]

SENATOR LANGEMEIER: Are there any...Senator Fischer. [LB1016]

SENATOR FISCHER: Thank you, Chairman Langemeier. Thank you, Tom, and thank you for your comments. I certainly have learned a lot from you in our conversations because of your involvement with water over many years. I agree with you that we need a planning process in this state and I too thank Senator Carlson for thinking outside the box and making all of us do that. As you know, I try to do that on occasion also. [LB1016]

TOM KNUTSON: Yes. [LB1016]

SENATOR FISCHER: At the end of your testimony which you didn't get to, you...the way I'm reading it, you're focusing on the local side of this. Am I correct in that? Do you think we need to begin this process locally in the river basins and have it a bottom-up process so the people that understand a certain area and everything that's tied together there, or do we come from the top down from...take it from the state telling us what we need to do? [LB1016]

TOM KNUTSON: Well I don't want it federal down. [LB1016]

SENATOR FISCHER: Oh, I didn't include that in your choices. [LB1016]

TOM KNUTSON: Yeah, yeah, I think, as I was going to say at the end of my testimony,

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that the water runs downhill and it doesn't stop at the township line, the county line, an NRD line, an irrigation district line, but within the basin you have to work together in...if one local authority is trying to jump over another local authority and it impacts the overall management of the water, we need to work those things out locally. But if we can't, we got to have some type of state oversight. [LB1016]

SENATOR FISCHER: I also heard you say, I thought pretty loudly, that what's happening in one basin shouldn't influence decisions made across the state in other basins. I took that to mean the Republican; I guess it could also refer to the Platte... [LB1016]

TOM KNUTSON: Yeah. [LB1016]

SENATOR FISCHER: ...and the cooperative that we have there. Do you think we're...I don't know if we're overreacting, but do you think we're reacting to the circumstances in those two basins and applying things that happen there in other basins even though there really is no rational application? [LB1016]

TOM KNUTSON: I think there's been attempts to do that. I don't know if it's purposely. It's just to try and correct, probably, some issues that they can't necessarily deal with within their own basin. [LB1016]

SENATOR FISCHER: Okay. Thank you. [LB1016]

SENATOR LANGEMEIER: Senator Carlson. [LB1016]

SENATOR CARLSON: Thank you, Senator Langemeier. And, Tom, thanks for your comments on what I've been trying to do. Let me ask you, Senator Christensen's brought this as a bill first and then in his introduction he talked about it being an interim study. Do you think things can be accomplished through an interim study on this issue that haven't been accomplished before? [LB1016]

TOM KNUTSON: Yeah, I think they can. I know...I realize, Senator, that we have had hearings in the past and I know that we testified from our group, if you will, Senator Langemeier, that we were in support of water planning. [LB1016]

SENATOR LANGEMEIER: I was going to note that at the end. [LB1016]

TOM KNUTSON: Yeah, in fact, I provided some testimony here from that last hearing along with, basically, a lot of information that we submitted at the last hearing. And I think you need to relook at it. And yes, there's going to be opposition. But maybe within that opposition we find solutions based upon opportunities to find a way to make things better for our river basins. [LB1016]

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SENATOR CARLSON: Thank you. [LB1016]

SENATOR LANGEMEIER: Any other questions? You kind of taken it away from me, but I was going to thank you, because you did come in and support, one of the few that liked the idea of doing a plan, so thank you very much. [LB1016]

TOM KNUTSON: Thank you for your time and I didn't mean to get real emotional, but it's something close to my heart. I've done it now for close to 35, 40 years; so thank you. [LB1016]

SENATOR LANGEMEIER: We understand. Thank you. Further testimony in support of LB1016? Seeing none. Anyone testifying in opposition? Director Dunnigan, welcome. [LB1016]

BRIAN DUNNIGAN: Thank you. Good afternoon, Chairman Langemeier and the committee members. 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 and I'm here before you to present opposition testimony on LB1016. LB1016 creates the Nebraska Statewide Planning Commission with the purpose of exercising the powers and performing the duties carried out by the department's Planning and Assistance Division and any additional duties that would be developed under the goals described in the Nebraska Statewide Water Planning Commission Act. The bill transfers all funding for the department's Planning and Assistance Division to the commission. The division employees, seven and a half positions, and as implied by its name, has broad responsibilities beyond those described in Section 2-1599 related to the Nebraska State Water Planning and Review Process. By economic necessity and design, it is a multifunctional resource within the department's organizational structure that assists other divisions with their statutorily required programs. The division assembles stream gauging, hydrography precipitation, and other geographic databases and performs analysis of data for a variety of agency activities including the Platte River Cooperative Hydrology Study, the National Hydrography Data Set, the Resources Development Fund, and Missouri River activities, and writes and administers grants for carrying out research and planning activities of the department. The division also performs duties related to coordination with NRDs on integrated management plans and assists the Integrated Water Management Division on analysis related to fully appropriated basin and subbasin areas. These duties, along with other state-water-planning duties, would be transferred to the commission. LB1016 could affect the function of the department in several ways. As an example, the Planning and Assistance Division helped develop and acts as the state's steward for the National Hydrography Dataset. That dataset model is useful for spacial comparison of a wide cross-section of applications using data related to surface water features. This is especially applicable to projects across the department from flood plain management to water administration to integrated management. Transfer of

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funds currently used for NHD stewardship to the commission would affect the operation of many department programs if the new commission did not continue this activity. As another example, the department's stream-gauging program which resides in the Planning and Assistance Division, is highly dependent upon coordination from the division and the operating budget the division is responsible for helping to expend. The actual field work for stream-gauging program is carried out through the department's field offices which are not part of the Planning and Assistance Division. This program is essential to the department for administering surface water rights in times of shortage and for monitoring flows released from reservoirs for downstream uses. Transfer of funds for stream-gauging related positions and the stream-gauging operation budget to another agency could cause significant difficulties in maintaining the stream-gauging program and coordinating field office stream-gauging activities. By removing the funding that supports seven and a half positions of the Planning and Assistance Division, there will be an impact on the department's abilities to conduct business under its remaining authorities including support for the integrated water management planning functions required under the Groundwater Management and Protection Act. The department's fiscal note for the bill includes a bare minimum for maintaining essential duties to other affected divisions. In summary, this request includes new funding for four FTEs and associated operating expenses totaling about \$398,000 to continue functioning at current levels in other divisions currently assisted by the Planning Division. Our estimate assumes that the department and the Statewide Water Planning Commission will develop affective coordination and cooperation where our separate planning and management activities intersect. I would also like to state that it is not accurate to say that there's only seven and a half people involved in state planning activities within the division. My count is that there's about 24 people actively involved in state planning in a variety of different areas within the department. Our department is about 105 people, so about a quarter of our activities involves state planning....water planning to some degree. I would be glad to answer any questions. [LB1016]

SENATOR LANGEMEIER: Very good. Are there any questions for the director? Senator Carlson. [LB1016]

SENATOR CARLSON: Thank you, Senator Langemeier. Director Dunnigan, you have come up in opposition to the bill; would you also be in opposition to an interim study? [LB1016]

BRIAN DUNNIGAN: Never in opposition to discussion, Senator. [LB1016]

SENATOR CARLSON: Okay. This isn't exactly on this bill, but...and I want to ask this in such a way that I'm not prejudicing my question. Could you define your responsibilities in any kind of overseeing or whatever with the NRDs? [LB1016]

BRIAN DUNNIGAN: We do not have any oversight of the NRDs. Through the integrated

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management planning process, we do develop joint integrated management plans and the key word there is joint. We are partners in that process. We don't have any oversight. [LB1016]

SENATOR CARLSON: Okay. So you're...you don't have any oversight, so describe your relationship again with the NRDs. [LB1016]

BRIAN DUNNIGAN: Within integrated management, we're joint partners in developing plans among water authorities. The department regulates surface water and the NRDs locally regulate groundwater. [LB1016]

SENATOR CARLSON: Okay. Thank you. [LB1016]

BRIAN DUNNIGAN: And we're also involved in activities within the department in administering funds that NRDs apply for and we make available to those NRDs for a variety of different activities. [LB1016]

SENATOR CARLSON: Would there...could there be a case or an instance where you could or would step in and make a priority decision over an NRD? [LB1016]

BRIAN DUNNIGAN: I'm trying to think of an instance. Certainly in the integrated water...integrated management planning process, there is a dispute resolution mechanism in there. If decided in the favor of one group or another, there could be oversight provided. I'm thinking of the Interrelated Water Review Board and the dispute that would go to the Interrelated Water Review Board and it...it...authorities could come under the department through that process. [LB1016]

SENATOR CARLSON: Okay. I'm not trying to make you uncomfortable by probing here a little bit. [LB1016]

BRIAN DUNNIGAN: I'm trying to think of other things and I'm not coming up with many. [LB1016]

SENATOR CARLSON: Okay. And through an evaluation and so forth on IMPs, you know I understand the process that could occur there and...so I'm seeing there are cases where you can, in a sense, step in and the NRD ends up either agreeing with you or going to the...I've lost what it is they go to. [LB1016]

BRIAN DUNNIGAN: The Interrelated Water Review Board. [LB1016]

SENATOR CARLSON: Water Review Board, but there isn't anything that way in a reverse direction is there? [LB1016]

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BRIAN DUNNIGAN: Not that I would know of. I guess the other instance that may come up, Senator, would be in the situation where the state is entered into a compact with another state. Of course, the state would need to do what the state needs to do to be in compliance. So in that case there could be some authorities that would be exercised where the department would basically say, this is what we need to do. [LB1016]

SENATOR CARLSON: Okay. Okay. Thank you. [LB1016]

SENATOR LANGEMEIER: Other questions? Senator Schilz. [LB1016]

SENATOR SCHILZ: Thank you, Senator Langemeier. Director Dunnigan, thanks for coming in today. And as I was sitting here listening to your testimony, I take it the sum of this...some of these planning activities could also be considered or looked upon as regulatory opportunities as well? Because like stream gauging, I mean if you're using that to protect waters that go downstream, isn't that more of a regulatory function than a planning function? [LB1016]

BRIAN DUNNIGAN: That could be a data gathering function or a regulatory function in that the positions that I mentioned would be strictly planning functions and I would say, for instance, in integrated...our Integrated Water Management Division, we have twelve and a half FTEs in that division; we have seven and a half FTEs in our Planning and Assistance Division; we have four FTEs in our Flood Plain Management Division which is a planning, certainly a planning activity of the department. That's the 24 positions that I was referring to as being involved in planning. [LB1016]

SENATOR SCHILZ: Right. Okay. And I guess my question was, is it...and I think you've told me that that is kept separate. [LB1016]

BRIAN DUNNIGAN: That is kept separate. [LB1016]

SENATOR SCHILZ: Right. [LB1016]

BRIAN DUNNIGAN: At least in my tracking. [LB1016]

SENATOR SCHILZ: Right. [LB1016]

BRIAN DUNNIGAN: And then we would have regulatory responsibilities and... [LB1016]

SENATOR SCHILZ: Sure. But that...yeah. [LB1016]

BRIAN DUNNIGAN: ...permits and registrations and other things. [LB1016]

SENATOR SCHILZ: But that doesn't mean that any one day somebody that was doing

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a certain job for the planning part couldn't be asked the next day to do something for regulatory, depending on what... [LB1016]

BRIAN DUNNIGAN: Based on priorities, that would be correct. And one really interesting thing about the division as it is set up right now with integrated management, with state planning and review process, many of the same types of positions are used across divisions for activities so there is a great synergy within the department to address all of our statutory responsibilities with the staff that we have, so even though you may be in the Flood Plain Management Division, your work could be contributing to a state planning and review process... [LB1016]

SENATOR SCHILZ: Right. [LB1016]

BRIAN DUNNIGAN: ...or integrated management planning across multiple divisions within the agency. [LB1016]

SENATOR SCHILZ: Okay. And I guess I'll just ask this because I don't know. Does your planning arm have a...I guess for lack of a better term, a mission? [LB1016]

BRIAN DUNNIGAN: Certainly. Our mission is described statutorily and we, based on priority, address pieces of that statutory provision. And I certainly want to emphasize that integrated water management planning is planning at the basic level that Mr. Knutson described and really becomes a foundation of any state-water plan that on a basin and subbasin level, you're looking at the resources, you're looking at the uses, and you're looking to balance those, so we don't see a conflict in between integrated water management planning and statewide planning. It's just the sequence that you're looking at it in and we're building the foundation with data and with the Integrated Water Management plans to have a very good state-water plan. And given the fact that LB962 has only been around for about five years, tremendous amount of work has been done. We either have completed or working on in 14 NRDs on integrated management plans and with Senator Fischer's introduction of her bill for voluntary IMPs, there could be a number of additional IMPs that would be entered into. So, I just don't want you to lose sight of the fact that integrated management planning at its basic level sets the framework for a statewide water plan. [LB1016]

SENATOR SCHILZ: Thank you. I just want to ask you one more question because Senator Carlson's line of questioning had me thinking, as we set up and we implement our integrated management plans, obviously they're working to either get you back to '97 levels or whatever we can deem as fully appropriated. What happens once that integrated management plan is in place and has gone through the first time frame if...if what we're trying to manage for isn't realized? [LB1016]

BRIAN DUNNIGAN: Well I would not see an integrated management plan ending.

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Planning goes on and on and what we do is we refine what the goals are and whether we're achieving what we need to achieve and adjust accordingly. So I would see those plans continuing forward and in the case of overappropriated designations, certainly one of the things that has to happen is you have to come back to some level. In the case of a fully appropriated determination, really what you have to look for is what your supplies are and what your long-term uses are going to be and then develop a plan that addresses that. And that...that's it; and then the constant monitoring of how you're doing in that planning process is essential. [LB1016]

SENATOR SCHILZ: Sure. And maybe, maybe I didn't state my question quite properly, but I... [LB1016]

BRIAN DUNNIGAN: I probably didn't answer it properly. [LB1016]

SENATOR SCHILZ: ...as in my natural resources district, Twin Platte Natural Resources District, there's a number out there, you know, a certain number of what we believe and the state believes working together that that district needs to come up with. What happens if those numbers aren't come up with? That was my question basically. [LB1016]

BRIAN DUNNIGAN: In...I think in your area, in the fully appropriated portion of the basin, those IMPs are written so that there are things that kick into place, including regulation, if those aren't met. Obviously, if we end up not being able to meet them, we have to rethink our strategy on what we're going to do and how we're going to do it. But it's not going to be just a free pass on, you know, we didn't get it so let's not plan anymore. It's going to be, how do we achieve what we need to achieve for the basin's sustainability. [LB1016]

SENATOR SCHILZ: So the state would have some teeth there to make some things happen. [LB1016]

BRIAN DUNNIGAN: Certainly. And as partners with the NRDs, we want to work together on those things. Absolutely. It's in our best interest. [LB1016]

SENATOR SCHILZ: So that would be another occasion where the state would have oversight over it. [LB1016]

BRIAN DUNNIGAN: And that would be through the Interrelated Water Review Board if there was... [LB1016]

SENATOR SCHILZ: If there was a dispute? [LB1016]

BRIAN DUNNIGAN: ...conflict on whether or not things were being achieved. Yes.

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[LB1016]

SENATOR SCHILZ: I appreciate that. Thank you. [LB1016]

BRIAN DUNNIGAN: Yes. [LB1016]

SENATOR LANGEMEIER: Senator Fischer. [LB1016]

SENATOR FISCHER: Thank you, Chairman Langemeier. Thank you, Director, for being here. Who's on the Water Review Board and how are they chosen? [LB1016]

BRIAN DUNNIGAN: The Interrelated Water Review Board by statute has five members. Two are appointed by the Governor. three come from a list from the Natural Resources Commission, a list of at least six to the Governor, and the Governor chooses from that list the additional three people. There are some other provisions on how many can be in the basin and not. I'd have to look at that to make sure, but that's generally it; five people. [LB1016]

SENATOR FISCHER: Who's on the Natural Resources Commission? [LB1016]

BRIAN DUNNIGAN: The Natural Resources Commission is a commission within our...our...with...kind of within the department. Those are selected by river basins throughout the state, those NRD Commission members. [LB1016]

SENATOR FISCHER: Has any dispute or any situation ever come before the board; have they ever heard anything and acted on it? [LB1016]

BRIAN DUNNIGAN: No. We've been able to work together and work out those differences without having to go the Interrelated Water Review Board. [LB1016]

SENATOR FISCHER: So in the IMP process, which, by the way, I like your comments on how that process works with the NRDs and with the department in a partnership. But in a fully appropriated basin in an IMP process, you made a comment that work can be done to address uses within the basin and future uses. Could you elaborate on that? [LB1016]

BRIAN DUNNIGAN: Absolutely. Each basin is different and there will be constraints in some basins that will be different than others. For instance, if you have a compact or if you have a cooperative agreement, those constraints may be very different than if you don't have either of those and what you're really looking at is what the supply is and what the stakeholder's uses are in the long term, both in the short term and the long term. Then it's a matter of prioritizing those uses and coming up with a plan to make sure those stakeholder's interests are addressed and met through time. [LB1016]

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SENATOR FISCHER: And that process, do you believe it needs to be flexible and fluid, no pun in intended? [LB1016]

BRIAN DUNNIGAN: I think...I think it is...I think it can be the way it is in statute right now, if that's the way we approach it. [LB1016]

SENATOR FISCHER: And that... [LB1016]

BRIAN DUNNIGAN: And I agree with you that it needs to be flexible. [LB1016]

SENATOR FISCHER: And I agree with you on your interpretation of current law as we have it that there is flexibility allowed there within those basins. [LB1016]

BRIAN DUNNIGAN: Yes. [LB1016]

SENATOR FISCHER: So thank you for your work. [LB1016]

BRIAN DUNNIGAN: You bet. [LB1016]

SENATOR CARLSON: One more. [LB1016]

SENATOR LANGEMEIER: Senator Carlson. [LB1016]

SENATOR CARLSON: Thank you, Senator Langemeier. Just to follow up on Senator Fischer. The Natural Resource Commission, how many members are there? [LB1016]

BRIAN DUNNIGAN: There's 16. [LB1016]

SENATOR CARLSON: But they're selected by who? [LB1016]

BRIAN DUNNIGAN: Twelve or 13 are selected by the basins, but basically by caucus through the NRDs and three are appointed by the Governor. [LB1016]

SENATOR CARLSON: Okay. Thank you. [LB1016]

SENATOR LANGEMEIER: Director, I have a couple questions. To follow up on what Senator Carlson talked about, we heard a few days ago, the NRDs came in and said we're not advocates for groundwater use, we're regulators. And then to follow up on Senator Carlson's question, he asked if your department and you have regulatory authority over groundwater and you said no. [LB1016]

BRIAN DUNNIGAN: I said no. [LB1016]

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SENATOR LANGEMEIER: But then you said that we have to create IMPs and we do those jointly, yet they are done jointly, but they have to be approved by DNR. [LB1016]

BRIAN DUNNIGAN: They're approved jointly. They're approved both at the NRD level and at the department level. [LB1016]

SENATOR LANGEMEIER: But at some point, they have to have your sign-off on it. [LB1016]

BRIAN DUNNIGAN: Just like they have to have the sign-off of the NRDs. [LB1016]

SENATOR LANGEMEIER: So... [LB1016]

BRIAN DUNNIGAN: Of the specific board. [LB1016]

SENATOR LANGEMEIER: And an IMP is basically a regulatory document. [LB1016]

BRIAN DUNNIGAN: It shouldn't be. It's a planning document. There may be regulations associated with it to make sure that the goals and objectives are met, but it's a planning document; it's not a regulatory document. [LB1016]

SENATOR LANGEMEIER: Okay. If the NRD does not agree and you can't come to a mutual agreement, they then can...I'm just walking this through my mind, they can appeal it to the Interrelated Water Review Board. [LB1016]

BRIAN DUNNIGAN: But that's either party could if the dispute is such that it can't be resolved. [LB1016]

SENATOR LANGEMEIER: Which is made up of primarily department derived people; yes, they come off the different review boards. [LB1016]

BRIAN DUNNIGAN: Not department derived people necessarily. From the...the commission is represented...local representation from the basins of the state. [LB1016]

SENATOR LANGEMEIER: Okay. That's all I have for now. Any other questions? Thank you very much. [LB1016]

BRIAN DUNNIGAN: Thank you for your time. [LB1016]

SENATOR LANGEMEIER: Great job. Further testimony in opposition to LB1016? [LB1016]

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DON ADAMS: Good afternoon, Senator Langemeier, members of the Natural Resources Committee, my name is Don Adams, A-d-a-m-s, executive director of Nebraskans First. We do applaud Senator Christensen for bringing this bill. We do support the concept of developing a twenty-first century water policy rather than the nineteenth century water policy we are now living under which is pretty simple. It's in times of shortage or drought that we just shut down wells. That's the policy in this state. There's no forward thinking at all involving expanding our storage capability which we could do. But the fact that we have 8 million acre feet of water flowing out of this state every year, to me that's the problem we have in this state. And we need to retain that. So we hope this interim study on a forward thinking water plan bears fruit. I'd like to just disagree a little bit with Brian Dunnigan, who is probably my all time favorite DNR director. But I think DNR has total and ultimate authority and control over groundwater. If they unilaterally issue a fully appropriated designation, that stops instantly all new development unless the DNR...or the NRDs can get together like they recently did in the Loup and Elkhorn and Lower Platte, spend a lot of money, do their own independent peer review and get the fully appropriated designation removed. But to say that the DNR has no control over groundwater is patently inaccurate; they have absolute total control with the issuance of a fully-appropriated designation. It all stops, ends. So I don't know where we're missing the boat on this. We have the Interrelated Water Review Committee which would be the ultimate authority in a dispute if IMPs cannot be agreed upon. It's a void that is voided with Governor appointments and we don't think we fare very well if the matter ever gets to that point. But perhaps, maybe in the Republican with what's happening down there, it will ultimately end up and we'll test out that board. I hope we don't get there. Anyway, I hope you do a good study on this and we develop a twenty-first century water policy and you guys can all be heroes if we can do that because if we have all the water in the world we need, we just got to bank it here, save it. Rec would be happy; environmentalists would be happy; industries would be happy; cities would be happy; irrigators would be happy if we developed a twenty-first century plan. Thank you very much. [LB1016]

SENATOR LANGEMEIER: Very good. Are there any questions for Mr. Adams? Senator Fischer. [LB1016]

SENATOR FISCHER: Thank you, Senator Langemeier. So you're opposed to the bill... [LB1016]

DON ADAMS: As written. [LB1016]

SENATOR FISCHER: As written. [LB1016]

DON ADAMS: As written. Support the concept. [LB1016]

SENATOR FISCHER: Okay. Thank you. [LB1016]

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SENATOR LANGEMEIER: Senator Carlson. [LB1016]

SENATOR CARLSON: Thank you, Senator Langemeier. Don, if you had...money wasn't necessarily an issue and there was one thing you could do to help solve the water issue in Nebraska, what would it be? [LB1016]

DON ADAMS: The one thing...I would... [LB1016]

SENATOR CARLSON: So let's find out what the most important thing is. [LB1016]

DON ADAMS: I would pick out...I would pick probably the three or four smartest people in the state that I've learned over 15 years know what they're talking about and get them together and they'd figure it out. [LB1016]

SENATOR CARLSON: Okay. [LB1016]

DON ADAMS: And there's a couple NRD managers in there; probably a former DNR director who has Nebraska ties; I think they could work it out. And if I were Governor, I would go to Kansas and lock myself in the room with the Kansas governor and say we're not leaving this room until we have this problem figured out and stop all the nonsense that's going on now with that because Kansas is obsessed with shutting down our wells. We will not be in compliance with Kansas until Kansas says we're in compliance with Kansas. And we don't know how to get there and all they want us to do is shut down wells and if it provides them no additional water, fine. They want our wells. And it's a true obsession with Barfield from Kansas. And I know that, I know that. [LB1016]

SENATOR CARLSON: Okay. I was trying to direct you to something else. (laughter) [LB1016]

SENATOR FISCHER: Be a little more obvious. [LB1016]

SENATOR CARLSON: Okay. So, we've got 8 million acre feet flowing out and we need to retain some of that. So quickly, what's a good way to retain some of it? [LB1016]

DON ADAMS: One or two medium to small sized reservoirs. I'm not an engineer, but I've talked to some; they're very doable. I know the Central Platte is looking at one around Elm Creek to deal with this so-called Cooperative Agreement which is the greatest misnomer in the history of water policy. It wasn't in cooperation at all. But, you know, again, I'd get three or four of the best engineers in this state from HDR and get somebody from Kiewit and stuff, get them together and say you've got two or three months, give me a plan how we save this water and retain it and release it on time when

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environmental needs require it or irrigation requires it; we'd be golden. Right now 8 million goes out, turns into saltwater, ends up in the Gulf of Mexico; sometimes 10 million. [LB1016]

SENATOR CARLSON: Okay. All right, thank you. [LB1016]

SENATOR LANGEMEIER: Senator Fischer. [LB1016]

SENATOR FISCHER: Thank you, Senator Langemeier. Thank you, Don. Do you think the NRDs have the authority now to build some reservoirs for storage purposes? [LB1016]

DON ADAMS: I think we'd have to be...that requires joint effort. Again, you'd probably want to talk to some of the managers from the NRDs. I'm not an expert on that matter, but... [LB1016]

SENATOR FISCHER: You know, I find it always very interesting that sitting on this committee and just in daily conversations we all hear how water is this tremendous resource that Nebraska has. But not very many people want us to use the resource or benefit from the resource and I think...and I think there's a balance there that we can definitely achieve, and as you said, not send out eight times the amount of water out of the state that comes into the state. Thank you. [LB1016]

DON ADAMS: Thank you very much. [LB1016]

SENATOR LANGEMEIER: Very good. Are there any other questions? Seeing none, very good, thank you. [LB1016]

DON ADAMS: Thank you. [LB1016]

SENATOR LANGEMEIER: Further testimony in opposition to LB1016? Seeing none. Is there any neutral testimony? Welcome. [LB1016]

JOE HERROD: Welcome. [LB1016]

SENATOR LANGEMEIER: Do you have a green sheet? [LB1016]

JOE HERROD: Pardon me. [LB1016]

SENATOR LANGEMEIER: Do you have a sign in sheet? [LB1016]

JOE HERROD: Oh, I...no I didn't, because I just want to say something quick because it just came to mind. I'm Joe Herrod, H-e-r-r-o-d, I'm only here representing myself, but

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the 8 million acre feet that flow out of the water...flow out of the state, last year I was invited to a workshop in Colorado put on by Ducks Unlimited on the use of water in the South Platte River Basin and this might sound silly to you, but storage of water to recharge groundwater. It is done in Colorado and the people that pay for it, on some instances, are Ducks Unlimited and in other instances they are duck clubs. And I was at a duck club in Greeley, Colorado, and they bring the water in and they put it out and they measure and they know what comes in and they know what recharges and they know what ends up in the ground and they know what ends up in the river and they use it to work with the water that they are by compact need to send on down the South Platte River. And so there's a lot of engineering expertise available through Ducks Unlimited, through duck clubs, through Ducks Unlimited projects and everything and the money that those of us that contribute to Ducks Unlimited could certainly be used to hold some of these storage and recharging facilities. So just a thought. Be glad to... [LB1016]

SENATOR LANGEMEIER: Very good. Senator Fischer. [LB1016]

SENATOR FISCHER: Thanks, Joe. I know Ducks Unlimited. They do great job with habitat and a number of individuals in my area are very active in it. How do they get the water? Do they just collect it; are they piping it? Are they pumping it? What are they doing, do you know? [LB1016]

JOE HERROD: Well, I never thought when I went through the whole workshop that I didn't try real hard to take a lot of notes or retain anything so that I could get back up and say anything other than it gets there and it's glorious. And the people involved are enthusiastic at...the group...we have the same sort of group here in Nebraska that we have in Colorado, but the group in Colorado I saw what they do and they have basically...I think there's four or five gentlemen that all work together out of an office in Fort Collins. There's a director, there's an engineer, there's a construction manager, and there's a biologist. And they get it done and then they increase the ability of water for pumping by other people because of the recharge they've done. In fact, some of the things that just kind of went past me, they were now, so and so community can now access X-more amount of pumping because of what is being recharged and this was outside the city of Greeley and things like that. So it's a, you know, just a thought that...so I thought I would... [LB1016]

SENATOR FISCHER: Which those irrigation wells also help with habitat tremendously. [LB1016]

JOE HERROD: Oh yes, yeah, but, well...yeah they...in fact they...they can run irrigation wells past the irrigation season and put water in certain holding areas and then...and then they still can say, okay, I put it there for my own storage because I sent it down to XYZ duck club and it goes back into the aquifer so back when I need it when it's time to

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put it out on the cornfield, I put it there in storage there for myself and it's something. And I was given volumes of Colorado water law which is tremendously more complex than ours is because of the water that they get, you know, the, you know, the Continental Divide and the Colorado River that goes all the way to California and everything. And it's very complex, but it's an interesting concept for storage. I mean, why not let private dollars use the water to sit there and have it recharge the aquifer. [LB1016]

SENATOR FISCHER: Very interesting. Thank you. [LB1016]

JOE HERROD: Thank you. [LB1016]

SENATOR LANGEMEIER: Thank you. Further testimony in a neutral capacity? Seeing none. Senator Christensen, would you like to close? [LB1016]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman. Well I'd encourage an interim study, possibly look in areas...at another interim study that maybe is more pinpointed and I would like to take ideas from this committee, from DNR, from anybody that would suggest areas that we could look at in an interim study. I think maybe that's where we'd get the best input is if we had areas that how do we get sustainable with water? How do we recharge an aquifer? How can we best utilize 8 million acre feet of water that's leaving or minimize the amount that is leaving the state? And I think if we would work together between this committee, anybody that would bring up suggestions, DNR, we really could make some benefit for the state of Nebraska and develop some new policy, some new ideas to look at to afford what we're doing in this state right now with water. Thank you. [LB1016]

SENATOR LANGEMEIER: Very good. Senator Christensen, we'll plan to have you draft that interim study language. Thank you. That concludes the hearing on LB1016. Now Senator Carlson will come up to the chair and we'll open on LB785. [LB1016]

SENATOR CARLSON: Senator Langemeier and members of the Natural Resources Committee, I am Tom Carlson, spelled C-a-r-l-s-o-n of District 38 here to introduce LB785. This bill is a further clarification of LB477 which was heard by this committee and passed by the Legislature last session. Briefly, that law required an NRD, prior to approving a transfer of certified irrigated acres or other certified water uses or participation by a landowner or water user in a financial incentive program, to obtain from the applicant (1) a title report identifying the existing lienholders; and (2) written consent to such transfer or participation from any such lienholders. And I believe the passage of that law is important and helpful to buyers of land, sellers of land, and then of course, financial institutions. It's been in affect a year and we knew there were some wrinkles and so that's what LB785 being introduced today would allow the transfer of four acres or less without such title reports or written consent of lienholders. A small

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transfer exception was part of the many discussions prior to the passage of LB477 last year. The interested parties agreed to go ahead with the bill and come back this year with an amendment and this is LB785. We'll hear testimony and there may be even further tuning of this amendment. And that concludes my introduction. I'd try to answer any questions and I know we have a number of testifiers behind me. [LB785]

SENATOR LANGEMEIER: Very good. Are there any questions for Senator Carlson? Seeing none. We'll move on to those that are in support of LB785. [LB785]

ROBERT J. HALLSTROM: (Exhibit 4) Senator Langemeier, members of the committee, my name is Robert J. Hallstrom. I appear before you today as registered lobbyist for the Nebraska Bankers Association to testify in support of LB785. Senator Carlson has done a nice job of recapping what we accomplished last year with the adoption of LB477. As he indicated, during the discussions of that legislation we had a number of minor issues that we knew would crop up, but due to the contentious nature of getting to where we got to finally get the law passed with help from this committee and others, we decided to leave well enough alone and come back this session. Dean Edson had contacted me this fall and there was a resolution passed by the Association of Resource Districts suggesting that we should look at a de minimis exception involving the four acres of certified irrigated acre transfers as being exception to the title report and the lienholder consent requirements which was acceptable to the Bankers Association, so you have LB785 in front of you today. I don't know what the science is or the method to their madness behind the four certified irrigated acres de minimis exception, but I would suspect that those who follow me will provide you with some real-life examples as to why that is what they're looking for. I would just note for your benefit, attached to my testimony is the lienholder's consent to transfer of certified irrigated acres and the instrument of transfer of right to use groundwater that have been implemented by at least in this case the Central Platte NRD which are being utilized from visiting with bankers and representatives of the NRDs, perhaps with the exception of these de minimis transfers. The other types of transfers are being taken care of appropriately as we anticipated. We don't think lenders are stonewalling the consents or anything of that nature, which we talked at great length about last year during the LB477 legislative process. So I'd be happy to address any questions that you may have. [LB785]

SENATOR LANGEMEIER: Very good. Are there any questions for Mr. Hallstrom? Seeing none, thank you very much. [LB785]

ROBERT J. HALLSTROM: Thank you. [LB785]

SENATOR LANGEMEIER: Further testimony in support of LB785? Welcome. [LB785]

JOHN THORBURN: (Exhibit 5) Good afternoon. 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

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Natural Resources District in Holdrege. I'd like to offer my testimony on behalf of my NRD and the Nebraska Association of Resources Districts in support of LB785. LB785 is a simple, common-sense revision of existing law. It exempts landowners who want to make a one-time transfer of four or fewer certified acres within a parcel or from one parcel to another from a requirement that they have a title search performed on their property before an NRD can approve such transfer. The title search requirement was added to state law last year as a way to protect lienholders from having property devalued as a result of a certified irrigated land transfer. Those involved in drafting the legislation recognized at the time that there was some minimum threshold below which a certified irrigated land transfer's effect on property values would be minimal. We weren't able to come to an agreement at the time as to what the threshold would be, so the original legislation was silent on that point. After additional consultation between the Nebraska Bankers Association and the NARD, we have agreed that four acres should be that threshold. Administration of groundwater irrigation rights is an evolving area of Nebraska law. This committee should expect to see additional legislation on this subject in future legislative sessions. Among the issues yet to be resolved are how to protect lienholders from having property devalued when surface water rights are transferred, and whether people who buy and sell irrigation rights should report the price of those transactions. I want to thank Senator Carlson for his willingness to work with NARD and the Nebraska Bankers Association on this complicated issue. I urge the committee to advance this bill to the floor of the Unicameral. Thank you. [LB785]

SENATOR LANGEMEIER: Very good. Are there any questions? Mr. Thorburn, I do have a question. [LB785]

JOHN THORBURN: Oh, yes. [LB785]

SENATOR LANGEMEIER: Won't let you get away. I think this is a good idea. I thought LB477 was a good idea and here's my question; why four acres? [LB785]

JOHN THORBURN: Obviously any threshold is going to be somewhat arbitrary. Four acres is actually even less than the size of most pivot corners. We had to pick a number, Senator, and four acres, essentially 2.5 percent of a quarter section I think most folks would agree that that wouldn't affect the value of most parcels. That's the best I can do for you on that point. [LB785]

SENATOR LANGEMEIER: So this wasn't a panel discussion of four or six, two. [LB785]

JOHN THORBURN: Yeah, there...relatively little in-depth research done on this point. [LB785]

SENATOR LANGEMEIER: That makes good legislation. Very good. Thank you very much. [LB785]

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JOHN THORBURN: Thank you, Senator. [LB785]

SENATOR LANGEMEIER: Further testimony in support of LB785. Welcome. [LB785]

MILT MORAVEK: (Exhibit 6) Thank you, Senator Langemeier. My name is Mil Moravek; I'm assistant manager and projects director for the Central Platte Natural Resources District and we have done a large number of these transfers. And the way the existing law works, we have to do a...go through the complete process on every transfer and to be quite honest with you, 75 to 80 percent of our transfers just deal with a producer that wants to put a center pivot on a piece of land and needs to maybe take out an old farmstead or a...some trees or something for the pivot to go all the way around. He is willing to give up the irrigation on one or more corners to take that farmstead out so the pivot can go around and make his irrigation system more efficient. Even if he already has a pivot there, he wants to get the thing to go all the way around so he doesn't have to windshield wiper it. What we have had to do with this LB477 law is we had to have our attorney...we have to have our attorney look at the paperwork that the staff puts together on this transfer or variance; we call them a variance. The staff takes it to the attorney; the attorney reviews it. There has to be a registered abstract or an attorney then that goes to the courthouse, register of deeds, and sees if there's a loan or loans on the property. Then the...our attorney then works up the loan release documents, sends them to the lending institutions and they have to sign them in front of a notary public and get them back to us. Then all that paperwork has to be filed. This is a \$325 cost to us and we pass that cost onto the landowner that is wanting that transfer. Now there's been many times where we've had to do that on transfers of less than one acre. And I can...you can imagine how upset some farmers are if they come in and want to transfer one acre and find out it's going to cost them \$325 and it's going to take three to four months for this process to go through. It's a waste of money; it's a waste of time by the attorneys, the abstractors, the register of deeds office that has to file them. And so I just want to let you know that we support LB785, but our attorney does not feel the four acres covers it good enough. Because like I said earlier, 75 percent of our transfers are one landowner, one piece of land, move a few acres from a corner to the piece of land, the old farmstead that was taken out. That usually always involves more than four acres. It usually involves five to six acres, to tell you the truth. We feel that if you could get this bill on the floor and have Senator Carlson add an amendment which is similar to what I show highlighted here on the handout sheet, that would cover those types of situations. And then we could go back to the lending institution and say, okay, this has been approved and maybe now you can even loan money to that farmer for his new center pivot that's going to go on there and the value of that property then is going to go up, you know, rather than down. So we support LB785 strongly. We would love to see this amendment added to LB785 on the floor and we would love to see it passed in this session of the Legislature. Thank you. [LB785]

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SENATOR LANGEMEIER: Very good. Are there any questions? Mr. Moravek, I have one. I didn't envision that you would be doing this process in LB477 on the same tract of land if you were moving the certified acre off a corner to be replaced by an acreage that was taken out for the pivot. I didn't anticipate there would be a need to do this on that particular scene. [LB785]

MILT MORAVEK: Well, and we were hoping that would not happen too in LB477. But if you read the way LB477 is written today, it says all transfers. It does not have any exemptions in there and that's where the gentleman before said something about we needed a de minimis clause in there; this...these two clauses provide that de minimis clause. We understand totally of the bankers concern that somebody is going to have a piece of land. They're going to sell all the water out from underneath of it, they're going to have a loan on there of irrigated rate; they're going to default on the loan and the banker is out that amount of money. That has not happened, by the way, but it could happen. We understand that. We are willing to go through that whole process on those types of transfers where you're talking about moving acres from one field to another, buying water, selling water, transferring water, but when it's just one landowner on the same piece of land just to improve his irrigation efficiency, then we want to make sure that we don't have to go through that cumbersome process. And like I said, we've done almost a hundred of them already just this last year and they are cumbersome, time consuming and a total waste of time and money in my opinion. [LB785]

SENATOR LANGEMEIER: Okay. I just want to make one comment. We're not buying and selling water; we're buying and trading a classification of the certified irrigated. [LB785]

MILT MORAVEK: We're buying and selling the use of water. [LB785]

SENATOR LANGEMEIER: I want to go home before 5:00; so we won't continue on that. [LB785]

MILT MORAVEK: Okay. [LB785]

SENATOR LANGEMEIER: Are there any other questions? Seeing none, thank you very much. [LB785]

MILT MORAVEK: Thank you. [LB785]

SENATOR LANGEMEIER: Appreciate it. Further testimony in support? That might have been borderline. Testimony in opposition? Seeing none. Neutral testimony? Seeing none. Senator Carlson, you're recognized to close. [LB785]

SENATOR CARLSON: Milt, before you leave, listen to my closing, would you?

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(Laughter) Senator Langemeier and members of the Natural Resources Committee, I want to thank those who testified today for coming. I want to especially thank Bob Hallstrom because last time he had me do a bill he left me out to dry and today he came and testified and I appreciate that. I also wanted Mr. Moravek to listen to what I was going to suggest here and I may not understand this completely, but in reading the potential amendment here: or if a transfer involves one landowner on a single tract of land where there is no reduction or increase; I'm inserting "or increase" in certified irrigated acres and the transfer involves an improvement to irrigation efficiencies. So my question would be whether there should be wording in there, "no reduction or increase". And with that, that's my closing on this bill and I appreciate your attention. [LB785]

SENATOR LANGEMEIER: Very good. Are there any question? Seeing none. Well done. That concludes the hearing on LB785. We will now move...I see Senator Avery is here. We'll now move to LB1025. And welcome to the Natural Resources Committee. [LB785]

SENATOR AVERY: This is my first time. [LB1025]

SENATOR LANGEMEIER: I realize that. We appreciate it. [LB1025]

SENATOR AVERY: I've been afraid of Senator Fischer all these years. (Laughter) [LB1025]

SENATOR FISCHER: As you should be. [LB1025]

SENATOR LANGEMEIER: You wouldn't be the first one. Senator Avery, you're recognized to open on LB1025. [LB1025]

SENATOR AVERY: Thank you. Mr. Chair, my name is Bill Avery, for the record; it is spelled B-i-l-l A-v-e-r-y. I represent District 28 here in the Legislature. I am bringing to you LB1025. It involves several things. First of all, it deals with fully or overappropriated water basins. Secondly, it involves instream-flow water rights for nine consumptive uses; and thirdly, exempts applications from the burdensome and cumbersome variance process. Specifically, this bill allows the Department of Natural Resources to accept and to act upon instream-flow water rights applications filed for non-consumptive uses on fully appropriated or overappropriated water basins requiring a variance. LB1025, I want to emphasize, does no harm to senior appropriations or existing groundwater appropriations. A little bit of history might be helpful. In 1984, Nebraska statutes recognized that maintenance of instream flows in our waterways as being important for the protection of fish, wildlife, and recreation. And the law recognized that maintenance of the instream flows is important, beneficial to the state and therefore is a good reason to allow instream applications in these fully appropriated waterways. The law specifically authorized the natural resource districts and the Game and Parks

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Commission to file instream-flow water rights on fully appropriated streams and rivers. The Game and Parks Commission first initiated instream-flow studies on the Platte River in 1982. They submitted their first application in 1988. It was granted and the first Nebraska instream-flow appropriation was made on the Long Pine Creek in 1989 for the trout fishery. This appropriation survived several challenges in the Supreme Court. We have out of our 23 NRDs, only one has...at this time only one holds an instream-flow appropriation. That's the Central Platte Natural Resource District and that is on the Platte for fish and wildlife. The process requires the commission and NRDs before they obtain approval for an application, they have to first receive a variance under existing statute for good cause shown from the Department of Natural Resources. The variance process is long; it's cumbersome. It involves a multi-science based process to determine instream-flow needs for our waterways and resources. Included in the variance process are numerous items requiring extensive research and study, hydrology of the river, for example, biology of the river, water quality conditions, a number of things including socioeconomic value of river resources. This information is important and it is essential for rational management of our water resources when we are deciding on consumptive uses. But it is, I believe, not necessary for nonconsumptive uses. So I'm suggesting that this vital information, which is important for rational management of the river, is more appropriate for consumptive uses and not for nonconsumptive uses. Currently, in Nebraska we have no specific law on the variance process for nonconsumptive use applications that I know of. In October, 2007, the Department of Natural Resources declared the Niobrara River fully appropriated above Spencer Dam. The action was finalized in January of 2008. When the department declares a river fully appropriated, an immediate moratorium is placed on new water...new surface water applications and on new groundwater well permits from the NRDs and on new irrigated acres within the affected basins. In anticipation of the fully appropriated status of the Niobrara in May of 2006, the Game and Parks Commission directed their staff to protect the existing instream-flow appropriation and develop recommendations for the Niobrara River. This initiative, I should point out, is consistent with the agency's mission, with its strategic plan, and its legal authorities and responsibilities. To meet the 2006 directive of the commission, the staff authorized...the staff was authorized to seek grants from the Nebraska Environmental Trust Fund in the amount of \$600,000. The National Park Service, the Fort Niobrara National Wildlife Refuge and the Nature Conservancy joined in with another \$120,000 to fund the required variance process on the request. Applying for this instream-flow right on the Niobrara has been lengthy and comprehensive. The task of filling out paperwork is fairly easy, but many other things must be attached to the application, studies to quantify and justify the flows, list of persons testifying at all public hearings and evaluation of the availability of the flow. A variety of things that required studies are time consuming, but the application process is too. The commission has spent over three and a half years and over \$600,000 and their instream-flow application is still not complete. Now on the other hand, applications for irrigation surface pumping rights are straightforward. You complete a form, you attach a fee, \$200 for up to 1,000 acres, send it in and you get

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your date of seniority; simple, straightforward, doesn't take much time. But when you have to request a variance, it seems to me that this is a cumbersome process and I'm suggesting it might not be necessary when you are applying for a nonconsumptive use. And that is what I am asking here is that you exempt nonconsumptive-use applications. We know that the Niobrara River, for example, is a valuable resource for this state. In fact, to put this in some context, I found that a study was conducted by the U.S. Fish and Wildlife survey in 2001 showing that almost \$307 million is generated by fishing in the state; wildlife watching generates another \$211 million. A 1996 study showed that expenditures related to wildlife watching on the Central Platte totaled between \$13 million and \$20 million. And more than 75 percent of that money came from outside the state. I would like to see this bill advanced so we could have a discussion on the floor. It would not require a variance for nonconsumptive uses. It would not interfere at all with senior appropriations or existing groundwater appropriations. I think this is good policy and I would hope that you would agree and advance this to General File. Thank you. [LB1025]

SENATOR LANGEMEIER: Thank you very much. Are there any questions? Senator Avery, I have a number of questions. What's your definition of fully appropriated? [LB1025]

SENATOR AVERY: Not being a specialist in the field of river management or water resource management, my layman's definition would be a water basin, subbasin or water reach that has...authorizations have been given to take water or use water from the basin that is at or approaching its capacity. [LB1025]

SENATOR LANGEMEIER: So if it's fully appropriated and it's at its capacity, you feel that there's still room for more by giving it this designation. [LB1025]

SENATOR AVERY: No, no. Not, not, see, the key here, Senator, is nonconsumptive. These are applications for appropriations where you would not be taking water out... [LB1025]

SENATOR LANGEMEIER: I'm getting there. [LB1025]

SENATOR AVERY: Okay. [LB1025]

SENATOR LANGEMEIER: So you're saying this is a nonconsumptive use. [LB1025]

SENATOR AVERY: Right. [LB1025]

SENATOR LANGEMEIER: So it's not affecting anything, right? [LB1025]

SENATOR AVERY: It is. It's affecting income for the state because recreation...

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[LB1025]

SENATOR LANGEMEIER: Well, no, I'm getting to this full appropriated designation.
[LB1025]

SENATOR AVERY: Yeah. [LB1025]

SENATOR LANGEMEIER: So when we determine a fully...a basin is fully appropriated, we use nonconsumptive instream-flow rights that have been granted in that determination of fully appropriated. So, if you're saying they're not harming, maybe we should take those out of the fully appropriated designation. [LB1025]

SENATOR AVERY: They're not...they're not taking water out of the basin. [LB1025]

SENATOR LANGEMEIER: But they are calculated in the fully appropriated, so if they're part of the math to determine whether you're fully appropriated, that says they're having an affect on the river, but yet, you want to give more that says it isn't having an affect. That's a pretty... [LB1025]

SENATOR AVERY: What I'm saying is, it doesn't have a consumptive effect. [LB1025]

SENATOR LANGEMEIER: True, but we determine fully appropriated by nonconsumptive instream-flow uses as part of the math now. [LB1025]

SENATOR AVERY: Well, I would have to...I know that I'm not supposed to ask you ask you questions, but... [LB1025]

SENATOR LANGEMEIER: Well, you can't, that's one of the good things, I get to make the rules. [LB1025]

SENATOR AVERY: Yeah. [LB1025]

SENATOR LANGEMEIER: But we'll...and I'll save some of these questions for others and I don't mean to pick on you because this is kind of new subject matter. But also, my other question is, as you talked about the Niobrara. I this piece of legislation directed towards the Niobrara? [LB1025]

SENATOR AVERY: No. You will have people who will testify after me who will talk about the Niobrara, I'm sure, because they have an interest in it. This would apply to all of our river basins, the Republican River included. [LB1025]

SENATOR LANGEMEIER: And that's why I bring it up, because it says in here, all overappropriated or preliminary determined to be fully appropriated... [LB1025]

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SENATOR AVERY: Um-hum. [LB1025]

SENATOR LANGEMEIER: ...so this wouldn't affect anything that's fully appropriated, so, the Niobrara would not fall under this at all. But that's something if the committee wanted to move it, we could address that. [LB1025]

SENATOR AVERY: Well, yeah, my intent was to include fully appropriate... [LB1025]

SENATOR LANGEMEIER: That's why I'm asking. [LB1025]

SENATOR AVERY: ...and overappropriated, if it's a nonconsumptive use. [LB1025]

SENATOR LANGEMEIER: Okay, because the way it's drafted, it would only affect overappropriated and we have no preliminary so overappropriated would be the Central Platte would be the only thing it would cover. But we could correct that... [LB1025]

SENATOR AVERY: Yeah. [LB1025]

SENATOR LANGEMEIER: ...if the committee wanted to move it. So I just wanted to know your intent. [LB1025]

SENATOR AVERY: I noticed that qualifying phrase: if the committee wanted to approve it. [LB1025]

SENATOR LANGEMEIER: I can't speak for them. That's why we have exec sessions, but. Are there any other questions? Okay. They're going to let you off the hook. Thank you. You've heard the opening on LB785...excuse me, you did hear that, but we're on LB1025. Now we'll take those that would like to testify in support of LB1025. [LB1025]

DUANE HOVORKA: Good afternoon, Chairman Langemeier and members of the committee. I'm Duane Hovorka, D-u-a-n-e H-o-v-o-r-k-a, here to testify on behalf of the Nebraska Wildlife Federation in support of LB1025. I'd like to thank Senator Avery for introducing the bill and I think it would be helpful to see how this fits into the existing integrated management process, because that's essentially what we're talking about today. Once those integrated...once that watershed is declared fully appropriated or preliminary fully appropriated, and I think it applies to both as the bill is...as the law is written, there are temporary stays that go into affect and those cover groundwater wells and surface water wells...I'm sorry, surface water appropriations. But there are also in the law, and you can see it in this bill on, actually, page 4 and 5, a whole list of variances for which we can provide, we approve new surface water rights and do groundwater permits for all of those purposes during the time when the group is doing its integrated management plan development. And if you look at those reasons in there,

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they're actually mostly one of two reasons: either one, it's some kind of an emergency and there's some provisions in there; or second, it's a case where we're not impacting other water users so we're not making the problem worse. So a replacement water well would be an example. So, those are the variances that are included. There is no specific language dealing with instream-flow applications. So where that falls into the law is about two-thirds of the way down on page 5 where you've got...what used to be, I need my glasses, what used to be subsection (n), surface water uses and increases in surface water irrigated acres for which a variance is granted by the department, and that's the DNR, for a good cause. So right now, before a natural resource district or Game and Parks can apply for an instream-flow water right, they have to go to the department, they have to ask for this variance, they have to spend taxpayer dollars to do it. The Department of Natural Resources then probably has to spend taxpayer dollars to hold a hearing, to decide whether, in fact, good cause has been shown, and then allow the Game and Parks Commission to submit its instream-flow application. At that point then, all the science comes into play: the application submitted, all the years of science that went into developing that application gets reviewed by the Department of Natural Resources, they make a determination of whether the science is there so whether the just cause, essentially, is there that supports the instream-flow application. And then they have to go a step further, and say: and granting this water right would be in the public interest. So that's the heavy standard that Senator Avery talked about that an instream-flow application has to meet. Well if it already has to meet that heavy standard, that burden of proof, then it doesn't make sense to also require that the application has to be approved based on just cause, that you have to get approval to submit the application. It's a two-step process that waste taxpayer dollars, that spends more time and it doesn't make sense. And so what the bill would do is, basically, to remove that...to provide a separate provision for instream-flow applications so that rather than having to get a variance to submit your application, you could submit...simply submit the application. It doesn't change the standards under which an instream-flow application would be reviewed or approved, it simply eliminates a bureaucratic step. It eliminates the public taxpayer cost of doing that step and holding additional public hearings on those and allows an instream-flow application to move smoothly whenever it's ready to be offered. So that's...we support the bill and I'd be glad to try to answer any questions. [LB1025]

SENATOR LANGEMEIER: Are there any questions? Oh, we'll start on this side, Senator Schilz. [LB1025]

SENATOR SCHILZ: Thank you, Senator Langemeier. Mr. Hovorka, thanks for coming in. I know you've been around these issues for quite a while as well. I guess my first question to you is, and it gets back to the nonconsumptive use. And I understand you're saying that you don't want to go outside the process for this; you want to maintain that. But if you using, as you defined, water that has a nonconsumptive use, you still want that water measured and protected, don't you? [LB1025]

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DUANE HOVORKA: Yes. [LB1025]

SENATOR SCHILZ: Yes. Okay, and therein lies my question, because if you're saying it's nonconsumptive use and yet you want it protected, then to anybody else that might want that, that water would be the same as being consumed, wouldn't it? [LB1025]

DUANE HOVORKA: No. The water... [LB1025]

SENATOR SCHILZ: But wait a minute, you want to maintain it in the stream, correct? [LB1025]

DUANE HOVORKA: Correct. [LB1025]

SENATOR SCHILZ: That would preclude it from being used by anyone else, junior downstream, correct? [LB1025]

DUANE HOVORKA: That is correct. Anyone with junior rights would not be able to get...right, would be junior to that instream-flow right. [LB1025]

SENATOR SCHILZ: Right. And so, and so when you say that it would be a nonconsumptive use, I'm not sure you could define it that way, because in all the other eyes of whether...whether it's actually being used for evapotranspiration by a plant or going into the ground or just running downstream, either way, that water then is tied up and not able to be used again. [LB1025]

DUANE HOVORKA: Well, it's legally protected, but it's not consumed unless you take it out of the river and use it for something that doesn't return it to the river. Then it's consumed and then nobody has access to it. If you... [LB1025]

SENATOR SCHILZ: But nobody would have access to it in this manner except for the instream-flow permit, correct? [LB1025]

DUANE HOVORKA: The...well the folks who are using the river would have access to the water for that use. [LB1025]

SENATOR SCHILZ: As they would have access to the water if it wasn't there, the instream-flow right, correct? [LB1025]

DUANE HOVORKA: Only if the water is not consumed. [LB1025]

SENATOR SCHILZ: But protected. [LB1025]

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DUANE HOVORKA: Right. [LB1025]

SENATOR SCHILZ: Thank you. [LB1025]

SENATOR LANGEMEIER: Senator Fischer. [LB1025]

SENATOR FISCHER: Thank you, Senator Langemeier. Thank you, Duane, for being here. Are you an attorney? [LB1025]

DUANE HOVORKA: No, I'm not. [LB1025]

SENATOR FISCHER: Do you know about Nebraska's preference law as it deals with water? [LB1025]

DUANE HOVORKA: I know probably not enough to be very dangerous. [LB1025]

SENATOR FISCHER: Do you think an instream flow has preference in Nebraska? [LB1025]

DUANE HOVORKA: No, I don't think so. It is a water right like other water rights and it's subject to the same structure or preferences that are in place for other water rights. [LB1025]

SENATOR FISCHER: When you spoke about saving taxpayer money, if an instream flow is granted, doesn't that put an additional burden on NRDs which are supported by taxpayer money in having those NRDs trying to regulate and manage that instream-flow right as they do other water rights? [LB1025]

DUANE HOVORKA: Well, it's, it's...I don't think any bigger burden than is already in place for those NRDs that have to regulate based on all the other surface watering rights and groundwater permits. [LB1025]

SENATOR FISCHER: I guess I would disagree with you on that and I'd also disagree that your...that this would lessen bureaucratic regulations involved in it too. I don't think that's a good argument you make in this case. Did you want to respond? [LB1025]

DUANE HOVORKA: Oh, I'd just... [LB1025]

SENATOR FISCHER: I always give people a chance to respond. [LB1025]

DUANE HOVORKA: I appreciate that. And what I would say is if the application is going to be filed anyway, then all of what you're saying is already in place that the DNR still has to review the application. If it's approved, the DNR and the NRDs have to manage

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based on the water right that's approved, if one is approved. All this does is take away that expense of that extra step of asking for the variance and getting approval for the variance. [LB1025]

SENATOR FISCHER: But don't you think, I realize you don't...you don't know Nebraska preference law on this, but don't you think that's in conflict with the preference that we have in this state when it comes to water use, that being domestic and agricultural, when you're allowing, in the cases Senator Avery gave they were dealing with fish and wildlife and also the case with the Niobrara is for recreation? But to allow those uses to jump ahead in preference in a fully-appropriated basin, don't you think that would be in conflict with the established law we have in this state? [LB1025]

DUANE HOVORKA: Well, I guess I would disagree that it allows them to jump ahead of other uses. That the uses in surface water are still first in time, first in right. [LB1025]

SENATOR FISCHER: But you're...if I can interrupt you. [LB1025]

DUANE HOVORKA: Sure. [LB1025]

SENATOR FISCHER: If you're allowing an instream-flow right to be granted in a fully or overappropriated basin when other rights cannot be granted, I would submit to you that you are allowing that preference to jump ahead. [LB1025]

DUANE HOVORKA: Well, but, as I've said, there are other surface water rights that under law right now can be granted in a fully-appropriated basin. And so... [LB1025]

SENATOR FISCHER: With the variance process. [LB1025]

DUANE HOVORKA: Well no. Well, okay, yeah, that's true, but... [LB1025]

SENATOR FISCHER: Which you're trying to circumvent under this bill. [LB1025]

DUANE HOVORKA: I think I see your point. [LB1025]

SENATOR FISCHER: Good. [LB1025]

DUANE HOVORKA: And the purpose of the variance in those cases is to make sure that there's a public review of the change. And in the case of, for instance, in the case of an irrigation right, you basically, if you're not in a fully-appropriated basin, you fill out the form, you write your check and you get the right. And there's really no public review as to whether that's in the public interest or not, because by law we assume it is. So what I'm saying is, there is already that public review process built in to the DNR determination of whether an instream flow is appropriate and whether it's in the public

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interest, so. [LB1025]

SENATOR FISCHER: Okay. I realize this bill doesn't, as it's drafted, does not address fully-appropriated basins; but in a fully-appropriated basin, no water rights can be granted. So it truly doesn't matter if an instream-flow right, in my opinion, would be granted or not because no new rights are granted, so you're not changing any river flow in a fully or overappropriated basin because of that designation. [LB1025]

DUANE HOVORKA: Well my understanding of the way the section works is those temporary stays that go into effect in a preliminary determination don't stop when it's fully determined. So those stays that this section refers to continue all the way until an integrated management plan is developed and finalized and approved. So I would argue that the bill does apply to both a preliminary determination and a fully-appropriated watershed. But I think that's a good question. And your second point, I'm sorry. No, it was a good one though. And I think it, in terms of whether...what you said, I think, was that there are no surface...no water rights being granted in a fully appropriated basin and that's not how we structured the law. That's not what LB962 says. That's why, you know, there's four, at least four different surface water rights that can be granted with that variance under current law, and once an integrated management plan is approved, then the granting of future surface water rights all depends on what's in that integrated management plan. And it can provide a process. Say, if an irrigator says I really want to irrigate this piece of land, there should be a process in an integrated management plan that they can get that water right. And the way they're probably going to have to do it is to talk somebody else into releasing their water right. [LB1025]

SENATOR FISCHER: Right, we passed a bill last year... [LB1025]

DUANE HOVORKA: Right. [LB1025]

SENATOR FISCHER: ...dealing with offsets, but I think that those of us on this committee who live in basins that are fully appropriated would definitely argue with you that nothing happens until a plan is approved because stays are put on a basin... [LB1025]

DUANE HOVORKA: Um-hum. [LB1025]

SENATOR FISCHER: ...and there are no water rights granted. There are stays on any well drilling. So I would argue with you when you say the management plan has to be complete, because an IMP and I think my experience and my colleagues' is that that is how it happens. [LB1025]

DUANE HOVORKA: Well, and I think it depends on what water right you're asking for. If you're coming in asking for a consumptive use like irrigating new acres, then that is

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going to make the problem worse and that's why there is a stay on those uses. If you came in and said, I want to build a factory near Valentine and I want to pump water out of the Niobrara, pump it up to my factory, run it through the cooling towers to try and cool the river and then I'm going to pump the water via pipe right back to where I got it and put it right in the river, that is a nonconsumptive use. But that would require... [LB1025]

SENATOR FISCHER: Well there is still some consumptive use on that, just through evaporation as you do that process. [LB1025]

DUANE HOVORKA: Well if you've got a closed loop system, then there should be...there shouldn't be any. But if you...but that would require a water right in order to take that water out of the river. If you put it back in the same place you got it, there would be no impact on other water users; there would be no impact on groundwater users that rely on recharge and I would argue that under the current law, that water right could be approved by the Department of Natural Resources. [LB1025]

SENATOR FISCHER: To bring up a point that Senator Langemeier started with Senator Avery, you would support that a nonconsumptive use should not be taken into account when a basin is being looked at and considered by DNR for a...either a...well, fully appropriated status. [LB1025]

DUANE HOVORKA: Well, the termination... [LB1025]

SENATOR FISCHER: Because you're saying it doesn't use any water so it shouldn't even be considered by the department when it's looking at that. [LB1025]

DUANE HOVORKA: No, what I'm saying is that if it's a water right that's in place and there are a couple instream-flow water rights, those are rights just as valid as any factory or any irrigator or any municipality that has a water right. And when you're looking at whether a basin is fully appropriated or not, you have to respect those water rights just as you respect the other kinds of surface water rights. So when you declare a basin fully appropriated, you have to respect all of the water rights, including the instream-flow rights that are in place. And then what I'm saying is, that any fully appropriated basin, if you've got a proposed water right that harms no existing surface water rights, that harms no existing groundwater permittees through recharge, then again, that should be allowed to be...to proceed, that should be allowed to be processed and become a valid water right in that basin. [LB1025]

SENATOR FISCHER: I think you would have conflicts with water law here in the state by doing that. But thank you. [LB1025]

DUANE HOVORKA: It's a very complex law in Nebraska, I'll sure agree to that.

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[LB1025]

SENATOR LANGEMEIER: Senator Carlson. [LB1025]

SENATOR CARLSON: Thank you, Senator Langemeier. Unless you can show me where I'm off here, I think this bill changes Nebraska groundwater law. We start on page 5 and go into page 6: if such appropriation will not harm the senior surface water appropriators on such river or stream or the groundwater users whose water wells are dependent on recharge from the river or stream involved and such groundwater uses were in place on or before the date the river basin was designated. Now, you mentioned first in time, first in right and that's policy in the state that applies to surface water. What's your understanding of laws that apply to groundwater? [LB1025]

DUANE HOVORKA: Well my understanding of that language is that it was designed to protect groundwater uses that were in place at the time that a watershed was declared fully appropriated. [LB1025]

SENATOR CARLSON: But this says groundwater uses that were in place on or before the date was designated as overappropriated. So if another well is drilled after that date, I think according to how this reads, that would put that well under the policy of first in time, first in right. [LB1025]

DUANE HOVORKA: Well, that's a good question. And I think what you would have is if you drill another well that was put in place after that time, then...okay, let me give you an example. We talked about the factory at Valentine or Brady or wherever. If you piped that water in to the factory, but piped it downstream and dumped it several miles below Valentine, to me that would be a different matter because if there are surface water users or if there are groundwater wells in that stretch that depend on that water being in the river, and you're rerouting a lot of the water out the river, that's a nonconsumptive use, but it may affect a water right or a groundwater irrigator. And the intent of the language was to not give those people a free pass. And so the language, I think, was designed to protect the people who were there in place at the time it was declared fully appropriated. [LB1025]

SENATOR CARLSON: Okay, but in the example that you gave, in that same area, you're taking water out here and you're putting it in down here, you've got these surface water and groundwater wells...irrigators in between, and there's a new well put in there, then according to this, that well is not protected. And that puts it in the same category as first in time, first in right which is not Nebraska groundwater law. [LB1025]

DUANE HOVORKA: Well, it would not be protected from...it would not be used in determining whether this right would be granted, but it would still be protected under whatever the integrated management plan process is that determines what we're going

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to do and who we're going to shut off and who we're going to reduce if we have to.
[LB1025]

SENATOR CARLSON: Okay, now...and I'm not reading that as I see this, and I may be interpreting it wrong, but I do see it putting groundwater in the same category as surface water and we've got two different policies in the state of Nebraska. [LB1025]

DUANE HOVORKA: We do and that certainly was not the intent of the bill, I don't think.
[LB1025]

SENATOR CARLSON: Okay. Thank you. [LB1025]

SENATOR LANGEMEIER: I'm just going to follow up on that. To give an example of what could happen is if I'm an irrigator, we go fully appropriated and my well goes bad, I can go to the NRD and I can get a replacement well; very simple process, in a fully appropriated. But now my new replacement well that went in today, after we were fully appropriated, under that language, we got a problem. [LB1025]

DUANE HOVORKA: Okay. [LB1025]

SENATOR LANGEMEIER: Now I've just become a junior into surface water law by that, and again, we're just trying to figure out the intent. This all can be changed if the committee chooses to move it forward. [LB1025]

DUANE HOVORKA: Sure. [LB1025]

SENATOR LANGEMEIER: But, are there any other questions? Seeing none, thank you very much for your testimony. [LB1025]

DUANE HOVORKA: Sure. [LB1025]

SENATOR LANGEMEIER: Very good. Further testimony in support of LB1025. Good afternoon. [LB1025]

MELVIN THORNTON: (Exhibit 7) Good afternoon. My name is Melvin Thornton, M-e-l-v-i-n T-h-o-r-n-t-o-n. I believe you will receive a 5-sheet packet that I put together. Obviously, within five minutes time I'm not going to be able to do that, so let me just jump ahead and try to answer what I think are two pressing questions. First, exactly what is it that LB1025 is designed to do and secondly, why should that be done? And, unfortunately, I'll probably will be repeating a little bit of what Duane said because I started out to ask exactly what does this do and as a mathematician I'm used to using logic and I'm painfully aware that mathematical logic is different than legal logic. It really is. And so my point of view might be somewhat different than the legal scholars, but let

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me give a stab at it. We're talking supposing we have a stream that has a fully-appropriated status. Then there are specifically listed some conditions under which water rights can be added or changed or modified somewhere, and those are listed, not only can I say...should say, should, because on, I suppose I've got the same pages you do, top of page 4 and page 5, those...I read carefully those pages. They were long, but confusing, but after reading them three or four times, there are 15 specific cases where a variance, I think, 'can be given', but it's really "should be given" at the top of page 4 says: shall exist; this variance shall exist. There's no choice about it; it is a variance. It isn't an...it was called an exception and things can be changed according to these. I read all of them; there were 12 of them that I think, rightfully, related to groundwater wells. There are a couple that were test holes and monitoring wells and there were four of them that related directly to surface water pumping. And as far as I could see, there was absolutely nothing that referred to nonconsumptive uses, nothing that would directly refer to the possibility of even considering this if someone had an instream-flow application, except those two places where it says "for good cause shown". And so, actually you don't really need LB1025 because if there's a good cause shown, then it could proceed under what's currently on the law. Now, I think Senator Avery very generously suggested that, well maybe we could short-circuit not any conditions on the application, but just conditions on showing good cause. Instead, let's write down a specific good cause on exactly the same relationship of these others that are already there filling up two pages. If it does not add any consumptive use, if it doesn't take up more water than you already have and if it doesn't harm anybody. Now, what he suggested, what the law suggests is adding a paragraph, they're calling 3(b), and it starts out by saying that the department "may accept". Now you notice the change already. It's not "shall exist", it's "may accept" an application for the instream flow of water, as long as it doesn't hurt anybody and since it's nonconsumptive, it certainly will not take out any more water. So it couldn't possibly deny any existing water rights. Now will it jump ahead of other water rights? I...see, I've got about 15 seconds left, so let me just say that the answer is clearly no, but speaking about jumping ahead, and you'll see this when you look at some of the material that I've put here, is in preparing for this, I wondered, is there really a need for this? So I contacted four of the outfitters, that's all I had time to get ahold of, in the Valentine area. I contacted the owners of Rocky Ford, the owners of Sunny Brook Camp, Dryland Aquatics and Graham Outfitters. Kerry Krueger, Steve Breuklander, Ed Heinert and Twyla Graham each gave me permission to use their name when I say they do support a minimum flow for the Scenic River and they do think that the Nebraska Game and Parks application for a nonconsumptive instream use is really the best way to get it. Now, are they trying to jump ahead in line? This application has been worked on now for almost four years. Some of these folks have been in business for decades and they don't yet have a legal recognition of the way they use the water profitably for the entire area as an outfitter. The outfitting business, the studies have shown impact over \$10 million annually in the Valentine area in the economics. And that is scheduled to increase as long as the flows remain. If they don't, who knows. I'm sorry, I see the red light. [LB1025]

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SENATOR LANGEMEIER: You're doing good. Are there... [LB1025]

MELVIN THORNTON: Glad to answer any questions. [LB1025]

SENATOR LANGEMEIER: Are there any questions for Mr. Thornton? Senator Schilz. [LB1025]

SENATOR SCHILZ: Thank you, Senator Langemeier. Thank you for coming in today. So if I understand this correctly, in the truest sense of the word, basically all the intent of LB1025 is to remove that step of variance. You don't want to change anything else that's going on. [LB1025]

MELVIN THORNTON: No, it's...I don't believe it's to remove the step of variance, it's to specifically put in this as a...one of the variances on the same level as the other variances. Now granted, it's a variance for nonconsumptive flow; it's not a variance for pumping for irrigation. But there are, what, 15 of those already in there and it's just going to specifically add one more. And also, it isn't forcing it to say it has to be a variance, it is saying the department may, if they want to. It isn't requiring it; it's just saying they can consider it and they can act on it if they so choose. It's not being forced to do it. Now I do believe for two reasons it does affect the Niobrara River because one of the thing you were stumbling on before is it says: temporarily fully appropriate...what does it say... [LB1025]

SENATOR SCHILZ: Preliminarily. [LB1025]

MELVIN THORNTON: ...preliminarily fully appropriated. What before preliminary is the word "was". Friends, the Niobrara was preliminarily fully appropriated from October, 2007 to the end of January, 2008. Since then it has been fully appropriated, but that whole dependence phrase there is modifying the groundwater users. It has nothing to do with the surface water users, and so it's not relevant if you're inferring about surface water user. The intent really here is, and probably it may be...there's probably a lot better way to express it, but the intent really is not to harm any irrigators at all; not to jump ahead of anybody. Now if you could put it down not to jump ahead in line, that would be fine. Now legally, of course, that's not going to cut it, but you have to have something, but that was what the intent was, I'm sure. [LB1025]

SENATOR SCHILZ: Okay. So now with the understanding that the Niobrara system is now fully appropriated... [LB1025]

MELVIN THORNTON: Is fully appropriated. [LB1025]

SENATOR SCHILZ: Right. You understand what that means, correct? [LB1025]

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MELVIN THORNTON: I have my understanding of what it is. I don't know whether a legal scholar would agree with it. [LB1025]

SENATOR SCHILZ: And I suppose we could all have opinions on it. [LB1025]

MELVIN THORNTON: To me, it would be a situation on a stream or river where there are so many appropriations on there that you cannot have an additional appropriation without harming some existing appropriations. [LB1025]

SENATOR SCHILZ: Which includes... [LB1025]

MELVIN THORNTON: You can't add any more. [LB1025]

SENATOR SCHILZ: Excuse me, which includes streamflow, correct? [LB1025]

MELVIN THORNTON: Which, of course, would include streamflow if... [LB1025]

SENATOR SCHILZ: Well, here's the thing, it's not just that determination; but there's also a management plan there to get to as it is defined in the IMPs some sort of sustainability. [LB1025]

MELVIN THORNTON: Well, eventually we hope there will be a management plan, yes. And I don't know that there...am I wrong? Is there one now? I think that's what they're working on; that's why it is still fully appropriated because they're working on the integrated management plan. [LB1025]

SENATOR SCHILZ: Right. And so that integrated management plan provides tools to make sure that there are opportunities to maintain or to mitigate all of these uses, correct? [LB1025]

MELVIN THORNTON: I would certainly hope it will. [LB1025]

SENATOR SCHILZ: Right. [LB1025]

MELVIN THORNTON: I don't know that we can say it can, because there isn't one yet. [LB1025]

SENATOR SCHILZ: And if I want to today, in an area where there is an integrated management plan, if I want to provide water to the stream, I could do that today because of how the integrated management plans are set up. I could go find outlet water and then that water can and should be protected through the stream and that is the process that everybody has to deal with that is on a basin that's fully or

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overappropriated. And so as I look at it, I wonder do we need to change anything or are those systems already in place and are the tools already there to move forward to get what you want exactly. And you don't have to do the studies. You don't have to do any of that. You just go find the water. [LB1025]

MELVIN THORNTON: No, as I read the requirements for applying for an instream water flow application and in my handout I have put the sheets right there and they're fairly explicit, you still have to do the studies; you still have to do all of the preparation. It's just that in...if LB1025 were law, you wouldn't have to wait another couple years or something to make the application; you could send it in today. Now today, of course, is about four years after they started...oh, three and a half years after they started to work on it. Right? [LB1025]

SENATOR SCHILZ: Right. Absolute...there is no...there is no guarantee, though, that today, no matter how long you wait, that the state will come up and grant you that variance. [LB1025]

MELVIN THORNTON: That's true, so, you know, there's no request in LB1025 to give it any kind of preference about being accepted. There's no direction saying you must use this exception, it strictly says this is an opportunity, if you want to, if the department wants to, they can accept it. [LB1025]

SENATOR SCHILZ: Right. And just... [LB1025]

MELVIN THORNTON: And act on it. And, of course, they could say no. [LB1025]

SENATOR SCHILZ: Right. Excuse me. One more question and then I'll let you go. [LB1025]

MELVIN THORNTON: Sure. [LB1025]

SENATOR SCHILZ: So as the department is going through and making their determination on their variance, I would guess that if that variance is approved, that then all that information could be used going forward in your application permit. Wouldn't that make sense? Wouldn't that reduce some of the costs? I mean, I understand what you're saying about layers. But what I'm saying is that if that determination is made, a lot of that...those findings would probably be available to be used in and for the application itself to prove that it's (inaudible). [LB1025]

MELVIN THORNTON: No, I think it has to be the other way. I think you have to complete your application, you have to have all the science down before you can send the application in and then that's when you have to start asking for this, for a good cause variance. [LB1025]

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SENATOR SCHILZ: So what you're telling me, so what you're telling me then, is that you're going to have to do all this work anyway. [LB1025]

MELVIN THORNTON: Yes. All the work has to be done anyway and ready to go and then what this bill is asking for is to forget the next step of doing everything all over again. It's already been done. It's already out there. If the application is acceptable... [LB1025]

SENATOR SCHILZ: Do you think you're going... [LB1025]

MELVIN THORNTON: ...then the variance should be acceptable. [LB1025]

SENATOR SCHILZ: Excuse me, sir. Do you think...do you think that...why would you do it all again? [LB1025]

MELVIN THORNTON: Because that's the way the law reads. [LB1025]

SENATOR SCHILZ: Okay. Thank you. [LB1025]

MELVIN THORNTON: The right...once you have the application, if it's fully appropriated, you have to meet the variance standard which is for a good cause and I would hope that that would be an easier job because you have all of this data already prepared for the application, now you just have to use it again. It's just another bureaucratic step you have to go through. [LB1025]

SENATOR SCHILZ: Thank you very much, I appreciate it. [LB1025]

SENATOR LANGEMEIER: Are there any other questions? Seeing none, thank you very much for your testimony. Very good. [LB1025]

MELVIN THORNTON: This is always fun, isn't it? [LB1025]

SENATOR LANGEMEIER: We get to do it every day. (Laughter) Further testimony in support. Welcome. [LB1025]

JAREL VINDUSKA: Hi, my name is Jarel Vinduska, I'm from Gretna, Nebraska, area. [LB1025]

SENATOR LANGEMEIER: I need you to spell your name. [LB1025]

JAREL VINDUSKA: Oh. J-a-r-e-l V-i-n-d-u-s-k-a. To be honest with you, I was debating whether I was in support of this or not because after first reading the bill I couldn't

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determine in my mind if it was going to accomplish what I would hope it would accomplish and I think, Senator Langemeier, I think you asked the crucial question that needs to be answered before any of us can discuss this intelligently is what does it mean to have a stream fully appropriated. Because when I read the bill, I said to myself, well, if fully appropriated means what I hope it would mean, and I hope what good stewards of our natural resources would mean, that you would use the stream, but you would not deplete the stream to any greater extent than would compromise the biological diversity of that ecosystem or any other important use that that stream is deemed to be used for. Well if that was the case, if the Niobrara was determined fully appropriated and there was still water enough in the stream to maintain those systems and uses, then I couldn't see what the purpose of this bill would be because there would be that water there, especially if it's a nonconsumptive use. But in the practical world and especially in this state, our water law the way it is, fully appropriated might mean like the Republican where you walk out there in the summer and it's salt cedar and cockleburs and no water flowing; or the Central Platte where it's phragmites and purple loosestrife and no water. Maybe that means fully appropriated to our NRDs because a lot of them seem pretty biased toward over using streams. So, if that's the case, I was hoping what this bill would mean would be that we don't affect senior users, but we let fish and game...Game and Parks put a water right on that stream so that if some of those senior users give up those rights, then that new water applies toward this nonconsumptive use and stays in the river so that we don't have the same problems on the Niobrara or the Platte like we have on the Republican or Pumpkin Creek or from Central Platte. So that's what I was hoping this bill could be tailored to do to accomplish that. So if we can do that, I'm in fully support of it. If you've got any questions? [LB1025]

SENATOR LANGEMEIER: I'm sure we do. I'm going to ask one right from the start. Is, in your comment of if people don't use their water rights it would refer back to this; do you believe that... [LB1025]

JAREL VINDUSKA: Or give up their water right. [LB1025]

SENATOR LANGEMEIER: Or give it up, do you believe that water right had a value? [LB1025]

JAREL VINDUSKA: Yes, it had extreme value. [LB1025]

SENATOR LANGEMEIER: So if it's mine and it has value and I want to give it up, how do I get my value out of it if somebody else just takes it because they got a surface right? [LB1025]

JAREL VINDUSKA: Well he wouldn't give it up if...like if you're talking about like a person selling his land or something like that, it would go with the land, that right and I was referring more like if a power plant or if somebody put an easement on a property,

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a conservation easement and didn't need to irrigate farmland anymore or something on that order where he didn't need that water anymore, then it...instead of giving it...instead of the NRD or the Department of Natural Resources giving that right to a junior user, then I was hoping that the Game and Parks nonconsumptive use would come into play because they would be the senior right holder then to these new uses. And that's...I was hoping that's the way this committee could...if you think that Nebraska water law doesn't...since agriculture is deemed whatever...Senator Fischer, what would you call it? [LB1025]

SENATOR FISCHER: Preference. [LB1025]

JAREL VINDUSKA: A preference, I was hoping we could work with that, realizing that agriculture is a preference, but still based on the seniority of the use and tailor it so that...to be good stewards of our resources that we do recognize the viability of preserving the integrity of our streams biologically. [LB1025]

SENATOR LANGEMEIER: Sure. Thank you. You're the first one to get away with asking the committee a question, and she answered it. [LB1025]

JAREL VINDUSKA: Oh, sorry. [LB1025]

SENATOR LANGEMEIER: Senator Fischer has a question. [LB1025]

SENATOR FISCHER: Thank you, Senator Langemeier. But now I get to ask you one back. I never answer questions, so consider yourself blessed, I guess. I don't know. Sir, I didn't hear where you were from. [LB1025]

JAREL VINDUSKA: Gretna area. [LB1025]

SENATOR FISCHER: I'm sorry. [LB1025]

JAREL VINDUSKA: I've got a farm by Gretna. [LB1025]

SENATOR FISCHER: By Gretna, okay, thank you. You made the comment that the NRDs were involved...I didn't get it down fast enough, but what I took from it was that the NRDs were involved with surface water and the NRDs aren't involved with surface water. The NRDs handle the groundwater in the state and the regulations of that. [LB1025]

JAREL VINDUSKA: I thought we determined a long time ago that in these valleys that surface and groundwater were interconnected. [LB1025]

SENATOR FISCHER: They are interconnected, but in Nebraska the Department of

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Natural Resources regulates surface water and grants surface water rights and the natural resource district that are local bodies, regional bodies, they deal with groundwater. [LB1025]

JAREL VINDUSKA: Um-hum, yeah, I understand that. [LB1025]

SENATOR FISCHER: So, okay. And I appreciate you coming forward today. Thank you. [LB1025]

JAREL VINDUSKA: Thank you. [LB1025]

SENATOR DUBAS: Any other questions? Thank you for coming today. [LB1025]

JOE HERROD: (Exhibit 8) My name is Joe Herrod, H-e-r-r-o-d; I'm here representing the Nebraska Council of Sportsmen Clubs. You can go straight to the yellow light if you'd like because I'm learning and I don't think I have anything to offer. I have a handout that since I went ahead and printed it off, I'll let you recycle it instead me, but it is the legislative findings from 1984. And with that I will tell you that if you ask me any questions, I mean, I'd love to have them, but I don't think you'd gain much from me on this subject other than I'm learning an awful lot. [LB1025]

SENATOR DUBAS: Well we do have a question. [LB1025]

JOE HERROD: Good. [LB1025]

SENATOR SCHILZ: I do have a question. [LB1025]

SENATOR DUBAS: Senator Schilz. [LB1025]

SENATOR SCHILZ: Thank you very much. I want to go back to your testimony that you were talking about before, okay? [LB1025]

JOE HERROD: Okay. [LB1025]

SENATOR SCHILZ: Okay. If you want to do these types of projects where you can pull water off and put it into recharge projects and maybe help habitat and things such as that, what you're doing is you're looking for times of excess within the stream to be able to do that. [LB1025]

JOE HERROD: Absolutely. [LB1025]

SENATOR SCHILZ: If you were granted an instream-flow right on some of these rivers, you won't be able to do that because there may not be water available to do it. [LB1025]

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JOE HERROD: Um-hum, okay. [LB1025]

SENATOR SCHILZ: Would you? I mean if that's... [LB1025]

JOE HERROD: I, you know, that's...the devil is in the details, but I don't know. But in my original concept, what went through my mind was is that if private money was available to purchase land and wanted to change what went on on that land, I could foresee that perhaps with some sort of legal...might take something through the Legislature, but let's say that somebody that had senior water rights wanted to use those water rights and send them to a certain area and then calculate the amount of water that went into recharge, which you can because there's no formulas on evaporation, and then use what he had done for recharging the groundwater by serving some good public purpose and then take that water and go some place else with a pivot, because he had...he put it there and now he was using it here. Yeah, it's just a...it's an idea; it would be most ideally used some place, probably, in your territory up there. You know, we all know that the meadows, a lot of people have taken the water off their meadows up there so it was easier to hay. I've seen them there, maybe not in your area, but I've seen them, they cut the ditch and then the ditch keeps pulling more water out which means the water level drops and pretty soon the hay meadow isn't there and then they decide to go back in and fill up those ditches that they've...you've seen it, I think, yeah. [LB1025]

SENATOR SCHILZ: Sure. [LB1025]

JOE HERROD: Maybe they don't...they're not...they have better foresight up north than they do where we're from. But...you know, there's some things that would seem to be able to be done and if your point is, yeah, if you...maybe that would preclude doing them. Like I say, I'm not... [LB1025]

SENATOR SCHILZ: I... [LB1025]

JOE HERROD: ...can't you see my time is up? (Laughter) [LB1025]

SENATOR SCHILZ: Thank you, Joe. I appreciate it. [LB1025]

SENATOR DUBAS: Senator Carlson. [LB1025]

SENATOR CARLSON: Thank you, Senator Dubas. Joe, I want to go back to your Colorado visit as well, because I was tracking pretty well with you when you talked about capturing, really capturing surface water and then utilizing it for wildlife and there is going to be some recharge out of that, there's no doubt about it. But you also mentioned pumping water, bring it up, capture it, and let it go back down. Well, that's a slow process, not that it won't... [LB1025]

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JOE HERROD: Yeah. [LB1025]

SENATOR CARLSON: ...but the best bang for the buck is capturing surface water and letting that recharge. [LB1025]

JOE HERROD: Um-hum. Yeah. That is...Colorado water law allows you to pump water, as I understood it from my little workshop, allows you to pump water, hold it in an area for some use at one time of the year and then calculate how much water that makes available for other purposes at another time of the year, which is maybe surface water setting here, outside of irrigation season goes there, used there, you know. And I think the ideal situation would be to get the people that I mentioned from my organization, Ducks Unlimited, those people and the people from Nebraska and say, well what are you doing there that we're not doing here and what in law makes it able...gives you the ability to do it there and not here, so. [LB1025]

SENATOR CARLSON: Okay. Thank you. [LB1025]

JOE HERROD: Might be a long-term deal. [LB1025]

SENATOR DUBAS: Senator Fischer. You're not done yet, Joe. Senator Fischer. [LB1025]

SENATOR FISCHER: Thank you, Senator Dubas. This is what you get. I appreciate you bringing up the legislative findings and I'm just wondering if the sportsman's organization would pick up on your idea because under the findings, storage and timely release of waters are a part of that. [LB1025]

JOE HERROD: Um-hum. [LB1025]

SENATOR FISCHER: So I guess I'm challenging you and your group to step forward and start managing that. [LB1025]

JOE HERROD: Yeah, and I would think the obvious, logical people to address on this would be Ducks Unlimited. [LB1025]

SENATOR FISCHER: Yeah. So next year when you come to the committee, I'm going to ask what you've done. [LB1025]

JOE HERROD: Next year I might be living in Arizona at this time of the year after this year. (Laughter) [LB1025]

SENATOR FISCHER: Thank you. [LB1025]

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SENATOR DUBAS: Any other questions? Thank you, Joe. Welcome. [LB1025]

PAUL JOHNSGARD: (Exhibit 9) Thank you. My name is Paul Johnsgard, J-o-h-n-s-g-a-r-d. I'm retired recently from 40 years of teaching and research at the University of Nebraska-Lincoln, most recently as a Regents Professor of Biological Sciences. During that time I've written and published 51 books, eight of which have dealt with the biology and natural history of Nebraska and the Great Plains. I've visited the Niobrara Valley almost every year since the 1970s and most recently have written a University of Nebraska press book on its biological, ecological, paleontological and aesthetic values. Nothing about law, so please don't ask me about water law. The Niobrara is a river that Nebraskans increasingly recognize as a unique source of historical interest, geological significance, biological diversity and human sustenance. How can these diverse resources be preserved and also be used to benefit the greatest number of human interests without degrading or destroying them in the process? By 2004 over 54,000 people were annually participating in river-based activities in the Scenic River corridor, with an estimated 33,400 floating the Niobrara, another 21,000 tourists visiting the area. At the time I looked at those data, I think that represented six or seven percent of the total economy of that area. Since then, the role of tourism and other nature-related uses has continued to increase and contribute to the economy of the region through fishing, canoeing, tubing, hunting, hiking, wildlife viewing, nature photography. LB1025 would help preserve...assure that the Niobrara River will remain Nebraska's most significant single natural attraction for fulfilling all these nonconsumptive uses. The Niobrara is Nebraska's only nationally recognized scenic river, and its many biological values include its transitional botanical and zoological characteristics, its nesting habitats of nationally threatened species such as the least tern, piping plover. At least 27 birds in the Scenic River section are considered sensitive by the Nebraska Natural Heritage Program. There are also nearly 100 species of state-listed sensitive, rare or unusual plants. Similar points could be made for some other vertebrate and invertebrate groups such as dragonflies, butterflies and some other insect groups. Some of these plants and birds are aquatic and semi-aquatic species and many more depend on subsurface water supplies that may be affected by a loss of instream flows. In considering this legislation we would do well to keep our state's long history of water rights and use always in mind. We Nebraskans, by virtue of our state constitution, all collectively own the Niobrara River. LB1025 would be a positive step in assuring that all Nebraskans can continue to enjoy and share the many recreational and wildlife treasures of the Niobrara into the future. In preparing my testimony today, I sought out the views of persons whom I knew...a person who I knew to have an active, informed interest in our state's management of Nebraska's water resources. I called Harold Andersen, longtime publisher of the Omaha World Herald, who developed and supervised that newspaper's vigorous reporting on water issues and equally vigorous editorial support of wise water resources management. His continuing interest is demonstrated by his chairmanship of an informal working group currently focusing on

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protecting the Niobrara. Andy is temporarily housebound for medical reasons and regrets he can't be here to testify today. In a brief e-mail, he told me he strongly supports LB1025 as an important addition to Nebraska's water management law. He noted that the legislation would not threaten current irrigation diversion rights to Niobrara water. It would allow establishment of a state policy of protecting nonconsumptive, and those are the key words, instream flow to serve such recreational purposes as canoeing and swimming and habitat for fish and wildlife. Some might say since Nebraska water is considered fully appropriated there is no current danger in reducing instream flow, damaging recreational and wildlife interests. But fully appropriated conditions can change. There is an old saying that the time to repair the roof is when it's not raining. So the time is right to assure continuing nonconsumptive streamflow for recreational and fish and wildlife purposes. Thousands of Nebraskans who enjoy the Niobrara and thousands of those who recognize its importance as one of the nation's important rivers would applaud the protection which LB1025 could provide for the flow of this congressionally designated national scenic river. Thank you. [LB1025]

SENATOR LANGEMEIER: Very good. You did a great job. Are there any questions for Mr. Johnsgard. Seeing none, thank you very much. [LB1025]

PAUL JOHNSGARD: Thank you. [LB1025]

SENATOR LANGEMEIER: Good afternoon and welcome. Just out of curiosity,... [LB1025]

BRUCE KENNEDY: Thank you. [LB1025]

SENATOR LANGEMEIER: ...how many more testifiers do we have in any capacity? Okay, thank you. [LB1025]

BRUCE KENNEDY: I will be real brief. [LB1025]

SENATOR LANGEMEIER: Oh, you're fine. I'm just...curiosity. [LB1025]

BRUCE KENNEDY: Mr. Chairman, members of the committee, my name is Bruce Kennedy, B-r-u-c-e K-e-n-n-e-d-y. I'm here this afternoon representing the Wachiska Audubon Society. Wachiska Audubon is the local chapter of the National Audubon Society. We have a 16-county area that, basically, is in the southeastern part of the state. We have been doing conservation in our chapter area for about 30 years. We're very much interested in healthy streams and rivers. We see this as a good...LB1025 as a good piece of conservation legislation. We would like to have...we realize that there is only a very small percentage of our streams and rivers that are...that have some type of instream-flow protection for fish, wildlife and recreation. And we encourage this

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committee to recognize that there is more that needs to be done. We have encouraged our Nebraska Game and Parks Commission to seek more protection on more streams for instream flows and we believe that...we believe that this piece of legislation is a step in the right direction and we would urge the committee to forward it to the general body. [LB1025]

SENATOR LANGEMEIER: Very good. Are there any questions for Mr. Kennedy? Seeing none, thank you very much. [LB1025]

BRUCE KENNEDY: Thank you. [LB1025]

SENATOR LANGEMEIER: You did a great job. Further testimony in support of LB1025. Don't be shy, come on up. [LB1025]

TIM KNOTT: (Exhibit 10) My name is Tim Knott; I'm from Lincoln, Nebraska and I'm just representing myself and my purpose in being here is just to pass out a Xerox copy of the Nature Conservancy Nebraska newsletter which appeared this winter with...yeah, give those, with a picture of whooping cranes on the cover standing in the Niobrara River. And I was looking at the magazine and I noticed that...I believe they sighted something like 19 different birds have been sighted in the area of the Niobrara River in this past year, 2009, which is quite a number. And it turns out from the map that's portrayed in this issue, unfortunately I don't have a copy for everybody, the map that they show in the original publication shows a lot of heavy use in the Niobrara by whooping cranes. So, that's the simple point I want to make. The whooping crane is an important endangered species and it looks as though it depends on the Niobrara River for quite a bit of its migration habitat. So that's my comment. [LB1025]

SENATOR LANGEMEIER: Thank you very much. Are there any questions for Mr. Knott? Seeing none, thank you very much; appreciate it. Mr. Winston, how are you today? [LB1025]

KEN WINSTON: Fine, Senator Langemeier, thank you. [LB1025]

SENATOR LANGEMEIER: Welcome. [LB1025]

KEN WINSTON: (Exhibit 11) Thank you. Senator Langemeier, members of the Natural Resources Committee, my name is Ken Winston, K-e-n W-i-n-s-t-o-n. I'm appearing on behalf of the Nebraska Chapter of the Sierra Club. I think all the points that I was intending to make have been made already so I'm offering my written testimony and will and would be glad to answer questions if I'm able. [LB1025]

SENATOR LANGEMEIER: Very good. Are there any questions? [LB1025]

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KEN WINSTON: I guess I suppose I should say we are in support of LB1025. [LB1025]

SENATOR LANGEMEIER: We're still on that category. [LB1025]

KEN WINSTON: We're still on that category, yeah. [LB1025]

SENATOR LANGEMEIER: So we had you down. Seeing no questions, thank you very much, you did a great job. [LB1025]

KEN WINSTON: Thank you. [LB1025]

SENATOR LANGEMEIER: (Exhibit 12, Exhibit 13) Further testimony in support of LB1025? Oh, we have Tom (sic - Tony) Korth with the Nebraska Chapter of the American Fisheries Society and Marian Langan with Spring Creek Prairie Audubon Center, two letters in support of LB1025 Now we'll move on to the...seeing no others, we'll move on to opponents to LB1025. Welcome to the Natural Resources Committee. [LB1025]

DON BLANKENAU: (Exhibit 14 and Exhibit 15) Good afternoon, Mr. Chairman, members of the committee. My name is Don Blankenau, my name is spelled D-o-n B-l-a-n-k-e-n-a-u. I'm appearing today on behalf of the Nebraska Association of Resources Districts. I've brought along with me two letters from NRD directors and I've offered those into the record. In addition to those two letters, I guess I just want to make a couple of quick comments, if I could, with respect to some of the things that I have heard this afternoon. First, I think the biggest problem with LB1025 is the insurmountable problem of the constitution. This is not a novel issue. The Nebraska Supreme Court has said on several occasions now, both with respect to consumptive and nonconsumptive water appropriations, that such appropriations can only be granted if there's unappropriated water available. So I don't think there's any doubt or debate about that. With respect to the concerns about the variance requirements, instream flows have certain statutory standards that have to be met. Senator Avery touched upon some of those with regard to the studies that need to be completed before they are granted. Those have to be done on any stream, whether they are fully appropriated or not. When a stream, however, is fully appropriated, those standards don't change. They're exactly the same as they were before. The variance simply requires one additional step and that is that the applicant show that there is unappropriated water available. Now typically what that means if you're an irrigator you have to go out and buy out some other use so that you have effectively created unappropriated water. The same would be true in an instream-flow context. But in any event, what you have is a property interest to that instream-flow right or out-of-stream diversion, and in order to acquire that right, you have to do so in an unappropriated context. Secondly, I heard, I believe it was Mr. Thornton, indicate a need for a minimum flow and that was related to some of the recreational interests. Instream flows are not minimum reserve

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streamflows. Instream flows stack up just like any other sort of water right. And the only value they really have is their priority date, because what that priority date does is allows the holder to regulate those who are junior and located upstream. And in a fully appropriated context, there is no upstream junior user. So what you have is essentially a meaningless water right that has the ability to shut down no one. So when Mr. Hovorka talked about meaningless expenditure of taxpayer dollars, I would think seeking an appropriation that has no ability to put water in the river, shut anyone down, that would be the epitome of taxpayer waste. Fourth, and this is...oh, excuse me, third, I believe, I think these appropriations would be subject to cancellation. Under DNRs long-held laws, unless you use your water right, you lose it. Within the context of an instream flow, they are periodically reviewed and unless it achieves the purpose for which it is granted, it is subject to cancellation. So in an instream-flow context, because you would never have the opportunity to shut down anyone, you would never receive the benefit of putting more water in the river and therefore achieving the purpose for which that right was granted and it would likely then be cancelled. And then lastly, this bill doesn't repeal any of the substantive provisions that Senator Avery referred to as creating the government red tape. Again, those standards all stay in place and they apply whether a stream is fully appropriated or not. So I don't believe that this bill even achieves the fundamental purpose for which it was introduced. And with that I would be happy to entertain any questions. [LB1025]

SENATOR LANGEMEIER: Are there any questions for Mr. Blankenau? Senator Fischer. [LB1025]

SENATOR FISCHER: Thank you, Chairman Langemeier. First of all, Mr. Blankenau, you are an attorney, is that correct? [LB1025]

DON BLANKENAU: I am, and I should disclose that I actually was the hearing officer in the two Platte River instream-flow appropriations that were granted many years ago. [LB1025]

SENATOR FISCHER: Okay, thank you. We've heard a lot of testimony on truly the priceless resources we have in this state with regard to water in the streams and I agree with everything that was said with regards to that. However, what we're talking about here is water law. Am I off base? [LB1025]

DON BLANKENAU: No, you're right on base. [LB1025]

SENATOR FISCHER: Thank you. I have a number of questions dealing with the issue at hand. You brought up that pesky thing we know as the Nebraska Constitution. In a fully appropriated basin, there is no unappropriated water, is that correct? [LB1025]

DON BLANKENAU: That is correct. [LB1025]

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SENATOR FISCHER: And how would that affect this bill; or how would the bill affect that? [LB1025]

DON BLANKENAU: Well, I don't think that the bill can affect the constitution; it's just the reverse. The constitution prevents, I think, this law from ever being enforceable, for the simple reason that we...again, the Supreme Court has been very clear on this. You can only obtain even an instream-flow appropriation if there is unappropriated water available. [LB1025]

SENATOR FISCHER: I asked earlier testifiers about Nebraska preference law, are you familiar with that? [LB1025]

DON BLANKENAU: I am. [LB1025]

SENATOR FISCHER: Can you explain that, please? [LB1025]

DON BLANKENAU: Sure. The Nebraska Constitution states that there is a preference to the water use. It's first in time, first in right, but that can be circumvented based upon preference categories and those categories. Are the highest being domestic, followed by agricultural, followed by manufacturing. If you are within that preference category, you can take water from a senior user, provided you pay that individual just compensation for the loss of that water right. [LB1025]

SENATOR FISCHER: So do instream-flow uses have any protection under our preference laws? [LB1025]

DON BLANKENAU: They do not. [LB1025]

SENATOR FISCHER: If, if we give instream flows a preference, what does that do with regards to our constitution then? [LB1025]

DON BLANKENAU: Well it's a good question. By giving...LB1025 essentially creates a super preference for an instream flow which arguably circumvents the constitutional list of preference categories and that's probably a secondary basis why it would be held unconstitutional. [LB1025]

SENATOR FISCHER: We've heard some talk about IMPs in this and I believe it was Mr. Thornton that said after an IMP is reached, a basin then isn't...is no longer fully appropriated and I did not follow up and ask him if that's what he said, but I think he did. But in my notes, I had that written down. Do you know of any cases where an IMP was reached and a basin is no longer fully appropriated? I mean, an IMP is a process you have to go through because you are fully appropriated, correct? [LB1025]

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DON BLANKENAU: That's correct. And it is the fundamental planning document for how you will accommodate water uses into the future. I think you heard Director Dunnigan earlier today refer to it as a planning document. Flowing is a tier beyond the IMP or the rules and regs to implement that document. [LB1025]

SENATOR FISCHER: And an IMP is required under our current water well in LB962 that was passed in 2004, isn't that correct? [LB1025]

DON BLANKENAU: That is correct. [LB1025]

SENATOR FISCHER: Would LB1025 undermine that? [LB1025]

DON BLANKENAU: I believe it has the capacity to undermine those IMPs which are already in place. And for example, if an IMP were already created and an instream flow were granted, subsequently it would force, essentially, a rewrite of that IMP and again trigger expenditure of additional taxpayer dollars and potentially lead to the regulation of landowners who had water use in place prior to the designation. That is, you would see potentially individuals who have valid property interests to use their wells, have to be regulated still further to serve the instream-flow process. And I'm not trying to court trouble, but I think we could fairly guarantee litigation following from a scenario like that. [LB1025]

SENATOR FISCHER: You heard a lot of talk about this nonconsumptive use; I guess I believe that a nonconsumptive use has...is considered and has to be considered with regards to a designation for a basin. For example, it was a nonconsumptive use at Spencer Dam by...and that right by NPPD that brought all this about on the Niobrara to begin with. Is that correct? Am I right in that? [LB1025]

DON BLANKENAU: You are correct in that. [LB1025]

SENATOR FISCHER: So to say a nonconsumptive use doesn't have an impact, I argue it has a tremendous impact. [LB1025]

DON BLANKENAU: I...well it's...it's a property interest just like the right to divert the water from the river. The implications to people who like to float canoes on the rivers may be different, but the fact is, it still remains a property interest and the Supreme Court said it gets treated like every other water right, even at the stage of granting it. [LB1025]

SENATOR FISCHER: Thank you. I'd better quit. I could go on...on water law with you back and forth here forever. Thank you. [LB1025]

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DON BLANKENAU: You're very welcome. [LB1025]

SENATOR LANGEMEIER: Senator Carlson. [LB1025]

SENATOR CARLSON: Thank you, Senator Langemeier. Don, you were involved in the instream flow for the Central Platte? [LB1025]

DON BLANKENAU: That's correct. [LB1025]

SENATOR CARLSON: When was that? [LB1025]

DON BLANKENAU: Sometime in the 1990s. [LB1025]

SENATOR CARLSON: Okay. And that was before fully appropriated? [LB1025]

DON BLANKENAU: That's correct. [LB1025]

SENATOR CARLSON: What value is that to the Central Platte? [LB1025]

DON BLANKENAU: The instream flow? [LB1025]

SENATOR CARLSON: Yes. [LB1025]

DON BLANKENAU: I think that they have found it valuable in dealing with threatened and endangered species and the requirements that came from the Cooperative Agreement between Colorado, Wyoming and Nebraska. [LB1025]

SENATOR CARLSON: How does that instream flow affect any groundwater wells in that area that were drilled after that date? [LB1025]

DON BLANKENAU: That is a great question. Senator Carlson, I think, is alluding to can wells drilled either before or after the date the instream flow was granted, can they be regulated? It's a question that has yet to be answered and I think it's something we will, or we anticipate some litigation on if it can't otherwise be resolved. For those landowners who had wells prior to an instream flow being granted, I think they have the belief that they have a constitutional property right to continue using those wells and should not be regulated for a subsequently granted water appropriation. [LB1025]

SENATOR CARLSON: If it were ever determined that those that were put in after that date are under different set of laws or requirements, that would change Nebraska groundwater law, wouldn't it? [LB1025]

DON BLANKENAU: It certainly could; and it could force a rewrite of all of those IMPs.

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[LB1025]

SENATOR CARLSON: Okay. Thank you. [LB1025]

SENATOR LANGEMEIER: Mr. Blankenau, I have a couple questions. To follow up on the Niobrara going full appropriated, I have to get my little map, because it's not all fully appropriated, that was based on the call which you were here previously testified to is because of the hydro facil...Spencer Dam... [LB1025]

DON BLANKENAU: That's correct. [LB1025]

SENATOR LANGEMEIER: ...hydro facility. And we heard earlier in our testimony that it would be okay in the eyes of those that want the instream flow that we could take the water out, as long as we put it back in the same place that we took it out. That seemed to be an acceptable use. Does not that dam take the water in one door and out the other in the exact same spot? [LB1025]

DON BLANKENAU: Um-hum, yes. [LB1025]

SENATOR LANGEMEIER: Yet that nonconsumptive use which in previous testimony would be acceptable has caused this whole basin to be fully appropriated. [LB1025]

DON BLANKENAU: That's correct. And moreover, had that river been fully appropriated prior to Spencer Dam being located there, they would have been prevented from locating there, precisely for the same reason, that the stream was fully appropriated. [LB1025]

SENATOR LANGEMEIER: All right, okay, thank you. Are there any other questions? Seeing none, thank you very much. [LB1025]

DON BLANKENAU: Thank you very much. [LB1025]

SENATOR LANGEMEIER: Further testimony in opposition to LB1025? [LB1025]

JAY REMPE: Senator Langemeier, members of the committee, my name is Jay Rempe, J-a-y R-e-m-p-e. I am vice president and governmental relations for Nebraska Farm Bureau, I'm here today on behalf of the members of Nebraska Farm Bureau in opposition to LB1025. Let me just...I'll try to make this short and sweet and add a couple different points that I don't think have really been brought up yet and let me take a little stab also at the consumptive use, nonconsumptive use argument...the discussion that's been going on and give you our perspective on that a little bit. If what I understand the proponents of LB1025 seek is they want to treat nonconsumptive surface water uses differently from consumptive surface water uses for the purposes of the variance for the

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department. To me, and it has already been stated earlier, or some discussion about it, the consumptive versus nonconsumptive is largely irrelevant. And it's irrelevant in this sense: what the surface water law does is, as Mr. Blankenau described it is provide a property interest in the use of that water. And so that's what we're doing; we're granting a right to use that water. And once that right is granted, that water is taken off the table, so to speak, from anybody else having access to that water. It is protected. And so in that sense, instream-flow rights are not treated anywhere differently than any other right. That right is granted, that water is taken off the table; no one else has access to use that water. It is protected for the purposes that were intended. And so in our minds then, because in the eyes of the law that's treated no differently for the variance purposes, then it shouldn't be treated any differently as well. So, that's our perspective on that issue. Let me...as I thought about this bill, I tried to mesh this bill and instream-flow rights into our integrated management planning process and there were about two or three issues that came to mind. Some of them already have been talked about and Mr. Blankenau mentioned the issue of designated and fully appropriated and Senator Langemeier, you've asked some questions along that, you know. We've already had designation of fully appropriated; how can we have unappropriated water available is one. Secondly, I'm not sure the way instream-flow process has worked, or the plans have been developed, we set it...the department and the NRDs set a baseline for water use and for streamflows or...and any use that depletes a streamflow then has to be offset. So those...that baseline is being protected. So I'm not sure what you gain by granting an instream-flow right, one. Secondly, we spent...this committee and Senator Fischer, in particular, spent a lot of time working on legislation last year dealing with offsets, and how we move forward to allow new economic development in these basins to simplify the process and move forward. My concern with instream-flow rights and fully appropriated basins is how does that impact new economic development or new uses and there's a couple concerns that come to mind. One is the offsets. If an instream-flow right is granted and depending on how it measures up to the baseline that they're trying to manage to, are we going to require additional or further offsets to protect that instream-flow right then from any new uses that come in, one. Secondly, what about new uses that come forward that have an offset and everything matches up perfectly; it's fine, it's great, and let's say it's a new surface water use. If a new instream-flow right is senior to that new surface water use, what happens if we have to administer the rights on the river and there's a call on the river? Even though that junior surface water right has provided an offset to offset their uses and so there's no new consumptive use, my understanding of the prior appropriation doctrine is that senior instream-flow right could shut down that junior right. So to me, why would I want to invest in a new surface water use or new economic development if I know I could be shut down at any time? I'm not going to. And so those are a couple of concerns in how the instream-flow right meshes with our integrated management planning process that I think we need to tread lightly and think very carefully before moving forward with some legislation like LB1025. And with that, I'll be happy to answer any questions you might have. [LB1025]

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SENATOR LANGEMEIER: Are there any questions? Senator Fischer. [LB1025]

SENATOR FISCHER: Thank you, Chairman Langemeier. Thank you, Mr. Rempe. Say the Elkhorn Basin is fully appropriated, which it could have been possibly a year ago... [LB1025]

JAY REMPE: Um-hum. [LB1025]

SENATOR FISCHER: ...and...why don't you just tell us what you think that would do to those communities that are a part of the Elkhorn Basin if it becomes fully appropriated and an instream-flow right would be granted if this bill goes into affect. What happens? Forget, here I am saying we need the legal stuff, but forget the legal stuff here. [LB1025]

JAY REMPE: Yeah. Well I think from a practical standpoint, if a basin has been declared fully appropriated, and let's say subsequent to that, then an instream-flow right is granted. If they're able to get through all the hurdles, I, as I sit here today, I think it makes it that much...it makes it much more difficult for any new economic development in that community that would require additional water use. It...for the reasons I just...I outlined in my testimony, one, it could increase offset requirements and then secondly,... [LB1025]

SENATOR FISCHER: If...if I can... [LB1025]

JAY REMPE: Yes. [LB1025]

SENATOR FISCHER: If I can interrupt you, with regards to the offsets, say it does require an offset to get the instream flow. What does that then do to the availability of water for other offsets in the future, especially in a basin that does, like the Niobrara. [LB1025]

JAY REMPE: Um-hum. [LB1025]

SENATOR FISCHER: I'm trying to get away from the Niobrara here, because this bill deals with a lot more;... [LB1025]

JAY REMPE: Yeah. [LB1025]

SENATOR FISCHER: ...but in a basin that doesn't have a lot of irrigation? [LB1025]

JAY REMPE: Well you raise a good question on whether or not an offset might be required for an instream flow or...and I guess, as sitting here, if it's a nonconsumptive use whether or not it would require an offset. An instream flow would have some

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evaporation loss potentially, so potentially there could be some offsets required there. I guess anything that pulls more water off the table just makes it that much more difficult for any new economic development to occur or even to find the offsets for that. [LB1025]

SENATOR FISCHER: Okay, thank you. [LB1025]

SENATOR LANGEMEIER: Senator Carlson. [LB1025]

SENATOR CARLSON: Thank you, Senator Langemeier. Jay, I'm having trouble getting my thoughts around nonconsumptive use on an instream flow because of evaporation. Can you think of an example of nonconsumptive use? [LB1025]

JAY REMPE: Um, well, that's a tough question in that, yeah, there are examples physically of something that wouldn't consume water and I guess sitting here I can't think of anything off the top of my head. But I'm sure there are some examples up there. But I think the key question for us is in the eyes of the law or the eyes of the management systems that we have in place, for all prac...as I said earlier, we are providing rights to use, and those right, there's no distinguishing between those for consumptive or nonconsumptive. And so, it's taking water off the table. Is that...I'm not really directly answering your question and I apologize. [LB1025]

SENATOR CARLSON: Well, I don't know if I'm off or not, but an instream flow is still as exposed to evaporation. [LB1025]

JAY REMPE: Um-hum. Yeah. I think there would be some...and some evaporation and some seepage, and some transmission losses. [LB1025]

SENATOR CARLSON: The one I can think of would be, if near the stream you had a house, and you've got underground pipe and you take water out of the river to cool the house and circulate it back into the river, the only thing that's changed is the temperature. [LB1025]

JAY REMPE: Um-hum. [LB1025]

SENATOR CARLSON: That might be an example of... [LB1025]

JAY REMPE: Of a nonconsumptive... [LB1025]

SENATOR CARLSON: ...nonconsumptive use, but I can't think of very many. [LB1025]

JAY REMPE: Yeah. I'll have to give that some thought. [LB1025]

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SENATOR CARLSON: Okay. Thank you. [LB1025]

SENATOR LANGEMEIER: Any other questions? Seeing none, thank you very much for your testimony. [LB1025]

JAY REMPE: Um-hum. [LB1025]

SENATOR LANGEMEIER: (Exhibit 14 and Exhibit 15) Further testimony in opposition to LB1025? Seeing...no one wanting to testify? I do have two letters that Mr. Blankenau referenced: Mike Murphy who is the general manager of the Middle Niobrara NRD and John Thorburn from Tri-Basin NRD in opposition to LB1025. Is there anyone that wishes to testify in a neutral capacity? Seeing none, Senator Avery, welcome back for closing. [LB1025]

SENATOR AVERY: Would I be right, Mr. Chair, if I conclude this is not a candidate for consent calendar? [LB1025]

SENATOR LANGEMEIER: I would say I'm not writing that letter. [LB1025]

SENATOR AVERY: I want to start with a quote from an article written by Sandra Zellmer, professor of law at UNL. The piece is on instream-flow legislation. She states: "adequate streamflows are the essence of what makes a stream or river." That the beauty of that statement is in its simplicity, because it is so simple and so clear. If you don't have water in the stream, you don't have a stream. So that's something I think kind of got lost in our discussion today. You know, you don't have a stream if you don't have instream flow. The...I'm going to try not to answer every point that was made, but I do want to address the last question that Senator Carlson had about a nonconsumptive use. There are many nonconsumptive uses of rivers and streams. Fishing, now I suppose you might say the fish might have a little water in its...attached to it when you take it out and that's a consumption; rafting, canoeing, tubing, you're not taking water out of the river and not returning it when you are using it for recreational and for purposes of fishing and things of that sort. Bird watching; the Niobrara, as I understand it, is a critical junction for a lot of wildlife that have the Niobrara as their western edge of their migration and some other wildlife, some 83 species that have the Niobrara as the junction for their eastern range. So it's a fairly unique asset and I think Professor Johnsgard made the point very well and nobody can make the point better. If you've got 58 books that deal with subjects just like this, I think you know a little bit about the subject. We talked about law and I really appreciate Senator Fischer bringing up the issue of law, but what we wind up doing is talking about different interpretations of law. As I listened though, I realized that really it's not different interpretation of law that have us debating; we're really talking about different philosophies. Different philosophies of how you interpret law, different philosophies of how you think our water resources ought to be used and who has the rights. I start with the fundamental principal that all of the

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assets, all of the resources, natural resources in our state belong to all of us, all of us; not just to irrigators, not just to hunters, not just to fisherman, not just to canoeists either; and I'm one of those and I love her river. Notice I say your river. Usually, I don't do that. But we're talking about who has the right to these resources and I think that its wrong for us to say, well, this group has a right and this group has a right, but these don't. We all have the right. They belong to all of us. These are resources that are common to the state. This legislation applies to all water basins. We've talked a lot about the Niobrara and it does apply there, of course, but it harms nobody, it does not take water out, it does not give preference to instream flows over any other applications. I mean, I would be happy to get this on the floor and debate that. It simply puts instream-flow applications in the same area of the law as several other exceptions that already exist. I think it was Mel Thornton that made that point. It's important to allow our state to better protect wildlife; to protect and provide for recreational activities on our rivers and streams. And I think we can do that without taking water out and without disturbing the rights of others. Thank you. [LB1025]

SENATOR LANGEMEIER: Very good. You've heard the closing on LB1025. Thank you all for your testimony and then that concludes our hearings for the day. Thank you. (Exhibit 16) [LB1025]