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Judiciary Committee  
January 30, 2013

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[LB61 LB134 LB136 LB152 LB172]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 30, 2013, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB136, LB134, LB152, LB172, and LB61. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Al Davis; Amanda McGill; and Les Seiler. Senators absent: Ernie Chambers.

SENATOR ASHFORD: Good afternoon, everyone. I came in just when we adjourned. It took me an hour and a half. Why don't we get started, please. First of all, apparently at 4:00 the weather is supposed to get very bad again, so we...that's just a...whatever that means. I know that we have a lot of testifiers here. We're going to have to watch it a little bit because if it gets very bad then we're going to have to conclude things probably. So let's...with that caveat, let me introduce my colleagues: Senator Seiler from Hastings, Nebraska; Senator Coash, to my left, from Lincoln; Senator McGill from Lincoln; Senator Lathrop from Omaha, from Ralston, Nebraska; and Senator Davis from...actually, he was born in Alliance, but what... [LB61]

SENATOR DAVIS: Hyannis. [LB61]

SENATOR ASHFORD: Hyannis now, so excuse me for that, but...and I'm Brad Ashford. Stacey Conroy is--I always want to call her by her maiden name, but she has a...that's a long time ago--from Lincoln. And Oliver VanDervoort is the committee clerk. There is...we do have a three-minute light system. So when you come up to testify after you've given the sheet to the page, then we're going to have a light system that shows you when to sum up your comments. They'll turn to yellow. And then when you get to red, then we'd ask you to stop your comments and there, most likely, in many cases, will be questions. So with that, I think we'll start with the first bill, LB61, Senator Murante. [LB61]

SENATOR MURANTE: (Exhibit 1) Thank you, Chairman Ashford and members of the Judiciary Committee. My name is John Murante, spelled M-u-r-a-n-t-e. I represent the 49th District of the Nebraska Legislature, and I'm here today to introduce LB61, which is legislation that amends the Data Security Breach Act to increase protection for Nebraska consumers. I have distributed an amendment which redoes much of the bill. It is a result of bringing many parties together, including the Nebraska Bankers Association, Mutual of Omaha, the Nebraska Chamber of Commerce, and several others. Currently, when a data breach occurs, Nebraska law requires notice to be given to the customer, however, the law does not specifically outline what information the notice should include. It only requires that notice be given if a Nebraska resident's information was or may have been compromised. In 2012 alone, over 800,000 Nebraskans were affected by security breaches, making them vulnerable to identity theft. Identity theft occurs when someone steals identifying information and that

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information is used to create fraudulent or credit accounts to apply for loans or government benefits. We should be doing everything we can to ensure that Nebraskans have the information they need to protect themselves from identity theft, and LB61 does just that. As amended, LB61 increases protection for Nebraskans by requiring the notice to consumers to include at a minimum a description of the incident in general terms, the type of personal information that was obtained as a result of the breach of security, a telephone number that the affected consumer may call for further information and assistance, contact information for consumer reporting agencies, and advice that directs the affected customer to remain vigilant by reviewing account statements and monitoring free credit reports. At least 16 states require notification to consumers of specific information upon a security breach. The information required by LB61 is based on Missouri's law. This bill provides a blueprint for businesses to follow and it also adds a layer of security. In addition to the changes in notification requirements, LB61 also requires notification to the Attorney General's Office. While many businesses do a great job in providing consumers with necessary information, without notification of the breach, the Attorney General's Office's ability to ensure consumers are provided the information they need is limited. Under LB61, in the event an entity notifies more than 100 Nebraska residents at a time, the entity must also notify the Attorney General's Office. At least 17 states currently require notice to the Attorney General's Office or a similar agency upon a security breach. LB61 requires notice to the Attorney General's Office include the timing, distribution, content, and number of residents of Nebraska affected by the breach. If the entity fails to notify Nebraska consumers or the Attorney General's Office, such failure shall constitute a deceptive trade practice under the Uniform Deceptive Trade Practices Act. I would be happy to answer any questions, and we also have a representative here from the Attorney General's Office who can get into detail about how they've processed these situations in the past. [LB61]

SENATOR ASHFORD: Okay. Any questions of Senator Murante? [LB61]

SENATOR LATHROP: Just briefly. The statute already requires notice, does it not? [LB61]

SENATOR MURANTE: It does. It requires the notice to the people who are affected. [LB61]

SENATOR LATHROP: Okay, what are we doing that's different? What are we accomplishing over and above what's already the law in Nebraska? [LB61]

SENATOR MURANTE: Well, first we're...sure. We're getting specific as to what the notice needs to contain and... [LB61]

SENATOR LATHROP: Has that been a problem? [LB61]

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SENATOR MURANTE: The Attorney General's Office has dealt with this on an annual basis. There's just no way really to know on a specific and case-to-case basis because there's no requirement to notify the Attorney General. So if a business isn't meeting up to their end of the bargain, there's really no way for us to know unless an affected person who has had their identity stolen contacts the Attorney General's Office. [LB61]

SENATOR LATHROP: So the Attorney General's Office now is going to be monitoring; every time there is a breach they'll get notice. We do that without a fiscal note? We're not going to add anybody or require one more person or any more time of the Attorney General's Office? [LB61]

SENATOR MURANTE: Well, it would only be...the only time the Attorney General's Office would need to be notified is if the company who had...is dealing with the breach has to notify more than 100 Nebraskans at a time. From my communications with the Attorney General's Office, this wouldn't be a significant cost to them, but I'm sure they'd be able to answer more specifically what cost they will have. [LB61]

SENATOR LATHROP: Okay, thank you. [LB61]

SENATOR ASHFORD: Yes, Senator Davis. [LB61]

SENATOR DAVIS: A couple of questions. I'm not seeing anything in here that...is there a time frame for when the AG's Office needs to be notified? [LB61]

SENATOR LATHROP: No. [LB61]

SENATOR MURANTE: I don't believe that we had a time frame in there. I'd have to... [LB61]

SENATOR DAVIS: Do you think that might be something that would be useful? That's the first question. [LB61]

SENATOR MURANTE: I think that would be reasonable. I think that would be reasonable. [LB61]

SENATOR DAVIS: And just a second one, which is just a language issue. But if they notify more than 100 persons at one residence at one time--I'm just playing the devil's advocate--... [LB61]

SENATOR MURANTE: Sure. [LB61]

SENATOR DAVIS: ...you know, you could say, well, on Monday I notified 100...or 99; Tuesday, 99. [LB61]

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SENATOR MURANTE: Um-hum. [LB61]

SENATOR DAVIS: You're talking about one incident, right? [LB61]

SENATOR MURANTE: Right. [LB61]

SENATOR DAVIS: So maybe we could tighten that language up a little there. [LB61]

SENATOR MURANTE: Sure. That seems reasonable to me. And in talking with the businesses who deal with this on a regular basis, the overwhelming majority already comply with a healthy number of this. [LB61]

SENATOR DAVIS: Sure. [LB61]

SENATOR MURANTE: So I'm sure that shouldn't be a problem. [LB61]

SENATOR ASHFORD: Seeing no other questions, thanks. Are you going to stick around? Yes. Next. David. [LB61]

DAVID COOKSON: Good afternoon, Chairman Ashford, members of the committee. My name is David Cookson, C-o-o-k-s-o-n. I'm Chief Deputy Attorney General. Given the long afternoon you have ahead of you, I think I'll skip the prepared remarks and go directly to some of the questions. Currently, we find out about almost all of these through a variety of sources, either through the media...a perfect example was the University of Nebraska last year had their system hacked. We worked very closely with them after we contacted them. The current act, the LB...or what was known as the Financial Data Protection/Consumer Notification of Data Security gives us certain powers to investigate these, which includes subpoenas. In terms of actual cost, this will be more efficient and probably save us some time and resource. By getting the notice and getting notice that the notice requirements have been addressed really takes care of a lot of the things that we would do otherwise. Our primary concern is that consumers get the right information about the steps they need to take as soon as they can. Senator Davis, to your question regarding timing, right now the statute reads, as soon as possible and without unreasonable delay. Generally speaking, we're comfortable with that as most folks are going to comply with that. We have enforcement authority under the Uniform Deceptive Trade Practice Act such that if we think there's unreasonable delay, we feel comfortable that we can remedy that. But the main focus here is to protect consumers by getting...time is really of the essence and making sure they know who and what to call because, in this day and age, no one is immune from these kind of data breaches, whether it's a big company or a small company. [LB61]

SENATOR LATHROP: Here's my question. The bill...the law already requires that if

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there's been a breach...so you're one of these...one of the businesses that come under the purview of this statute or this bill. It already requires that you give notice to the affected individual, right? [LB61]

DAVID COOKSON: Right. [LB61]

SENATOR LATHROP: That's already the law. So if it happens, "Joe Consumer" is going to find out about it or should. Now we're going to involve the Attorney General's Office if it's big enough to require 100 notices to go out. [LB61]

DAVID COOKSON: Right. [LB61]

SENATOR LATHROP: Is that the case? What's the AG doing about it? [LB61]

DAVID COOKSON: Well, I'll give you... [LB61]

SENATOR LATHROP: What is the point in giving you guys notice if we've already told the people, somebody now has your Social Security number and your name, you could have somebody try to, you know, develop a...steal your identity? So what's the AG... [LB61]

DAVID COOKSON: There's two parts...yeah, there's... [LB61]

SENATOR LATHROP: What's the point in having you do that before somebody steals the ID? [LB61]

DAVID COOKSON: There's two parts to that. Let me tell you first what the change to the notice provision is here. We now make it specific what information the notice has to be provided. Our experience has shown us, since we've presented the Financial Data Protection Act back in 2006, is that some companies do a better job of others than telling them what it is they need to know. Some companies have, in the past, simply said, your data may or may not have been breached, we're providing you notice. And then we'll get a complaint or the media will come to us or another state will come to us and say, hey, wanted to make sure you knew about this because that other state already requires notice to the AG's Office. And then we go to them and say, we want to see what you sent them. And if we don't think it's sufficient under the current law, we can ask them to do more or, if it's a violation, we can take some kind of action if they fail to provide what we think is adequate notice. In order to provide some certainty and make sure consumers get what they need, we provide...we lay out in here what those notice provisions are and what the information is. Currently, what we do when we get notice is to make sure consumers have access to that information. We have what we'd call an identity theft repair kit which, for instance, when the university had their breach, they provided a link to our Web site to find that...to get that information, which

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allows...then walks the consumer, step by step, what they need to do to protect their identity and/or protect themselves from identity theft. [LB61]

SENATOR LATHROP: Do you think it would be beneficial to tell them that they can lock their credit report up? [LB61]

DAVID COOKSON: That's part of the... [LB61]

SENATOR LATHROP: That's... [LB61]

DAVID COOKSON: It's not in the specifics here. [LB61]

SENATOR LATHROP: It doesn't say that they should tell them that though. [LB61]

DAVID COOKSON: Right, it's not... [LB61]

SENATOR LATHROP: Don't you think it should? That was a Mines bill, if I remember right, my first year. [LB61]

DAVID COOKSON: You could. I know that's part of our identity theft repair kit, and it is in statute as well. [LB61]

SENATOR LATHROP: Okay. [LB61]

SENATOR ASHFORD: Senator Seiler. [LB61]

SENATOR SEILER: I just have one thing, in that you're giving notice, and then it says, without unreasonable delay. Tell me what time frame that is. That notice by the people that now discovered there is a problem,... [LB61]

DAVID COOKSON: Right. [LB61]

SENATOR SEILER: ...they're going to notify you without unreasonable delay. [LB61]

DAVID COOKSON: Right. [LB61]

SENATOR SEILER: Is that one day? Two days? Thirty days? Sixty days? [LB61]

DAVID COOKSON: It...in some... [LB61]

SENATOR SEILER: And it wouldn't bother me but except it makes them subject to the Uniform Deceptive Trade penalties. [LB61]

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DAVID COOKSON: Right. [LB61]

SENATOR SEILER: So maybe we ought to clean that up. [LB61]

DAVID COOKSON: And I think that goes to Senator Davis' question. But right now it depends on the situation. If it's a large breach, like the university's breach was significant, and there was an ongoing criminal investigation...so the time it took for them to notify folks was probably longer than what the university would have done otherwise, but they had to allow for the law enforcement investigation to be completed. [LB61]

SENATOR SEILER: No, this is notifying you, which is an exception to the law enforcement. [LB61]

DAVID COOKSON: Right, right. Oh, I'm sorry. I was thinking of a different part of the bill. [LB61]

SENATOR SEILER: Yeah, it...no, no. It's paragraph (c) on page 2. It's that loose type of language that bothers me when you've got people being subject to... [LB61]

DAVID COOKSON: Right. [LB61]

SENATOR SEILER: ...because you're excepted... [LB61]

DAVID COOKSON: The language we have mirrors the language that we've provided for the notice to the consumers. [LB61]

SENATOR SEILER: Um-hum. [LB61]

DAVID COOKSON: I think, as Senator Murante indicated, though, we'd be amenable to working through a specific time period if the committee was interested. [LB61]

SENATOR SEILER: That's all I have. [LB61]

SENATOR ASHFORD: Thanks, David. [LB61]

DAVID COOKSON: Thanks. [LB61]

SENATOR ASHFORD: Any other proponents? Any opponents to this bill? Neutral? Okay, Senator Murante...closes that hearing. Now LB136, Senator Avery. How many testifiers do we have on LB136? How about LB134, which is the next bill after? How many are going to testify on LB134? Okay. And Senator Coash's bill, LB172, how many do we have here for that bill? Okay. As long as we have a little time, I assume most of the rest of you are here for LB152. How many plan to testify? Okay. What I'm going to

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ask you to do when you come up is try to not be redundant and try to...if you have something new to add, please do. If someone is testifying on the same general subject or issue, what I think would be good is if we try to organize our testimony so that each testifier that does testify on LB152 adds something a little different to the discussion, if possible. And also you can indicate your support or opposition to the bill or neutrality to the bill on the sheets that are up at the front of the room or on the table. And so if you do not wish to testify, you can indicate, and give us your name and address and indicate your preference on the bill. So hello, Senator Avery. [LB61]

SENATOR AVERY: (Exhibit 2) I apologize, Senator Ashford, for being late, but you've moved faster than we thought you would on that first bill. I am not unmindful of the workload that this committee carries so I will try to not hold you up. I am here to...oh, by the way, my name is Bill Avery, A-v-e-r-y. I represent District 28 here in Lincoln. I bring to you LB136. It is a technical cleanup bill that has potentially rather significant implications. It amends 37 statutes to clarify that the common school fund under Article VI (sic--Article VII), Section 5, of the Nebraska Constitution is the proper depository of any and all fines, penalties, or license fees made by the State Treasurer. The permanent school fund, which is referenced in Article--I think it's Article VII--or Article VI (sic--Article VII), Section 7, of the Nebraska Constitution is the proper distribution for the proceeds of all lands and other property. For a long time there has been some confusion about where penalties and fines should be deposited. The state statutes have been unclear about whether fines and penalties should go to the common school fund under Section 5 or the permanent school fund under Section 7. The result is that these funds usually have been misdirected to the generic permanent school fund instead of the common school fund which is where it should go, and therefore these funds have been distributed in a manner that is not consistent with the constitution. The constitution directs that all fines, penalties, and license money be paid into the common school fund--that's Article VI (sic--Article VII), Section 5--for distribution to the counties where the fines were levied and then they go to the benefit of the public schools. The permanent school fund receives net proceeds of lands...of the property. So there's a clear distinction between these two funds. The misdirection of funds has been around for a long time. In 2002, the Attorney General issued an informal opinion regarding administrative fines levied by the Nebraska Racing Commission. He argued that the confusion resided in the Legislature's reference to the perpetual fund created by Section 7 but it intended to reference the common school fund, sometimes referred to as the permanent fund, which is created in Section 5. The Auditor, actually in an audit conducted of the Nebraska Department of Banking and Finance in April 2008, made the following finding. There appears to be a conflict between the department statutes and the Nebraska Constitution. If fines are deposited into the permanent school fund as provided by statute, the monies are not being distributed as required by the Nebraska Constitution. The department deposited \$315,500 during the fiscal year 2007 into the permanent school fund for fines when it should have gone to the common school fund. The Auditor went on to say that in apparent contravention of the requirement under



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Article VII, Section 5, of the constitution that fines and penalties be paid to the counties in which they are levied for the support of the schools in those respective subdivisions. Various state statutes direct the department to deposit funds that it collects into the permanent school fund. So what we're trying to do with this bill is to clear up that confusion. Legislation was actually introduced, I believe it was in 2002, but the bill failed to advance because of an unanticipated impact on school financing. Depositing fines, penalties, and license fees in the common fund for direct distribution to the counties where the fines were levied would have caused a sharp increase of revenue to school districts resulting in a decrease in state aid. Because the way the formula works, you know that if you have additional resources, that increases one part of the formula, and the formula is based upon needs calculation minus resources equals equalization aid; and that was not anticipated by the bill in 2002. And because of the impact on school districts, there was a quick drop-off of support for the bill and the bill was not advanced. The truth is that since most of the fines are levied in state agencies here in Lancaster County, LPS is affected most profoundly. However, there is a case that occurred in western Nebraska where a substantial insurance settlement would have pushed the school district over their reserve percentage allowed by the constitution that would have caused them to lose a lot of equalization aid as well. If you look at the fiscal note, you will see what the dollar impact is likely to be. It shows here that the permanent school fund realized in 2002-04, \$2.6 million--no that's...yeah, \$1.3 million in 2002-04; \$2.6 million in 2004-06; and \$3.5 million in 2006-08; and \$2.1 million in 2008-10. You get the point. I mean, this is not a huge amount of money but it can cause problems in those districts where the net increase in revenue that results from the bill would cause their state aid to decrease two years later. So I have an amendment that the page has distributed that addresses this problem. This amendment was worked out in close consultation with the legal counsel of the Education Committee. The amendment allows school districts that will experience a temporary windfall following the shift of funds--this is largely Lincoln Public Schools; it will allow them the opportunity to file for a three-year exclusion from allowable reserve restrictions if they receive more than 10 percent of total receipts in fines and penalties than the preceding fiscal year. It is my belief that this bill, along with the amendment, brings Nebraska into compliance with our own constitution while protecting school districts from adverse and unanticipated consequences; and I urge your favorable consideration of this bill. [LB136]

SENATOR ASHFORD: Any questions of Senator Avery? Yes, Senator Seiler. [LB136]

SENATOR SEILER: Senator Avery, it may be my hearing, but I thought you referred to the constitution in Article VI. [LB136]

SENATOR AVERY: It's Article VII. [LB136]

SENATOR SEILER: Article VII. Okay. That's what I was reading, I just... [LB136]

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SENATOR AVERY: Section 5 and Section 7 are the two keys. But you're right, it's Article VII. [LB136]

SENATOR SEILER: Okay. Thank you. [LB136]

SENATOR AVERY: There is a typo in my notes here, by the way. [LB136]

SENATOR SEILER: Okay. [LB136]

SENATOR ASHFORD: I don't see...thanks, Bill. [LB136]

SENATOR AVERY: Oh, yes, thank you. [LB136]

SENATOR ASHFORD: I don't see any other questions. Don... [LB136]

SENATOR AVERY: I have obligations in my own committee but I'm next up so I think I'm going to hang around. [LB136]

SENATOR ASHFORD: You're next. Okay. (Cell phone ringing) Normally, the Chair will eject you if you...Don, good to see...welcome to the committee. [LB136]

DON STENBERG: Thank you very much. Good afternoon, Chairman Ashford and members of the committee. For the record, my name is Don Stenberg, S-t-e-n-b-e-r-g, Nebraska State Treasurer. I'm here in support of LB136. I'd like to thank Senator Avery for bringing this bill forward, and I will try not to repeat what Senator Avery has said, because I thought he explained it pretty well. But there are a couple of points I'd like to emphasize and then take whatever questions the committee may have. Very simply, the purpose of this bill is to ensure that fines and penalties are placed in the proper school fund by the state agencies collecting those fines and penalties. I think it's very important to understand this legislation makes no changes in public policy concerning school funds and fines and penalties. It merely brings the state statutes into conformance with the state constitution, specifically Article VII, Section 5, which very clearly provides that all penalties are to go into the Article VII, Section 5 school fund for distribution to the schools in the counties where the fines or penalties were levied or imposed according to the language of that statute. It came to my attention last summer that a number of state agencies were, instead of placing fines and penalties in the common school fund or the Article VII, Section 5 school fund, were placing it in the perpetual school fund which is a fund created by Article VII, Section 7, of the state constitution. And the primary source of funds for that are state school lands and grants from the federal government and other sources. The difference between the Article VII, Section 5 school fund, is that those fines and penalties are distributed each year, the entire amount of the fine and penalty is distributed to the counties where those fines were levied for use of the schools there. The Article VII, Section 7 school fund, money that goes there is not

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spent. Only the income from the investment of those funds is spent. So as Senator Avery mentioned, the 2002 Nebraska Attorney General's Opinion--and I'd like to elaborate on that just very briefly. It dealt with this question in the context of the State Racing Commission; and that statute provided that the fines and penalties levied by the Racing Commission would go to the permanent school fund. And what the Attorney General's Opinion said when it got to the final bottom line was that in order to be in compliance with the constitution, that should be interpreted as a reference to a permanent fund under Article VII, Section 5, and not the perpetual school fund. And it noted that the constitution does not use the words "permanent school fund." It refers to a perpetual school fund. So all this legislation does apart from the amendment that Senator Avery mentioned is simply say that fines and penalties from a variety of these agencies will go in an Article VII, Section 5 fund, which is what the constitution requires. So that's the bill in a nutshell and I'd be happy to take any questions. [LB136]

SENATOR ASHFORD: Thanks, Don. Any questions of Don? Seeing none, thank you. [LB136]

SENATOR LATHROP: Just if I may? [LB136]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB136]

SENATOR LATHROP: The short...the headline on this is that we need to do this to bring our statutes into compliance with the constitution. [LB136]

DON STENBERG: Constitution. Exactly right. That's all...and that's all the bill does apart from Senator Avery's amendment which makes some adjustments in the school aid situation. But the original bill in its original form simply brings state statutes into compliance with the state constitution. [LB136]

SENATOR LATHROP: Good. Thanks, Don. [LB136]

DON STENBERG: You bet. [LB136]

SENATOR ASHFORD: Thanks, Don. Good to have you here. [LB136]

DON STENBERG: You bet. Thank you. [LB136]

SENATOR ASHFORD: Any other testifiers on this bill? Any proponents or opponents? Neutral testifiers? Bill, do you want to...Senator Avery, do you want to conclude and introduce...oh, I'm sorry. Excuse me. [LB136]

SENATOR AVERY: We have a neutral. [LB136]

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SENATOR ASHFORD: Oh, we have a neutral. Okay. Good afternoon. [LB136]

CONNIE KNOCHE: (Exhibit 4) Good afternoon, Senator, members of the committee. My name is Connie Knoche, C-o-n-n-i-e K-n-o-c-h-e, and I'm the finance director for Lincoln Public Schools, and we're testifying in a neutral capacity on this bill. We understand that it's aligning the constitution with the state statutes and we understand the implications of this bill. The amendment helps school districts with the cash flow because you may get a large sum of money in one year and that would cause you to exceed your cash reserve limitations. So this is helpful to have the amendment. And we understand that it is revenue neutral because we are an equalized school district. That means we have more needs than we do resources, so we get state aid. With this bill, if we would get more revenue from fines and licenses, that would cause our resources to be higher and reduce our equalization aid two years down the road. So the amendment is very helpful and it makes this possible to manage the cash flow better; and we have no opposition to the bill. [LB136]

SENATOR ASHFORD: That's good. Thank you for your testimony. Any questions? I don't see any. Senator Avery...well, I think you...that's good. You can be excused. Senator Avery, do you wish to...? [LB136]

SENATOR AVERY: I'm going to waive. [LB136]

SENATOR ASHFORD: You're going to waive closing, and then...but you have the next bill. [LB136]

SENATOR AVERY: I do. [LB134]

SENATOR ASHFORD: So that's LB134 concerning inheritance tax. [LB134]

SENATOR AVERY: And I have an amendment here, too, if you can get me a page. [LB134]

SENATOR ASHFORD: Our pages are gone right at this very moment, but Senator Seiler, he's always been...he could be the Vice Vice Vice Chair now. Thanks. Senator Avery. [LB134]

SENATOR AVERY: (Exhibit 3) Thank you for your hospitality, Senator Ashford. My name is Bill Avery, B-i-l-l A-v-e-r-y, representing District 28. LB134 allows for posthumously conceived children up to three years to be expressly identified as a rightful heir to an estate following the death of a parent. The decedent must provide indication of their intent to include the child in their estate. I am having distributed an amendment that came to my attention after we had drafted the bill. The amendment addresses constitutional concerns raised regarding discrimination on the basis of

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gender and marital status, striking the word "husband." The amendment also uses the phrase "posthumously conceived" to cover all methods of assisted conceptions not just one. These were unintentional oversights during the drafting. In the original version it did not expand the bill enough to include both parents or all manners of assisted conception. The science of assisted reproductive technology is moving dramatically faster than the inheritance and intestacy laws of our state. And this is true for other states as well. Traditional relationships are no longer the exclusive method of reproduction. There are medical, social, and situational reasons that families choose to use assisted reproductive technology. Assisted reproductive technology, which is referred to as ART, refers to a range of techniques used to achieve pregnancy by nontraditional, artificial, or partially artificial means. Technology has so quickly advanced in the area of reproduction that methods such as cryopreservation have allowed for children to be conceived past the death of a particular donor. The Centers for Disease Control report that 1 percent of all live births are the result of assisted reproductive technology. In 2010, this was in excess of 61,500 births. This is still an emerging field. It's clear that there are significant amounts of families utilizing reproductive technology. It is often after tragic personal circumstances that families look for alternative methods of reproduction. A medical condition, a catastrophic accident, and military deployment often lead families down this path. It's a financial commitment because not always are these procedures covered by insurance. It often requires multiple treatments over a period of time, and it often works, producing little miracles to these families clinging to hope. However, these families have been finding that their probate laws in the states where they reside do not reflect the advances that we have in the technology. In 2012, the U.S. Supreme Court ruled unanimously in a decision entitled Astrue v. Capato that states must have an established intestate succession law in statute in order for children born by way of assisted reproductive technology to be eligible for benefits from the Social Security Administration. In that case, the mother used frozen sperm of her deceased husband, and conceived twins 18 months later. The Social Security Administration denied her twins benefits under Florida law because a child born after a parent's death, in Florida law, could not inherit property from the parent; only if the child was conceived during the parent's lifetime. The Florida law was silent as to children conceived after the death of a parent. But we have a case here in Nebraska that occurred last year where a woman, who is here today and will testify, conceived a child following the untimely death of her husband and was denied benefits on behalf of her daughter. The Nebraska Supreme Court ruled--and I think that if you read the Opinion, they did so reluctantly--but they said that they were bound by the plain, direct, and unambiguous meaning of the law and could not interpret these statutes in a way to favor the child. Four other states have reached similar conclusions when dealing with reproductive technology and intestate succession. So this bill addresses what the Supreme Court and now our own Nebraska Supreme Court have identified as insufficient legislative guidance in the area of inheritance, by expanding our probate laws to include children born by way of assisted reproductive technology following the death of a parent. I have included voluntary advance directive language in the proposed

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amendment, which is intended to minimize any misunderstandings and maximize the family's liberty to make a private, personal decision about the future of their family. In the proposed amendment, I have strengthened the language regarding the declaration of intent, making it a written or electronic record or a will. I will leave this up to the committee to decide how they want that worded. The most comprehensive law, apparently today, is in California, and I think that we have the means here today to correct what is a gap between our law and technology, and to right a wrong that I think was inflicted on this Melinda (sic--Melissa) Amen who is with us and will give her firsthand account. [LB134]

SENATOR ASHFORD: Thank you, Senator Avery. Yes, Senator Coash. [LB134]

SENATOR COASH: Thank you, Senator Ashford. Senator Avery, if we were to get this bill through and correct this ambiguity in the legislative direction that the Supreme Court has indicated needs to happen, will this do anything to affect cases that have already been heard? [LB134]

SENATOR AVERY: You know, we've been discussing that in my office. We're not absolutely certain but we think that, once it becomes law, that a person who has been denied benefits would be able to reapply and then the current law would apply to that case. I'm not sure of that but that would be the fair thing. [LB134]

SENATOR COASH: Thank you, Senator. [LB134]

SENATOR ASHFORD: Senator Seiler. [LB134]

SENATOR SEILER: Senator, I have no problem with the law as you're proposing, but I have a practical problem. Right now, the Supreme Court of Nebraska has leaned on the county judges and the attorneys to finish estates within 18 months. I believe you need to convert some of this language to the section, and I can't remember exactly, in the Probate Code that says if this language exists, that that estate cannot be processed for three years. [LB134]

SENATOR AVERY: That's why we have lawyers in this body. [LB134]

SENATOR SEILER: Well, I can see the... [LB134]

SENATOR AVERY: No, I'd be happy... [LB134]

SENATOR SEILER: I can see the conflict coming only on the practical side not the ethical side that you're working on here. [LB134]

SENATOR AVERY: Yeah. I would find that amendment to be very suitable. [LB134]

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SENATOR SEILER: Thank you. [LB134]

SENATOR ASHFORD: Yes, Senator Davis. [LB134]

SENATOR LATHROP: Along the same...I'm sorry, did you say...? [LB134]

SENATOR ASHFORD: I said Senator Davis but...well... [LB134]

SENATOR LATHROP: Oh, no. Go ahead. [LB134]

SENATOR DAVIS: Well, with regard to the written consent issue that you've got here, how are you going to do that? Are you going to have a notarized document or is it going to be on the back of an envelope? [LB134]

SENATOR AVERY: Well, the bar association wants it to be in the will, and I think that's probably a good place for it. And this might also encourage people who are young and suffer from maybe a life-threatening disease to get a will. Often they don't do that; and I think Ms. Amen will admit that they didn't have one. [LB134]

SENATOR DAVIS: But that will be defined at some point. I mean, we're not going to just have any sort of vague language as to what is... [LB134]

SENATOR AVERY: Yeah, right. Absolutely. [LB134]

SENATOR DAVIS: Because I can see that being a very contentious issue. [LB134]

SENATOR AVERY: And your legal counsel can help us with that, I'm sure. [LB134]

SENATOR LATHROP: My concern is sort of a mix of the last two that you heard. One is I think it absolutely has to be in the will or whatever document they're taking care of the estate, otherwise you could have somebody literally pull up a napkin or an e-mail. The other side of it is, if this is the law and that's in whatever document that we ultimately decide works, the probate proceedings can't be resolved for three years. So if that's in there, everybody who's waiting around is now waiting for the surviving spouse to make a decision about whether she wants to have a baby for three years. And I'm not so much worried about the progression of the case or the standards the Supreme Court sets, as I am those people that are waiting for their inheritance are now going to wait for three years while they're waiting...it sounds a little reality TV-ish. Everybody is going to be waiting to see if Mom decides to have a baby after Dad dies, for three years, before they can distribute the estate. [LB134]

SENATOR AVERY: Yeah, Senator... [LB134]

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SENATOR LATHROP: And that's a very real, practical problem. [LB134]

SENATOR AVERY: Senator Seiler raised that issue and I frankly was not aware that there was an 18-month limit on settling these probate cases. But we... [LB134]

SENATOR LATHROP: That's more of a guideline that pushes the judges. [LB134]

SENATOR AVERY: Yeah. [LB134]

SENATOR LATHROP: And I understand Senator Seiler's concern, but practically speaking, if this is in a will, no one is getting anything until three years pass and we make sure Mom didn't get pregnant with...after Dad died. [LB134]

SENATOR AVERY: I can work with the committee if you want to consider an amendment on that. [LB134]

SENATOR ASHFORD: Okay. Thank you. Thank you, Senator Avery. [LB134]

SENATOR AVERY: Thank you. [LB134]

SENATOR ASHFORD: Let's have the proponents of this bill. It's a very pretty dress that you have on today. [LB134]

MELISSA AMEN: Say thank you. [LB134]

SENATOR ASHFORD: Go ahead. [LB134]

MELISSA AMEN: (Exhibit 5) All right, hello. My name is Melissa Amen, A-m-e-n. I'm proud to be sitting here today in support of LB134. My five-year-old daughter and I are the reason we're here today discussing this bill. I'm going to share with you a very personal story. In 2004, my fiance at the time, Josh, was diagnosed with rhabdomyosarcoma, a very aggressive form of cancer, and it was highly recommended that he bank sperm due to the fact that the aggressive treatments would likely render him sterile; so he did. For the next year we fought cancer, during which time we married. And after 11 months of intense treatments he was told he was cancer-free. We celebrated and decided to make a visit to the fertility clinic to start the process of conceiving a child by intrauterine insemination, also known as an IUI. In 2005, we began the long process to conceive. A few months had passed and we had not yet found the perfect mix of fertility medication in order to reach the IUI. Just as we were about to begin another month of fertility drugs, Josh noticed the lump in his abdomen and we both knew right away that the cancer was back. We put a hold on the fertility process in order to focus on fighting cancer for a second time. New treatments were put



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in place but the cancer wasn't responding. Josh was always very strong, very positive yet very realistic. We started talking about the most important things to us as a young couple, and every time we discussed this a child was always at the top of our list. So despite the fight against cancer, we decided to continue on our path of conceiving a child. We met again with the fertility doctor in mid 2006 and decided we would be more deliberate with our efforts to conceive. After a few cycles of injections, we saw Josh's health was declining. He insisted that I continue in the process to have his child. He helped me choose names for our future child and talked about the important things he wanted me to tell our child, and that he believed in me and trusted in me to raise our child the way he wished we could have together. In November 2006, my fertility cycle was on track for an IUI while Josh was fighting to stay with me each and every day. And then the morning after Thanksgiving, November 24, Josh left this earth while holding my hand. That morning I fell apart but I had to keep moving. I planned a funeral all while making sure never to miss an appointment at the fertility clinic. By the grace of God, only seven days after Josh's death our fertility doctor told me everything was perfect for the IUI. Later, it was confirmed I had successfully conceived a child on the first try. I had conceived only seven days after losing my husband. Having this child was not a decision I made on my own or not a decision that I made after my husband had died. Having this child was a mutual dream that Josh and I were living out together. Why seven days had to be the separation between the most difficult day of my life and one of the most fulfilling days of my life, I will never know; but I was never alone in the decision to have this child. In August 2007, I delivered a beautiful baby girl less than nine months after my husband's death. After having our child, I was made aware of the fact that I could apply for Social Security benefits for her; so I applied. I waited months for a response from the Social Security Administration regarding the application, and finally, after contacting my local congressman and the local media, I received a letter denying benefits. The SSA, at this time, even stated that in the eyes of the law my child didn't have a father because she was conceived posthumously, seven days after my husband's death, so she could not qualify for benefits. I appealed the decision and upon appeal was granted benefits. This decision was overruled and the benefits were denied once again. I continued to fight, working my way through the system, until just recently a certified question from my case was brought before the Nebraska Supreme Court: Could a child conceived after the death of a parent yet born within nine months of the death be able to inherit from that parent? The Supreme Court felt sympathetic towards my daughter but ruled that because the law is silent on posthumously created children and their rights to inherit, they could not rule in the affirmative regarding the certified question. Since this ruling, my case has been closed, decided in favor of the SSA denying all benefits to my child. I have never given up hope. The strength in my husband that I was witness to drives me to provide for our daughter to the best of my abilities. I can't give up. I made a promise to my husband and I will always fight for what is right for my family, and by supporting LB134 I hope that my fight will not be in vain. There will be other women like me in the future who will struggle through the pain that I have known firsthand, but I hope they will not have to struggle through the battle of

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getting the benefits that their posthumously created children deserve. Thank you.  
[LB134]

SENATOR ASHFORD: Thank you. Thank you both. [LB134]

SENATOR MCGILL: What's her name? [LB134]

MELISSA AMEN: This is Kayah. [LB134]

SENATOR MCGILL: Kayah? [LB134]

MELISSA AMEN: Um-hum. [LB134]

SENATOR MCGILL: You're very pretty. [LB134]

MELISSA AMEN: Say thank you. [LB134]

KAYAH AMEN: Thank you. [LB134]

SENATOR ASHFORD: Yeah. All right. Do we have any questions of either of these young ladies? Thank you very much. [LB134]

SENATOR MCGILL: Thank you. [LB134]

MELISSA AMEN: Thank you. [LB134]

SENATOR ASHFORD: Do we have... [LB134]

SENATOR LATHROP: Oh, can I ask one quick question? [LB134]

MELISSA AMEN: Yes. [LB134]

SENATOR LATHROP: Do you have idea whether, if we passed this, it would help your Social Security circumstance? [LB134]

MELISSA AMEN: I will say I am in contact with many women across the country that have been fighting this, and I know the woman from Iowa is in a similar situation. She went through, was denied benefits, and did exactly what I'm doing now and got the law changed, and I don't believe that when she reapplied she was able to get benefits. Of course, nothing retroactive could be put in place. But our hope is that, if I were to apply, maybe from that day forward, but there's no guarantee of that. [LB134]

SENATOR LATHROP: Okay. Thank you. [LB134]

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MELISSA AMEN: You're welcome. [LB134]

SENATOR ASHFORD: Thank you. Do we have another proponent? Opponent? [LB134]

JAMES NELSON: Good afternoon, Senator Ashford, members of the committee. I'm James Nelson, N-e-l-s-o-n. I'm a practicing attorney in Beatrice, Nebraska. I'm here on behalf of the Nebraska State Bar Association. We want to make it perfectly clear, there are really two issues. The first issue is the social issue, and that we have absolutely no position on. We fully understand the ramifications of the rules and regulations of the Social Security Administration and their restrictions, and I believe the Iowa case that was in federal court--I've not read that decision, I've read a summary of it--that indicates two reasons for the denial, one based on Iowa statute, the other one based on Social Security regulations. The concern that the bar association, and quite frankly, the practitioners in the estate and probate part of the bar, is that this, as Senator Lathrop has alluded to, really requires an estate to be left open for three years. Talking with our local county judge in Gage County, they have...the judge has concerns about that, because basically it freezes an estate because we don't know who the heirs are until after three years. That makes it a little impractical. You probably should not distribute assets from the estate until you know who all the heirs are. It just makes it hard to deal with. I think the reference was to the Supreme Court guidelines on estates. I think the current rules are that an estate is to be closed within 12 months if there's not a federal estate tax return to be filed; in 18 months if there is. Again that's court rule. And us practicing attorneys always to get the show cause orders, and if we have reason to keep an estate open longer than that, the judges allows us to. That's the practical issue from administering estates. We talked about, at least some of us in the legislative committee of the bar, what alternatives would there be. Certainly, individuals could prepare a trust to handle their own personal assets that could be held in place for children that exist and that might be born thereafter. That's an option, or placing a testamentary trust in their will. There are other options to deal with their personal assets in a reasonable way rather than all estates have to be left open for three years. That's our concern in the administration. [LB134]

SENATOR LATHROP: Briefly, if I can. [LB134]

SENATOR ASHFORD: Yes, Senator. [LB134]

SENATOR LATHROP: Did you...do you understand the point that they were making, that if we make some accommodation in the Probate Code for after conceived children, that they at least have access to Social Security? Have you studied that issue or do you know enough about it? [LB134]

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JAMES NELSON: I have not studied that specifically but I think if you deal with the Social Security regulations, if they were expanded to include children conceived after the death of one of the parents, whether it be the mother or the father, that would probably take care of the issue that is here in Nebraska and Iowa. [LB134]

SENATOR LATHROP: We can't do anything about the Social Security. [LB134]

JAMES NELSON: We can't do anything about the Social Security. [LB134]

SENATOR LATHROP: But if the regulation says if the state's Probate Code provides for children conceived after death, we can shrink that three years down to a very short period of time and may give them access to the Social Security in that way. [LB134]

JAMES NELSON: Possibly. I'll use the Iowa... [LB134]

SENATOR LATHROP: Did you guys look at that? [LB134]

JAMES NELSON: Yeah, the Iowa case, I think conception there was a little over two years after death. [LB134]

SENATOR LATHROP: Okay. Thanks. [LB134]

JAMES NELSON: But we just...our concern is keeping it open that long. [LB134]

SENATOR ASHFORD: Yes, Senator Davis. [LB134]

SENATOR DAVIS: Is this going to clog up the probate courts by having all these estates left open for three years? [LB134]

JAMES NELSON: It will just delay. And I don't think it will clog it up; it just delays getting them closed. My concern is if I have three children currently... [LB134]

SENATOR DAVIS: Right. [LB134]

JAMES NELSON: ...they're going to have to wait, whether it's 18 months or 3 years. [LB134]

SENATOR DAVIS: Yeah, they'll have to wait for distribution of anything out of the estate. [LB134]

JAMES NELSON: Of anything, because there could be... [LB134]

SENATOR DAVIS: Unless there's something in the will that specifies the release.

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Right? [LB134]

JAMES NELSON: Yeah, something in the will as a testamentary trust or an inter vivos trust for their assets, for the mother's and father's assets. [LB134]

SENATOR DAVIS: Okay. [LB134]

SENATOR ASHFORD: Senator Seiler. [LB134]

SENATOR SEILER: Wouldn't you say that the problem will come when a large set of assets dissipate over the three-year wait, and then there will be litigation all over as whose fault it is that they had to wait? [LB134]

JAMES NELSON: I'll phrase it this way. Sometimes us attorneys like complicated laws; it's full employment for attorneys. That's not why we're here. Let's make it reasonable, efficient. I would sure hate to think that there was a section of farm ground tied up for three years and we can't distribute because there might be other children. And again, it's strictly the administration... [LB134]

SENATOR SEILER: I agree. [LB134]

JAMES NELSON: ...and not the social policy. [LB134]

SENATOR SEILER: Thank you. I have nothing further. [LB134]

SENATOR ASHFORD: Thank you, Senator Seiler. Thanks, Mr. Nelson. Any other opponents? [LB134]

DEBORAH SCOTT: Good afternoon, Chairman Ashford and committee. My name is Debbie Scott, S-c-o-t-t. I'm here today representing the Nebraska Land Title Association and its more than 115 company members and nearly 500 employees of those companies across the state. I am one of those employees. The Nebraska Land Title Association is a nonprofit organization of land title professionals who work directly with and depend on local records in creating the title assurance products that protect the rights of parties to real estate transactions. On the surface, this bill appears to be relatively innocuous from an industry standpoint; but upon closer consideration, the overly broad language carries with it some consequences that have the potential to be quite damaging to certain folks involved in real estate transactions: in particular, a seller who may be barred from selling real estate because it's tied up in probate for three years, or a bona fide purchaser whose new home is subject to the claim of a child born up to three years later. We have some concerns as an industry. LB134 states that with written consent the issue of the decedent conceived posthumously shall inherit as if the issue had been born in the lifetime of the decedent. First, in order to demonstrate

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written consent that the land title industry would be able to rely on for purposes of insuring property, we would need to have written consent defined. Is that consent going to be in the form of a will or some other document that would be notarized and then filed in the real estate records in the register of deeds office against which the husband would have an interest or the deceased would have an interest. And if it's required that that sort of a notice be filed in the register of deeds office, then are we going to be encroaching on some privacy issues? But beyond that, assuming the term "written consent" is defined that everybody can, you know, agree to, then the effect of the legislation is that the distribution of all of the assets, including personal and real property, and in particular, the sale of any real estate owned at the time of death, would be subject to the claim of the posthumously conceived issue for up to three years. In other words, if the estate of the deceased appears to hold an interest in real estate being sold and the sale can be delayed. And simply put, as title insurance companies and agents, we won't be able to insure the transactions. And if we can't insure them, then the banks won't loan on them. So you're tying up real estate transactions on the go forward basis. And then what about the rest of the heirs? As it was indicated earlier, the other siblings or, you know, the other family members won't be able to receive their distribution, you know, for three years. So it just seems more prudent to me that the bill would be...should be more specific in the recitation of what its purpose is. As it's written, on behalf of Nebraska Land Title Association, we oppose LB134. Any questions?  
[LB134]

SENATOR ASHFORD: Do we have any questions? Don't see any. Thanks. Any other opponents? Okay. Any neutral testifiers? Senator Avery, do you wish to...? [LB134]

SENATOR AVERY: Actually I was going to waive until I heard some of the opponent testimony. They didn't have access to the amendment. You do. It clearly specifies here that the consent of the decedent for such inheritance is recorded in a written or electronic document or will. If it's the desire of the decedent, it's in a will, then I think the people who might have to wait a year or two or three for their inheritance should be willing to respect the wishes of the decedent. And if it involves real estate transfers, I don't think those trump the desires of the decedent. [LB134]

SENATOR ASHFORD: Okay. In fairness, they didn't have the amendment. [LB134]

SENATOR AVERY: No. Right. [LB134]

SENATOR ASHFORD: So we'll check with them and work... [LB134]

SENATOR AVERY: And I trust the judgment of this committee to make the appropriate changes. [LB134]

SENATOR ASHFORD: Thanks, Senator Avery, very much. Thanks for your comments.

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That will conclude the hearing. And Senator Coash. [LB134]

SENATOR COASH: Good afternoon, fellow members of the Judiciary Committee. For the record, I am Colby Coash, C-o-a-s-h. I represent the 27th District right here in Lincoln, here to introduce LB172. LB172 is a clarifying bill with the intent of clarifying LB157 from 2011. You will recall that bill which enhanced protections for vulnerable people under the supervision of a guardian or conservator. Unfortunately, the written language in a small portion of that law dealing with guardians' and conservators' notifications to interested persons was contrary to the intent. The intent of the language was to have guardians and conservators, following their appointment, mail inventories to all possible interested persons. Such mailings also include a form for the interested person to fill out and send back to the court affirming that he or she wants to continue to receive those notifications about the ward. In other words, an interested person must opt in to remain an interested person and receive further notifications about that ward. Inadvertently, the text of LB157 made those mailings of the inventories and the opt-in form an annual requirement. So what this bill does is remove that annual requirement and only make it mandatory for the initial filing. LB172 affirms that a guardian/conservator must file an inventory with the court and mail it to all possible interested persons following their appointment. Proof of such mailing is submitted to the court via an affidavit of mailing. Each year thereafter the guardian must continue to file an inventory but mail it only to those persons who have notified the court via the opt-in form indicating their desire to become an interested person. LB157, which we passed a couple years ago, put a lot of protections in place both through legislation and through court rule. The legislation and the court rule combined have been challenging for some of the practitioners in this, and we want to do anything we can to remove any kind of burden, remove any kind of paperwork, and still keep those protections in place and try to simply the process. This takes out one requirement that we didn't really want to be in the law in the first place, and clarifies that. So again it only clarifies that only a person who wants to continue to receive those mailings will continue to receive them after that initial appointment. So I will close on that. I've been working with the bar on this issue. They are interested in the same intent that I have, which is to simplify and streamline the process. They've suggested some amendments. I'm not presenting those to you today but they may follow with some additional ideas on how we might continue to simplify this process. [LB172]

SENATOR ASHFORD: Okay. Pretty straightforward. Thank you, Senator Coash. Do we have some proponents? Janice is here. Welcome, Janice. [LB172]

JANICE WALKER: Thank you, Senator Ashford and members of the committee, Senator Coash. My name is Janice Walker. I'm the State Court Administrator for Nebraska. And, Senator Coash, thank you for introducing this legislation. And as he said it's to provide a cleanup to two current statutes, and making this change will reduce unnecessary paperwork for guardians and it will also reinforce accountability and

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oversight for vulnerable adults. Under the current law, guardians must send an inventory of their wards of state to all interested parties, meaning family members or heirs, within 30 days of their appointment. And then each interested party may opt out of being sent further documents by not returning the notice of interested party form to the court. Unfortunately, as the current law is worded and as Senator Coash pointed out, even if interested persons opt out of receiving this information in the future, the statute requires that they still send these accountings and the notice of interested party every year thereafter. And that simply means the people who have already expressed a wish not to receive these documents will have to continue to receive them. This bill will correct that issue and direct that the inventory goes out the first year to all interested parties but thereafter the annual report will only be sent to those who have an interest. Two goals are being accomplished here. One is that guardians must continue to share information about the ward's assets upon appointment, which promotes transparency and accountability; and it allows the interested persons who wish to remain involved a way to receive information annually, and that provides an additional check on the accuracy of the information that's being given to the court. Finally, LB172 makes this same procedure apply to conservators as well as to guardians. And I'm happy to answer any questions if you have them. [LB172]

SENATOR ASHFORD: Does anyone have any questions of Janice? I don't see any. Thank you, Janice. [LB172]

JANICE WALKER: Very good. Thank you. [LB172]

SENATOR ASHFORD: Katie is up. [LB172]

KATIE ZULKOSKI: (Exhibit 6) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Katie Zulkoski, Z-u-l-k-o-s-k-i, testifying today on behalf of the Nebraska State Bar Association in support of the changes in LB172. And Senator Coash and Janice did a good job of addressing those changes, and I will speak only to the amendment that's being passed around. As Senator Coash mentioned, we have been working with his office and we appreciate his office being willing to discuss these changes with us. What this amendment would do is add a new section to the bill. Section 30-2601 has the definitions for purposes of Article 26. Article 26 is what addresses the vulnerable adults. And so this would just change those definitions in Article 26 and it would add to the language that defines the interested persons definition. And how specifically that would change that is after the death of the ward who becomes an interested person at that time. And so that is the only change that is contained in that amendment. The other suggestion we would like to bring to your attention, it is not in that statute, and I have not shared this yet with Janice Walker and so she will probably be sitting back there wondering at what suggestion this is. We have shared this with Senator Coash. One of the suggestions the bar association would have to the guardianship and conservatorship area is where an affidavit is required, which



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because it's an oath you need to get a notary to sign that, where an affidavit is required that we could change that to a certificate. In a lot of instances these are small estates and the guardian or conservator is dealing with small amounts of money and it is an added expense to go get something notarized every time you file it with the court. We don't want to lessen the solemnity of what it is they're turning into the court. We don't want to make it less of an important filing, but we do want to make it less expensive for those guardians and conservators that are giving...generally giving of their time and not really...this is not a process you make money in and it is generally a family member or someone that is doing this out of the kindness of their heart and we would like to see this be a less expensive process. So that is not included in the amendment. That is one thing we, however, would like to add to the discussion. And I would just like to add that the bar association has been working with the Supreme Court, Judge Bazis, and Judge Hutton have been working very closely with the bar on the court rules that address most of this process, and we are very thankful for the time that they are spending with us to address most of the issues by court rule. And we think that that's a really good way to address most of this. These issues that we are bringing today are those that we do think need to be addressed in the statute. [LB172]

SENATOR ASHFORD: All right. Thank you, Katie. Keep plugging away at it. All right. Do we have any other proponents? Any opponents? Neutral? Okay, Senator Coash, do you wish to...? [LB172]

SENATOR COASH: I'll waive. [LB172]

SENATOR ASHFORD: Okay, Senator Coash waives. Now we will go to Senator Dubas who I saw came in. We don't get to see Senator Dubas very much in our committee, so we're very happy to see you today. [LB172]

SENATOR DUBAS: Well, it's always a pleasure to see you too. [LB152]

SENATOR ASHFORD: Any Westside graduate is...well, actually you didn't...did you graduate? [LB152]

SENATOR DUBAS: I didn't graduate but I'd still consider myself an alum. [LB152]

SENATOR DUBAS: (Exhibit 7) Thank you very much, Senator Ashford and members of the Judiciary Committee. My name is Senator Annette Dubas, A-n-n-e-t-t-e D-u-b-a-s, and I represent Legislative District 34. LB152 is a bill that deals with the use of eminent domain. The very nature of its use creates angst and tugs at something that we hold very dear: our property rights. The use of eminent domain is a taking of private property, and while it is intended to be used cautiously and with just compensation, it is in place to help promote the public good through the development of needed infrastructure. That has typically included roads, reservoirs, transmission lines, and other projects that

provide a public purpose and benefit. In 2005, a Supreme Court decision said that eminent domain could be used for economic development that provides a public benefit. This ruling has resulted in many states revisiting their eminent domain statutes. And even though the Supreme Court ruling favored the use of eminent domain because there was a plan that "unquestionably serves a public purpose," they also went on to state, "We emphasize that nothing, in our opinion, precludes any state from placing further restrictions on its exercise of the takings power." Our Legislature did revisit the eminent domain statutes in 2006 after that Supreme Court ruling. The changes we made prohibit condemnation for projects that are primarily for economic development purposes which encompasses use by a commercial for-profit enterprise. It further went on to clarify what eminent domain could be used for, highlighting those projects that are in the public interest. I submit it may be time for another visit. We have many entities in Nebraska that work very hard to include the public in the planning of projects that serve the public good. There is typically a great deal of lead time when any particular project is being proposed that gives all interested parties opportunities for discussions and negotiations. These various groups know that they have the power to use eminent domain but do everything that they can to create a transparent and inclusive process so they can create an environment conducive to negotiations and mutually beneficial agreements. There are those rare times when negotiations aren't successful, and for the project to move forward eminent domain proceedings may be the next option. The actual application of eminent domain requires that property be condemned, and when such a petition is filed, there is very specific information that is required. The authority for the acquisition must be stated along with the nature, necessity, and purpose for which the land will be used; the title, right, or interest in the property; the quantity needed to complete the public purpose; and the reasons for selecting the location or route and evidence of attempts to negotiate in good faith. The questions I seek answers for are when and how the potential use of eminent domain comes into that discussion. Once the notion of eminent domain is injected into the negotiations, is it a benefit or is it an impediment to a successful agreement? How do we define a present plan and public purpose? Are there adequate opportunities for landowners to receive complete and accurate information early in the planning stages? What recourse does a landowner have if they feel they have been treated in a coercive manner? How do we avoid eminent domain being used as intimidating leverage during the planning, presentation, or negotiations? It is no secret that my interest in this topic came from our experience with the Keystone pipeline project. Many landowners were astonished that what they perceived to be a private foreign company could have that right to take their property. They had more questions than answers and were left feeling intimidated and afraid. I thought that LB1 from the special session, the Major Oil Pipeline Siting Act, had solved many of these issues and questions. In that act we gave the Public Service Commission the authority to conduct public meetings and hearings to gather information pertaining to an application by a pipeline company to become a common carrier in Nebraska. The pipeline carrier would then have the burden of establishing a public purpose based on specific factors that the PSC would review, including the carrier's compliance with state

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statutes and local ordinances; and only after receiving approval of the application, could eminent domain powers be exercised. However, the passage of LB1161, last session, weakened what we had accomplished with LB1. In essence, we gave away the Legislature's control and authority over eminent domain to the executive branch without creating any standards of application through that process. So here we are again looking at this issue. And while my initial interest was derived from our experience with the pipeline, I decided to step back and take a broader look at the application and use for eminent domain. My staff and I spent all summer and fall trying to determine what needs to be done to improve our eminent domain laws. I do understand that there is a time and a place when such a procedure must take place. But I am driven by the need to balance property rights of Nebraskans with the need for acquiring property for public infrastructure. Property owners should have complete and accurate information regarding any proposed project and know there is a very clearly stated present plan and purpose. Negotiations should be conducted in a manner that is not threatening or intimidating. The mere use of the words "eminent domain" invoke very strong, almost visceral, reactions from those who perceive that they may lose a part of something that they hold very dear: their home, their property, their farm, their ranch. This bill is a work in progress. Typically, I bring impacted parties together and try to find common ground when I work on controversial issues. But because I wanted this to be presented as my own work product, I decided to introduce the bill and then let the hearings be the beginning of any needed negotiations or changes. I know there are many individuals here today who will tell you they have serious reservations about LB152, and I appreciate where they're coming from and I do appreciate the communications that they had with me ahead of time about their concerns. I will carefully listen to all of the testimony today that is presented with the hopes that we can find areas of agreement. I am open to continued work on this bill; but my end goal will not change, and that is, ensuring that individual landowner property rights are protected. So I appreciate the committee's willingness to listen today. I do have a handout from a landowner--he didn't get this in, in time for me to forward it on to your office, so I did make copies--from Mr. Randy Thompson from Martell, who is in support of LB152. So with that, I would attempt to answer any questions you may have for me but know there are a lot of people behind me with very strong thoughts as well. [LB152]

SENATOR ASHFORD: Thank you, Senator Dubas. And thank you for not only your leadership on this issue but all your hard work in bringing to us all of the information this year and last year on these issues. So with that, we will go to the proponent testifiers. And how many proponents do we have over here? Okay, about the same as we said before. Come on up. Hasn't changed. (Laugh) No, thank you for your patience; and it is 2:55 so I know you've had to sit here for a while, but we felt it was best to start this and have whatever time it took rather than have other hearings after it. So good afternoon. [LB152]

MYRON FRANZEN: Senator Ashford, members of the committee, I am Myron Franzen,

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M-y-r-o-n F-r-a-n-z-e-n, from Columbus, Nebraska. My wife and I own some farm ground by Leigh, Nebraska, and the LE NRD out of Norfolk decided they wanted to put a dam in the Leigh area. Well, that involved putting some of my farm ground underwater. So the process took place and I wound up going to court in March 2007 for the eminent domain process of them taking my land. In October 2007, the LE NRD approved a contract for construction of the dam site at Leigh. In that document, the NRD stated that they had the 404 permit that it would take to do it. Well, I found out later that they did not have the 404 permit and nothing was happening in the start of 2008. So I contacted the Corps of Engineers about the permit of how I could oppose...or where I would send information to oppose the permit, and found out that there was a hearing for the corps permit but no one in the area of the dam site found out about it. So it went on, and the NRD eventually hired a law firm out of Denver, and through negotiations and whatever with Washington and the like, they were able to get their 404 permit in the latter part or fall, late fall, of 2008. So what this did for me is they took 51.3 acres of my land in March '07 and construction for the dam could not start...or did not start until the spring of '09. This means they took two years of income off of this land for no reason other than the process that they were eligible to do. Throughout all of this, I also found out that I wanted to appeal their decision to take my land early, and found out there is no appeal process for an NRD. You have one choice and that's go to court. Well, there aren't many people that can go to court and fight a taxing entity in that fashion. So someday I would like to see the Unicameral address the issue of how you appeal a decision by an NRD. I feel, and stuff, that LB152 would certainly help if they had to have all their permits and make those permits available to anyone that would request them before they could take eminent domain and take your property. [LB152]

SENATOR ASHFORD: Thank you for your comments, Myron. Do we have any questions of this witness? Seeing none, thank you, sir. [LB152]

MYRON FRANZEN: Thank you. [LB152]

SENATOR ASHFORD: Next proponent. Good afternoon. [LB152]

SUSAN DUNAVAN: (Exhibit 8) Good afternoon. My name is Susan Dunavan, S-u-s-a-n D-u-n-a-v-a-n, from York, Nebraska. Thank you to the members of the Judiciary Committee for the opportunity to speak. I am here today to speak in support of LB152. I'm here to testify as a York County landowner who has experienced firsthand the threat of eminent domain. In the past two and a half years I have been threatened by eminent domain not once but twice. Nebraska needs stronger eminent domain laws to protect its citizens. No landowner or citizen in the state of Nebraska should have to face a threat of eminent domain condemnation by a condemner that does not have their permits in place or has not proven their public purpose. Accurate and not misleading information must be given regarding the purpose of the condemnation. Landowners must be entitled to compensation for violations of their rights by threats or intimidation before permits are

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issued or if inaccurate information is given. When the public purpose is questionable or is actually for private gain, the condemner must be held accountable for their actions. Thank you. [LB152]

SENATOR ASHFORD: Thank you, Susan. [LB152]

SUSAN DUNAVAN: Are there any questions? [LB152]

SENATOR ASHFORD: Any questions of Susan? Yes, Senator Seiler. [LB152]

SENATOR SEILER: I have just a short one. Was that an easement taking or was that a total taking on the condemnation cases? [LB152]

SUSAN DUNAVAN: On the condemnation it was an easement. [LB152]

SENATOR SEILER: Okay. Thank you. [LB152]

SUSAN DUNAVAN: Um-hum. [LB152]

SENATOR ASHFORD: Next. [LB152]

BRUCE BOETTCHER: (Exhibits 9, 10, and 11) Thank you. Bruce Boettcher, B-r-u-c-e B-o-e-t-t-c-h-e-r. I support LB152 for numerous reasons, one being that property can only be condemned for the purpose and that purpose only. For example, the KXL, if it is abandoned, it could be used for another purpose or the easement could be sold to another entity for another purpose. Secondly, that in order to condemn property, the project must have a public purpose; for example, KXL, an export pipeline with little or no benefit to Nebraska. Third, that all permits be in place or approved prior to condemnation; for example, TransCanada is soliciting eminent domain as we speak here today with no presidential permit in place. The language in LB152 is exactly what should have been added to LB1161 to prevent these bullying tactics that are being played out today. I ask you to insert an emergency clause to pass this bill immediately. But with TransCanada's lobby money, I'm sure that won't happen. With that in mind, who really does run this state? It seems that the second governing body is always being dismissed. Is there any questions? [LB152]

SENATOR ASHFORD: No questions other than to...I appreciate your comments but don't tell that to Senator Dubas. She's pretty resilient when it comes to outside interests. [LB152]

BRUCE BOETTCHER: I appreciate what she's doing but there's been a lot of things that have... [LB152]

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SENATOR ASHFORD: No, I'm not taking your comments lightly. I'm just...I understand what you're saying. It's just that Senator Dubas has...I think has been listening to the people. [LB152]

BRUCE BOETTCHER: Yes, she has. [LB152]

SENATOR ASHFORD: And some of these issues are tough and difficult and... [LB152]

BRUCE BOETTCHER: But it takes all of you. [LB152]

SENATOR ASHFORD: It takes all of us. [LB152]

BRUCE BOETTCHER: Not just one; all of you. [LB152]

SENATOR ASHFORD: But it starts with one sometimes and then we'll get more of us. Okay. [LB152]

BRUCE BOETTCHER: Now I have written testimony from Amy Schaffer and RoxAnn Boettcher also. [LB152]

SENATOR ASHFORD: Thank you, sir. Okay, let's go to the next. [LB152]

KEN PROSOSKI: (Exhibit 12) Hi. My name is Ken Prososki, K-e-n P-r-o-s-o-s-k-i. I live in Nance County near Fullerton, Nebraska. Our farm operation is on the south side of the Loup River on the first mile of the proposed Keystone pipeline. We have high water tables and shallow wells with sandy loam soils. I support Senator Dubas' bill, LB152. We need accurate information regarding condemnation of our land. TransCanada will not disclose to us landowners what toxic chemicals there are in the pipeline besides benzene and methazine (sic--methane), which are highly flammable and causes cancer. We as landowners need protection. Thank you. [LB152]

SENATOR ASHFORD: Thank you very much. Thanks, Ken. Any questions of Ken? I don't see any. Thank you, sir. Okay, over here and then we'll go over to here for the next. [LB152]

KENT FRANZEN: Thank you, Senator Ashford and members of the committee. My name is Kent Franzen, F-r-a-n-z-e-n, from Wayne, Nebraska. You heard from my father a little bit earlier so I won't go through the details there. I did want... [LB152]

SENATOR ASHFORD: It sounded familiar, the name. [LB152]

KENT FRANZEN: I do want the committee to know that as part of that process we were actively engaged; we were watching everything very closely, and the notice provisions

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of LB152 are very important to me. I specifically asked the Lower Elkhorn NRD, in writing, for a list of permits that were required. I was told that one did not exist. I later found out that was incorrect. There was a full and complete copy of that list included in the study done by Olsson Associates for the LE NRD that was submitted to the Department of Natural Resources. I did not think to look at the Department of Natural Resources until many years later, and found that list there. That would have been most helpful to us at the time as we were contesting this issue. And the one question that comes to mind that I'd like to ask the members of the committee, we as a state would not think of depriving the right of liberty of an accused in a criminal prosecution without making everything available to that person for their defense. Yet when it comes to depriving the right of property, very little notice is given and the person being deprived of that right is left to their own devices as far as to find out when things are happening, what they can do, what rights they have. We as a state give them next to nothing, and I don't think that's proper. Thank you. [LB152]

SENATOR ASHFORD: Thanks, Kent. I don't see any questions though, sir. Thanks. Next proponent over here on...to my right. [LB152]

JAMES TARNICK: (Exhibit 13) My name is James Tarnick, J-a-m-e-s T-a-r-n-i-c-k. I'm a fourth-generation farmer and rancher here in Nebraska. I'm also a landowner on the proposed and Governor-approved environmentally dangerous Keystone XL pipeline route; and I support LB152. Since the passing of LB1161 and the reroute of the pipeline, of the TransCanada pipeline, my neighbors and I have been hounded and harassed by TransCanada agents, telling and misleading us in trying to obtain their land leases. From their first lies of "we need to sell our leases before values fall," to "your neighbors are negotiating," fellow landowners and I have been under a constant TransCanada barrage. LB152 would give us some protection to our property rights that over the last year seemed to have dwindled. How is it that I as a landowner can be pushed around with the threat of eminent domain for the gain of a private interest? How is it that I attend county board meetings to seek protection of my property rights only to argue against the TransCanada spin doctors defending their crude oil pipeline through our ground without divulging a plan or a list of the deadly chemicals in the tar sand oil or an acceptable emergency response plan or a public purpose? Did I also mention the label of the crude oil pipeline? Why can't they call it what it is, which is a tar sands oil pipeline? Finally, I ask this committee to move forward with this bill. Put the faith and trust of Nebraskan landowners back into this Legislature by approving this bill and making it effective immediately. Making this bill effective immediately gives landowners the protection that LB1161 took away from us. This protection is needed badly, as this reroute is no better than the first route. It is still in the aquifer, going through neighbors' and my ground. Where the pipeline would run now would be through very high water tables. I will reiterate one more time that we should not be forced into eminent domain for the private gain of a foreign company. Thank you. [LB152]

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SENATOR ASHFORD: Thank you. Any questions? Seeing none, thank you, sir. Over here and then we'll go over here. [LB152]

SCOTT JAPP: Good afternoon, Senators. My name is Scott Japp, S-c-o-t-t J-a-p-p. I'm a Papio NRD director but I'm not here representing the Papio NRD. I'm here representing the constituents in my county, mainly in Washington and Burt County. We have been...I'll give you an example that I just left the court Monday and today. We have a farmer that was...the NRD wanted to build a three-acre pond on his farm. They condemned him. In the public hearing he had, there was no purpose given, no alternatives given, there was no plan given. However, he was told he had the right to seek an attorney and if you don't like our appraisal we give you, we can condemn you. On June 30, the NRD gave him a proposal of the appraiser. Six days later, Mr. Camden (phonetic) replied with a counteroffer. The counteroffer was never shown to us board directors, and on the 13th of August, which was a total matter of one...from the day he was given the proposal until the day we...a board condemned him, was a matter of 14 days. Now a district judge in Blair has to make a decision, did the NRD negotiate in good faith? And I really believe that a total of from an offer to a condemnation in 14 days is not negotiating in good faith. We have other instances where the NRD is the agency that has the eminent domain for other purposes for other governmental agencies. For an example, outside of the city of Blair, Blair wanted to build a park but it's outside the city limit. So they find a governmental agency that has the ability of eminent domain. Ten years ago the farmer, 200 acres was condemned, and ten years later the park isn't even built. We have numerous examples with thousands of acres in Fort Calhoun where they used eminent domain with the Fish and Wildlife because the Fish and Wildlife don't have the ability for eminent domain but they need a local authority to do it. Again, thousands of acres was condemned and the Fish and Wildlife didn't have the funds available to reimburse us as originally planned, so we donated. Other instances in Burt County, where the NRD management threatens eminent domain for a wetland project, which is a voluntary project. And I have nothing wrong between voluntary and the owners getting together; but, however, when we threaten eminent domain to force people into a voluntary program, I think it's appalling. Thank you. [LB152]

SENATOR ASHFORD: Thank you, Scott. Any questions? I don't see any. Yes, sir. [LB152]

RICK HAMMOND: Hello. [LB152]

SENATOR ASHFORD: Hello. [LB152]

RICK HAMMOND: (Exhibit 14) Thank you, Senator Ashford. I'm Rick Hammond. I farm out in Hamilton County and in York County, and so I've been wrestling with this for about four years. And so they...I was dragging my feet. We're against this on every level



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from an environmental standpoint but also since our land is involved. But, so after, you know, not agreeing with them, well, they threatened me twice with eminent domain and then sent me this letter on July 21, 2010. So I'd like to enter that. And then after the reroute, why, we weren't involved in Hamilton but now it goes across my sister-in-law's land in York County, and...which we farm, so I'm still fighting the fight. And I appreciate Senator Dubas' efforts and I hope that it's strong enough, because I don't believe that this project is in the greater good for all of us. So thank you very much. [LB152]

SENATOR ASHFORD: Thank you, Rick. Let me see. Do we have any other...the next proponent, supporter of the bill. Okay. [LB152]

SHERRY LOSEKE: (Exhibit 15) Thank you. Hello. My name is Sherry Loseke, L-o-s-e-k-e, and I'm from Omaha, Nebraska. I'm here today to publicly state my support for LB152, which in my view will provide needed protections for landowners in the state of Nebraska as they relate to eminent domain. While the bill does not specifically refer to pipelines, it is through this prism that I make my testimony. Section 1 requires that complete and accurate information regarding the purpose of the condemnation be given to landowners. This is very important to the landowner--and the state, for that matter. It is important that the contents and use cannot be changed at will in order to protect our land, water, and other resources from damage or destruction from, for example, a yet-to-be-discovered product or undisclosed contents. We have a fairly good idea how conventional crude travels through a pipeline, but there is very little data about dilbit and its effect on the pipe over time. This information could be crucial when negotiating an easement contract. Think about this: Once the purpose is finished, the easement should be finished, not open-ended, and further protected from sale to a foreign company that might be interested at that time, with the aquifer below. I'm just saying. Section 2 requires all permits to be in place before the condemner attempts to negotiate with the condemnee. Right now, today, landowners are not protected because despite the fact that TransCanada does not have a federal permit, LB1161 allows the corporation to immediately seek easements. This section would put a stop to that until there are legitimate reasons to talk. I'd like to request that this bill be amended to put the law into immediate effect to give essential protections to landowners in the Keystone XL route. Traditionally, the power of eminent domain applied to seizure of property for public use, then was broadened to involve public benefit, and today, with increasing frequency, it is applied to private use for public benefit. Where are the consequent protections for landowners' rights? The rules of the game of eminent domain have been drastically changed from the original intent. The state of Nebraska has passed laws giving rights and opportunities to corporations to seize our property with eminent domain, but the work of anticipating future players and technologies and the potential for harm to landowners has in no way been addressed. This bill is a good commonsense start, but clearly there is much more work to be done. Thank you, Senator Dubas, for your work; and thank you, members of the committee, for allowing me to speak in support of LB152. [LB152]

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SENATOR ASHFORD: Thank you. Thank you, Sherry. Next proponent. Okay, I think the gentleman right here in the front and then... [LB152]

CLAYTON CHRISTIANSEN: Senator Ashford, members of the committee, Governor Lathrop, I did not come here with any prepared remarks. I will keep this brief. (Laughter) [LB152]

SENATOR ASHFORD: Could I have time out? Time out. Time out. We don't want our good friend Steve to get a big head... [LB152]

CLAYTON CHRISTIANSEN: Excuse me. Mistake of fact. [LB152]

SENATOR ASHFORD: No, no, no...to get a big head over this thing. Let's keep him at our level and then we'll... [LB152]

CLAYTON CHRISTIANSEN: I did not come here with any prepared remarks so I will keep this brief. I felt compelled to speak. I'm not a landowner. I'm from Syracuse. I don't have any property that's anywhere near the Keystone XL pipeline. However, I am a Nebraskan and that's why I've come before you guys, to remind you what that means. The Capitol Building that we're sitting in has a sower on top of it. My family came here to start a farm by Dorchester, Nebraska, that was subsequently sold, but that's where my roots lie. As a citizen of Nebraska and as a citizen of the United States, that didn't start on that farm in Dorchester. That started when my ancestors, my forefathers, left Europe on a boat to come to this state for the promise of land. For generations that promise has been upheld; and now, hearing the stories from the ranchers in western Nebraska, it seems like that very compact is at risk. This is a very simple bill, two pages long, and I believe that this bill helps to meet those issues and I'm asking you for your support of this bill so we can keep that promise that we made generations ago. And that's all I have to say. Thank you. [LB152]

SENATOR ASHFORD: Thank you, Clayton. I don't... [LB152]

SENATOR SEILER: Excuse me. I didn't get your name. [LB152]

CLAYTON CHRISTIANSEN: Clayton Christiansen. [LB152]

SENATOR SEILER Thank you. [LB152]

SENATOR ASHFORD: Thanks, Clayton, very much for your comments with the exception to the ones about...no. (Laugh) Next testifier. It may happen. I mean, you may... [LB152]

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DONNA ROLLER: (Exhibit 16) Hi. Thank you. I'm Donna Roller and it's R-o-l-l-e-r, and I have a farm, a family farm, near this Keystone pipeline in York County. And I have witnessed so much in the last year and it is a total disregard for the citizens of this state as far as our rights to our property and the health of our water. I have witnessed bribes, lobbying, money exchanged against the people of this state. I have witnessed laws passed to protect us, then taken away on a whim. I'm at a loss that why are we not for the people of this state? Why are we not for our water? Why are we not for our rights? I support this bill. Our farms and our ranches, they're our heritage, they're our income, they're our future. You condemn it at the risk of our ability to deal with operating costs, liability, and damage. We need legal protection. And last year, most of our testimonies were completely ignored. The citizens' input in this state has totally gone astray. Please help me renew my faith in this legislative body. I have no money to offer you nor do I have the ability to ask for a private meeting behind closed doors. I am only an owner of a small family farm that I grew up on. Losing it would be devastating. Being subject to bullying and threats would be intolerable, as other farmers and ranchers are subject to right now, and I feel their pain. If you have any respect for us ranchers in this state, working extremely hard to make a living on this land and making sacrifices to care for this land, then you should...there should be no reason why this bill can't go forward immediately. [LB152]

SENATOR ASHFORD: Okay. Next testifier for the bill. Do you want to come up maybe from the front, those that wish to just sort of ease your way up to the front, and then you won't have to walk so far? Yes, sir. [LB152]

JAREL VINDUSKA: Senator Ashford and members of the committee, my name is Jarel Vinduska. My family farms near Gretna, Nebraska. Vinduska is spelled V-i-n-d-u-s-k-a. I want to thank Senator Dubas for her work on this bill and she eloquently stated why there's so many people here today, is we do, in this country, hold property rights pretty dear. And as such, the bar should be set very, very high, listing what the characteristics are of projects that qualify to use eminent domain. And (inaudible) over this bill, it is a simply written, and the first thing that hit me...of course, this happens lots of times, there isn't anything in here that most Nebraskans I don't think would be just common sense. You...of course, you would have a project approved before you would start threatening people; and, of course, you'd want to know what the purpose of it's for. And yet, you know, there is people in this world that take advantage of situations. And so we do have to spell out the obvious, it appears. And, you know, when I listened to the last lady's testimony I thought, what a shame; we've got a process here that's happened in Nebraska and it's not only the Keystone XL, it's...I've seen it. You know, seeing as how Gretna is pretty close to Omaha, I've seen the NRDs use eminent domain and then turn over part of the project to a developer for a housing project. Wouldn't it be nice if a landowner would have the ability to fight, saying, wait a second, this piece of land that you're using isn't going to be used for flood control, which is considered, you know, a legitimate purpose for eminent domain; this is going to go to a developer. I'll negotiate

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with the developer myself and I don't need to have my ground condemned and then turned over. Or like in Omaha, those blighted designations. There's areas that wouldn't qualify for a blighting under any person's criteria of what that term means, and yet some agency will take the land and then turn it over to somebody else. And so, you know, the citizen feels like he's fighting with a short stick when you're dealing with big corporations like TransCanada. So how can they feel any different when they know the financial resources and they're fighting with a short stick to start with, and then all of sudden they get knocked on their door before there's any permits approved? And, you know, it seems like the cards are stacked against them and it's a done deal ahead of time. So that's why this is needed so bad and needs to be approved so that at least the citizens can have faith that they have a chance on equal footing. Thanks. [LB152]

SENATOR ASHFORD: Thank you, sir. Thanks for your comments. Ken and then...whoops. Why don't we go...Ken, why don't we...this gentleman here in the shirt behind you was next, so. [LB152]

KEN WINSTON: That's fine. [LB152]

SENATOR ASHFORD: Oh, maybe...oh, you can wait? Okay, Ken, you go ahead. [LB152]

KEN WINSTON: Okay. Well, I just didn't want to have a long pause. [LB152]

SENATOR ASHFORD: You didn't want a long pause? No, it's fine that you're...I just...this gentleman behind you...(laugh). [LB152]

KEN WINSTON: (Exhibit 17) Okay. Well, it looked like nobody was ready to go so I...anyway, good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Ken Winston, K-e-n W-i-n-s-t-o-n, appearing on behalf of the Nebraska Chapter of the Sierra Club. We're in support of LB152. As one of the other speakers or several of the other speakers have indicated, the right to own property is a fundamental right in the United States and that as such it requires due process in order for it to be taken for a governmental purpose. And due process requires definite and sufficient standards, which means that a person of reasonable intelligence has a reasonable opportunity to know how the law will be applied. LB152 does supply these kinds of standards. Now we would recommend that LB152 be amended to deal only with oil pipelines, because that's the issue that I think most of the people here are concerned about. And I understand there's some concerns about NRDs and other entities, but I think that the oil pipeline issue is probably the one that's foremost on most people's minds. It's also an issue that's currently in court. LB1161 passed during the 2012 legislative session has no standards for the use of eminent domain; it just allows it to be exercised upon approval by the Governor. We believe that this violates due process, the requirement of having definite and sufficient standards. This is one of the reasons

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LB1161 is being challenged. We also believe that the enactment of standards for eminent domain would benefit all Nebraskans. The Legislature has enacted a number of laws that say that eminent domain should not be used by private entities, therefore it should be highly restricted. Rural Nebraskans have the...they're engaged in agriculture, as several people have testified to today, and that's a major reason why our economy is in good shape. I think that we have one of the lowest unemployment rates in the country and I think we ought to protect the people that are feeding the state and feeding our economy, and we think that they deserve the adequate and sufficient standards for the application of eminent domain by pipeline companies. And we'd be glad to work with the committee, with your staff, with the introducer and any other interested parties to amend the bill as we suggest. [LB152]

SENATOR ASHFORD: Just a comment. I don't see the logic in your... [LB152]

KEN WINSTON: In my...my logic in what? [LB152]

SENATOR ASHFORD: Why would we only apply this to pipelines? [LB152]

KEN WINSTON: Well, there was a special session, as you may recall... [LB152]

SENATOR ASHFORD: No, I realize there was a special session. I do recall it; yes. But aside from what I do recall, what we all recall...but I'm not critical. I'm just trying to understand the logic, because some of the examples that were given are real too. I mean, they deal with NRDs, and I'm not...I'm just wondering why. [LB152]

KEN WINSTON: Okay. Well, I guess the issue most of the people here are dealing with the pipeline issue particularly, and I certainly...and the other thing is that, as I indicated, LB1161 is currently being challenged in Lancaster County District Court. [LB152]

SENATOR ASHFORD: Right. [LB152]

KEN WINSTON: If that's thrown out, then actually I would think the pipeline companies would want to have a procedure along with the rest of us to know how pipeline companies are being addressed. [LB152]

SENATOR ASHFORD: I understand, except that it seemed...I just don't...I would...it would seem to me that this, what Senator Dubas has proposed and the concerns raised by the testifiers here, would go beyond pipelines, so. [LB152]

KEN WINSTON: Well, and certainly if...I guess if there's interest in working on all those other issues, I guess part of where I'm coming from is I think it brings in a lot of other entities that have concerns about the bill. [LB152]

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SENATOR ASHFORD: You mean, people who are opposed to the bill? [LB152]

KEN WINSTON: I don't know who all is opposed to the bill, but... [LB152]

SENATOR ASHFORD: Well, I mean I think...all I'm going to say, and Senator Chambers isn't here or he would probably...he'd ask this much more artfully, but when you...the consequence...what you're suggesting is that we carve out pipelines for this kind of eminent domain restriction. And I just don't see the logic of doing it... [LB152]

KEN WINSTON: Well, part of the reason I'm suggesting... [LB152]

SENATOR ASHFORD: ...other than there may be less opposition. [LB152]

KEN WINSTON: Well, part of the reason I'm suggesting that is because the Legislature has already done that. They've carved out pipelines and they carved them out in a way that we believe is unconstitutional, and we think we ought to come back and fix that. [LB152]

SENATOR ASHFORD: Okay. [LB152]

KEN WINSTON: Okay. Thank you. [LB152]

MELVIN THORNTON: Good afternoon. My name is Melvin Thornton, M-e-l-v-i-n T-h-o-r-n-t-o-n. I'm here talking as a landowner both in Lancaster County, the city here, and Keya Paha County. I'm very enthusiastic about this bill and hope it does pass for one simple reason: fairness--simply fairness. It strikes me that if this bill would have passed, would have been introduced and passed many years ago, many of the problems that we've been hearing about this afternoon would simply not have occurred. And I perhaps should apologize to Senator Ashford because in his comments to some of the things that he was asking Ken about it strikes me that's just really kind of my point. This whole thing should be viewed as a preventative measure rather than fixing any present problems. Now you don't have to have lots of land to be worried about this. I have two examples in mind. First, simply our house here in Lincoln. If the city decided that 33rd--we live just east of Woods Park--33rd Street needed to be paired with another street so there would be two one-way streets handling more traffic, the obvious thing would be 34th Street, which in fact does not exist on our block because it's really our driveway. And I can see being condemned for that and then them changing their minds and we'll end up with an alley where our driveway is. That certainly would be prevented by this. More likely it would be our retirement log home and land in southwest Keya Paha County. We're just north of the Niobrara River, and \$4 million has been earmarked for hard-surfacing the River Road on the north side of the Niobrara. And when that happens, and it will happen, the only way to get down there during the construction will be to go right through our land and that's an unmaintained road right

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now, and so something is going to have to be improved by that in order to build that; and we'd all be in favor of that. What I would not be in favor of is a lot of construction on our land and then changing their mind and not having that River Road hard-surfaced. And those problems really would make me feel much better and I think a lot of other landowners that don't have thousands or hundreds or even maybe tens of acres, because this will affect a lot of us. Thank you for your kind consideration. [LB152]

SENATOR ASHFORD: Thanks, Melvin. Yes, Senator Davis. [LB152]

SENATOR DAVIS: Mr. Thornton, I just would ask that you might stop in my office some day. I'd like to visit with you about the River Road issue. I represent Keya Paha County, so. [LB152]

MELVIN THORNTON: Yes, you've taken Senator Fischer's place. [LB152]

SENATOR DAVIS: Yes. [LB152]

MELVIN THORNTON: Yes, I'd be glad to talk with you. Thank you. [LB152]

SENATOR DAVIS: Thank you. [LB152]

SENATOR ASHFORD: Thank you. All right, next proponent. [LB152]

BEN GOTSCHALL: (Exhibit 18) Thank you, Chairman and members of the Judiciary Committee. My name is Ben Gotschall; that's B-e-n G-o-t-s-c-h-a-l-l, and I am the landowner outreach coordinator for the Nebraska Easement Action Team or NEAT. NEAT is a landowners' legal defense fund. We deal mainly with the Keystone pipeline issue, and I'd have to say if we had bills like this or laws like this bill would provide, I would probably be out of a job. But that might not be the worse thing. In that capacity, I've spoken to hundreds of landowners, darn near all of them two or three times actually. Many of them are very concerned about this issue. And I know this isn't a pipeline bill but I'm going to draw on my experiences with that because all I have are my experiences. First of all, I highly support the provision in the bill that would require all permits to be in place before a company can use eminent domain or threats of eminent domain. Because of last session's poorly written and amended LB1161, we currently have a situation in our state in which pipeline companies, like TransCanada, technically have that power as a result of the Governor's approval of their proposed pipeline route. As you know and as has been mentioned, LB1161 is currently being challenged as unconstitutional by Nebraska citizens in a pending lawsuit. But rather than speculate on the unconstitutionality of LB1161 or argue whether or not the Governor should have that power, I will say that LB152, by requiring all permits both state and federal to be in place before a company can use eminent domain provides a commonsense solution to the current legal predicament in which Nebraska landowners find themselves. The truth is,

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TransCanada currently owns permanent perpetual easements on Nebraska private property for a pipeline for which they have never had a permit. Think about that for a minute. There's a pump site near Ericson, Nebraska, that NPPD cleared and tore up and there will never be a pump station there or substation there. That's kind of ridiculous. I also support the provision that would require a detailed description of the purpose of the condemnation. Down in Texas, they're having a problem with landowners challenging TransCanada's representation of the substance to be moved through the pipeline as crude oil. And I'm not here to debate whether or not diluted bitumen is crude oil or whether, you know, or not TransCanada should have it both ways, but what's clear is that if these companies were required by law to accurately portray the purpose, landowners wouldn't feel like they were deceived and they wouldn't sign easements under what they perceive to be duress. And that's a big problem that we have had, that we will have until we fix it. I support this bill and I support the passage of this through your committee. Thank you. [LB152]

SENATOR LATHROP: Thank you very much. Appreciate your testimony. Anyone have any questions? Yes, Senator McGill. [LB152]

SENATOR MCGILL: I just want to ask a few questions. If nothing else, if you don't have specific thoughts maybe somebody else as a proponent will before we get opponents up here and you might be able to address a few of these things. [LB152]

BEN GOTTSCHALL: Okay. [LB152]

SENATOR MCGILL: I know in the letter from the city of Lincoln, for instance, they talked about how some permits require having the property already. And I don't know that much about permitting processes and the various things that eminent domain is used on; this is not my area of expertise. Are there different types of permits that require different types of ownership first, and do you think we can delineate between some of those different things? [LB152]

BEN GOTTSCHALL: I would say there might be. [LB152]

SENATOR MCGILL: And if you don't know the answer maybe somebody else who is still going to be a proponent... [LB152]

BEN GOTTSCHALL: I mean I'm definitely not an expert on that. [LB152]

SENATOR MCGILL: Yeah. [LB152]

BEN GOTTSCHALL: I would say there might be but I would say in the case of a pipeline where the easements that I've seen, in my experience, are perpetual permanent easements that can be sold. [LB152]



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SENATOR MCGILL: Okay. [LB152]

BEN GOTTSCHALL: I would say those landowners would feel a lot better if there weren't that provision that it had to be in place, because that's a permanent easement. They don't want to have that and then not get the permit like we have already. That's a huge problem. I mean TransCanada has never had a permit to build this pipeline yet they have used the threat of eminent domain. They've got easements that are permanent and perpetual. [LB152]

SENATOR MCGILL: Well, I definitely need to learn a little bit more, and I know that maybe there's some differences between what a city would be doing or a government entity and what a private business would be doing; so I have a lot of learning. One of their other concerns was pushing just public discussion about a project underground, like they're afraid that, oh, if we're not allowed to negotiate then that will somehow perhaps impact their ability to bring the community in to try to develop a plan. And I'm just...I guess I'm challenging folks to think out...especially since this bill is broader than the pipeline issue, because I totally get where everybody is coming from on that. But, in general, you know, a lot of places do work well with their community in talking things over and people are willing to participate in that. [LB152]

BEN GOTTSCHALL: I agree. And even other pipeline companies do. I mean, I've talked to landowners not just in Nebraska but in North Dakota, South Dakota, Kansas, Oklahoma, Texas, Michigan, and they all say...and many of them already have other types of pipelines on their property and their experience has been TransCanada has been the worst company to deal with that they've ever experienced. [LB152]

SENATOR MCGILL: All right. Thank you very much. [LB152]

SENATOR LATHROP: Oh, Senator Davis has a question for you. [LB152]

SENATOR DAVIS: Just to explore this a little bit: the landowner outreach that you have. Is Nebraska significantly different than the other states where the Keystone pipeline is going through in terms of the law here? I mean, how are landowners protected in the Dakotas that aren't protected here? [LB152]

BEN GOTTSCHALL: You know, I'm not...I don't know. I'm not sure about that. I wouldn't want to answer that and be misleading. [LB152]

SENATOR DAVIS: And to follow up on Senator McGill's question and maybe this is just something I need to know, I need to know more about this. But do some of these easements require...or not easements, but are there deadlines on some of these? Are they open-ended? [LB152]

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BEN GOTTSCHALL: On the, like the impetus to sign the easement? [LB152]

SENATOR DAVIS: Right. I mean we're talking about all the permits being in place. But are some of these permits, do they have time lines on them before...? [LB152]

BEN GOTTSCHALL: The permits, like pipeline permits? [LB152]

SENATOR DAVIS: Well, let's just say that you've got to get a water permit to go across a specific county or something, and federal law might give you 90 days or 180 days to get that done. I'm just asking, are there time frames like that? Are the companies limited by some of these time issues? [LB152]

BEN GOTTSCHALL: I would say yes. In this case that I have experience with, TransCanada is limited by the federal process which is ongoing at this time; and, you know, they would be governed by those deadlines. So in my opinion, yeah, they definitely would have that permitting process time line to have to operate within, and probably any other state time lines that states would impose. But as for time... [LB152]

SENATOR DAVIS: Well, my question that kind of leads to is... [LB152]

BEN GOTTSCHALL: Okay. [LB152]

SENATOR DAVIS: ...would that be the reason why they are trying to get the easements in place before getting the permits? [LB152]

BEN GOTTSCHALL: I would say no. I would say the reasons they're trying to get the easements in place before the permits is to exercise leverage in advertising their project as preferred--or, not preferred--as acceptable to the public. From what I've seen, TransCanada has been very proud of their record of getting a certain percentage of landowners to voluntarily sign an easement. They don't really have a...I don't think they have the same definition of the term "voluntarily" as most of us do, because many of those landowners that I've talked to, who have called me in the middle of the night because they can't sleep, have said they signed those easements under duress because they felt threatened by, in some cases, a 30-day deadline that was artificial and arbitrary, or they felt intimidated by just the prospect of eminent domain when, in fact, the company did not have that power at that time. [LB152]

SENATOR DAVIS: Thank you. [LB152]

SENATOR ASHFORD: Thank you, Ben. [LB152]

BEN GOTTSCHALL: Thank you. [LB152]

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SENATOR ASHFORD: Next proponent. [LB152]

ABBI KLEINSCHMIDT: I am Abbi Kleinschmidt, A-b-b-i K-l-e-i-n-s-c-h-m-i-d-t. I am in support of LB152. The proposed pipeline crosses a half-mile of my farm in York County, and I am a fifth-generation farmer. When a project such as this threatens the health and well-being of the environment and of human lives, eminent domain should not be allowed. It is not for public gain. It is an export pipeline. And that's all I have to say. [LB152]

SENATOR ASHFORD: Thank you, Amy (sic--Abbi). [LB152]

ABBI KLEINSCHMIDT: Um-hum. [LB152]

SENATOR ASHFORD: All right. [LB152]

JOHN HANSEN: Good afternoon, Mr. Chairman and members of the Judiciary Committee. For the record, my name is John K. Hansen, J-o-h-n, Hansen, H-a-n-s-e-n. I'm the president of Nebraska Farmers Union and I appear before you today as my organization's lobbyist. As you can tell by the testimony that we have heard so far this afternoon, that there is not a high degree of acceptance or support for the current standards for the use of eminent domain relative to pipelines in our state. There will be a very substantial use of eminent domain authority relative to the pipelines. I've been a public official and I've been involved in the use of eminent domain myself in the past, and so I have been working on eminent domain issues for the better part of 40 years. And I've been president of Farmers Union for 22 years, and so we do service work for our members who are landowners. And so, yes, we have heard from those folks from the Papio NRD and landowners, and we hear as projects that go forward. We were there for the first pipeline. Nothing in my experience even begins to compare to the amount of unhappiness and landowner distress over the use of eminent domain as in the case of the pipeline. And so as I look at eminent domain across the board, this bill seems to be an effort to try to raise the standards for eminent domain across the board. A lot of those other entities that we work with do a good job. The public utilities do a good job, the cities do a good job. They work with eminent domain all the time. They have good standards, they have good process. They're clear. Unfortunately, in this particular area, in the case of pipelines, we moved forward substantially with the passage of LB1. And so we had a clear process, we had dispute resolution, we had all of the notification. We had a good process in place. And then we retreated when we passed LB1161 in that now it's either/or. And so those same kinds of protections and standards that were there in LB1 are now not there, and so the true test of theory is when you get into the practice. And the practices of how this has gone forward is just appalling in terms of how our landowners have been treated, coerced, squeezed, pressured, and that the legal position of TransCanada folks have been clearly

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misrepresented for material gain in the process. And so there needs to be, in my opinion, a bona fide effort to help come up with a better, more reasonable set of standards for eminent domain in this particular area that are more consistent with the kind of standards that we have in almost all other areas that I can think of or have experience with. And with that I would close and be glad to answer any questions if I might be able to do so. [LB152]

SENATOR ASHFORD: John, that's fine. My experience in the all the years I've been here, is though, that the eminent domain concerns have been raised vis-a-vis these other entities as well for pretty consistently for a long period of time. So your point is well taken. I mean, we haven't done much of anything in our eminent domain laws even though...and primarily, I suppose, to the point of some of these testifiers that the industry opposition was too great. And so as a result, you know, we don't...these protections aren't there. They are there in other states. They aren't here, so I appreciate your point, though I...and I do think cities probably do a better job or whatever. But these kinds of things happen in those arenas as well, when you...I mean, you've been...you've testified... [LB152]

JOHN HANSEN: Yes. [LB152]

SENATOR ASHFORD: ...for many years about the eminent domain laws. So you certainly have standing in that regard. This is not just something you arrived at after 26 years or whatever...22 years. You've been consistently arguing for this. [LB152]

JOHN HANSEN: Thank you, Mr. Chair. And it seems to me that I've seen firsthand the human toll that it has. [LB152]

SENATOR ASHFORD: I'm not excusing Keystone. [LB152]

JOHN HANSEN: Right. [LB152]

SENATOR ASHFORD: All I'm saying is, is that the...you know, we have been behind the curve on eminent domain and I know you've testified... [LB152]

JOHN HANSEN: Yes. [LB152]

SENATOR ASHFORD: ...and had concerns about that, whether or not it applies to Keystone. I mean, it applies to...it would apply to Keystone, obviously, but those concerns have been raised for some while. [LB152]

JOHN HANSEN: They have, and it's always, I think, good for all of us in the public arena and who deal with these things, you know, to ask for opportunities to raise standards. [LB152]

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SENATOR ASHFORD: I'm giving you an accolade actually on... [LB152]

JOHN HANSEN: I like higher standards. I want to make it still practical for them to operate and do what they do and yet not easy. I want the standard to be higher. So I applaud Senator Dubas in the effort to try to raise the bar a bit. [LB152]

SENATOR ASHFORD: Right. And sometimes it takes...I mean, unfortunately, and to the point of some of these testifiers, sometimes it takes an episode like this to underline some of the shortcomings in our laws. That's all I ask. [LB152]

JOHN HANSEN: Sure. And this...and that was kind of my point, is that compared to all of the other issues that we've received down through the years, the use in the case of eminent domain relative to how we really don't have a clear set of, you know, operating rules for that in the case of pipelines, has caused this huge outpouring. And so it cries out for some sort of appropriate remedy which I leave to you. [LB152]

SENATOR ASHFORD: Thank you, John. Thanks for coming. [LB152]

SENATOR MCGILL: Oh, that's very kind of you. [LB152]

SENATOR ASHFORD: It is kind. [LB152]

JOHN HANSEN: And by 5 o'clock... [LB152]

SENATOR ASHFORD: That's why we get the big bucks, John, so. [LB152]

JOHN HANSEN: That's right. [LB152]

SENATOR ASHFORD: All right. [LB152]

JOHN HANSEN: Thank you. Thank you very much. [LB152]

SENATOR ASHFORD: Thank you, John. All right, any other proponents? [LB152]

JENNI HARRINGTON: I want to thank you for letting me speak to you all today. It was a harrowing trip down here on the interstate, but we made it. And my name is Jenni Harrington, J-e-n-n-i H-a-r-r-i-n-g-t-o-n. I am a fifth-generation family farmer from York County, and the proposed pipeline is going now a mile from our home and crosses our family farm. So I'm very emotional about this issue and I apologize for this. Farmers and ranchers, landowners work their whole lives to protect the land and the water below the land. And we have been harassed and frightened about the proposed pipeline, and so I just want to speak today so that my children who are 10 and 13 know that I took the

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time to stand up for this. And I hope that you as a committee can stand and support us with this bill and start to make a difference to protect landowners' rights with eminent domain. And thank you very much. [LB152]

SENATOR ASHFORD: Now when did your family first start the farm, what year? [LB152]

JENNI HARRINGTON: My great-great-grandfather came from England and homesteaded in 1864, so of course, we're very proud of that, as many Nebraskans are. [LB152]

SENATOR ASHFORD: Pre-statehood, if I... [LB152]

JENNI HARRINGTON: Yeah, yeah. So we call our farm Centennial Hill Farm, so. [LB152]

SENATOR ASHFORD: Thank you. [LB152]

JENNI HARRINGTON: Thank you. [LB152]

SENATOR ASHFORD: Okay. Next proponent. How many opponents? Do we have any opponents here? Okay. Let's go with those. [LB152]

SENATOR SEILER: Are you a proponent? [LB152]

SENATOR ASHFORD: Oh, I'm sorry. [LB152]

SENATOR SEILER: Hold it. We've got one more. [LB152]

SENATOR ASHFORD: Well, come on if you want, but there's one more person who is in favor of Senator Dubas' bill. [LB152]

ZACK HAMILTON: My name is Zack Hamilton, Z-a-c-k H-a-m-i-l-t-o-n. I work for the Nebraska Farmers Union helping staff NEAT, Nebraska Easement Action Team. I'm here today in support of LB152. I believe this is a good...this bill is a good start to protect landowners. Oil pipelines are not currently separated from things such as public power projects, which I think would be very helpful, and I do not believe that private foreign...foreign, private, for-profit companies should have eminent domain authority in our state or our country without a federal permit. For a foreign entity to come in and impose eminent domain upon landowners and our fellow citizens is just not acceptable in my eyes. I think it's disgraceful that LB1161 passed, and I hold the Legislature to that. Landowners are not being justly compensated under current laws. They are not compensated for loss of crop outside of the easement section, at least in the current

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Keystone XL project. I believe that if we work together with Senator Dubas, both as private citizens and citizen advocacy groups, we can strengthen this bill and be sure to fully protect our landowners. I'd like to thank Senator Dubas for getting the ball rolling and I'd like to thank this hearing committee for hosting the hearing. [LB152]

SENATOR ASHFORD: Thank you, Zack. Any questions? I don't see any. Thank you. [LB152]

ZACK HAMILTON: Thank you. [LB152]

SENATOR ASHFORD: Let's go to the opponents now. [LB152]

DAN HOINS: (Exhibit 19) Thank you, Senator Ashford and members of the committee. My name is Dan Hoins, H-o-i-n-s; D-a-n, first name. I'm the city administrator for the city of Papillion, Nebraska. Today I am representing the United Cities of Sarpy County. For those of you who are not aware, the United Cities of Sarpy County are a coalition of four cities--Springfield, Papillion, La Vista, and Gretna--in Sarpy County that have worked together for the past six or seven years on areas of government efficiencies and mutual cooperation. The United Cities has taken a position of opposition to this bill primarily. As I sit here and listen today, I'm a little bit torn. I'm a born and raised Nebraskan in south-central Nebraska. I know a lot of the areas that these people are talking about. Most of my adult life has been as a government official in the Omaha metropolitan area, and so...and it's frustrating to hear what they're going through, because professionally that's not been anything that I have experienced using the eminent domain process. And so one of the testifiers or the opponents said, you know, the problem is this is not a pipeline bill, and if it was the United Cities and certainly the city of Papillion would not...taken no position on that. The reason we're here today is if LB152 passes in its current form it's going to have a tremendous negative impact on municipalities in particular. I cite in the letter that I sent around to you, a couple of instances, because as I read the statement of intent I see that, you know, and hear that these people have been harassed and bullied and threatened. And again, frustrating is the best way I can explain that. On the other side I cite two cases in my letter to you, in the last few years, that the city of Papillion has been involved in, where we condemned or used eminent domain for roadways. And during those processes in both of those cases, the first one, there was a \$345,000 court-appointed award, three independent appraisers, and the landowner's attorney wanted between \$9 million and \$13 million and wanted \$3.5 million of attorney fees for himself. And so I sit and look at a mayor and council who are representing the taxpayer money which all eminent domain money is all taxpayer money at the end of the day. It doesn't come out of my personal account; it comes out of everybody--or the mayor's account--it comes out of every citizen in Papillion. And so LB152 in its current form is going to increase the cost tremendously. And so I'm not sure how we separate that, and I'll try to make use of your time and just answer any questions. I think the letter speaks for itself, Senator Ashford. [LB152]

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SENATOR ASHFORD: Yes, thanks, Dan. Any questions of Dan? I don't see any questions. Thank you. [LB152]

DAN HOINS: Thank you. [LB152]

SENATOR ASHFORD: Thanks for your...the next opponent. [LB152]

CHARLES HUMBLE: (Exhibit 20) Senator Ashford and members of the committee, I'm Charles Humble, H-u-m-b-l-e, practicing lawyer here in Lincoln. And I have done eminent domain work for about 40 years. I've practiced on both sides of the aisle, both for acquiring properties and representing landowners. I'm here representing the Nebraska Power Association, which is a voluntary association representing all of Nebraska's public-owned electric utility systems, including municipalities, public power districts, rural public power districts, public power and irrigation districts, and cooperatives; and also appearing on behalf of the Nebraska Chamber. We have followed the laws and there are many of them--I'll touch on a few of them; the handout goes into more detail--for many, many, many years and by and large have acquired property without all of this contention that you've been hearing about today. The system is really comprehensive and I don't think that message may be getting out. You go from the fact that private property cannot be acquired for private uses. Now what are private uses is determined by the Legislature. But you've got cases that have indicated that it has to be a public purpose. Also you talk about complete and accurate information in the bill regarding the purpose of the condemnation. You've got 13 pages of statutes encompassing something like 26 sections that spell out the procedure to be used for the acquisition of property. And in 76-704.01, there are seven factors that have to be listed, and I've listed those within the handout. So there are a number of procedural steps that have to be followed and, by and large, by my clients are followed in order to effectuate eminent domain. There are levels of court protection and injunctive relief. If good faith negotiations, for instance, are not carried out, a court can enter an injunction; the same with public purpose; the same with the amount of the taking. And one of the things we talk about is...in the bill, talks about having a present plan and present public purpose. That has been the law in this state for...since 1977, and that law is found in a case of Krauter v. Lower Big Blue which I have cited here in my materials. And you have to have...the court very clearly says you have to have a present public plan, a present public purpose, and you cannot have an excess taking. One of the things that has been alluded to in this hearing may be--and we're not endorsing it--but LB533 that's pending takes the notice provisions that are applicable to the rest of us in Article 25 of the statutes and makes it applicable to pipelines. And maybe that would solve some of the problems that we've been hearing about. Then in very quick summary, I also would like to just indicate in the permit section, we believe that the authorities, like, for instance, from the Power Review Board, that kind of authority should be obtained ahead of time. There are some permits and we'd like to work on what those maybe are that you



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acquire after the fact and you acquire during construction and that kind of thing. So we could work with you on that. [LB152]

SENATOR ASHFORD: Could I just ask one question? [LB152]

CHARLES HUMBLE: Please. [LB152]

SENATOR ASHFORD: And I understand your point. However, in this case, where you have a federally...you have a project that crosses state lines and it requires a federal permit, do you see or is there an analogous situation in...with interstate situations where there's an eminent domain exercise, do you see a situation similar to this where...you know, where a permit...? In effect, this requires a permit from someone outside of the jurisdiction, outside of the state. Do you see that as any...does that create a difference in your mind? [LB152]

CHARLES HUMBLE: Well, it would be obviously much more difficult for the state to regulate that and probably impossible. [LB152]

SENATOR ASHFORD: Right. [LB152]

CHARLES HUMBLE: And so I see that's different than the things that most of my clients deal with. [LB152]

SENATOR ASHFORD: Right. So if there isn't a federal permit and the federal permit process takes place in Washington or wherever, and so when the eminent domain...or when the acquisitions occur prior to the permit, I guess is there a present project? [LB152]

CHARLES HUMBLE: Well, let me take this... [LB152]

SENATOR ASHFORD: And I understand your point about being able to control the federal action, but...in the intrastate commerce aspect and all those things. But if...is it a present project if we don't have a...? I mean, there's a vision to build a pipeline through Nebraska and there's an idea to do it. There are other pipelines that have gone through the state and have been federally approved, so there's some history. But other than that, is there a project? Is there a present project? [LB152]

CHARLES HUMBLE: Well, Senator, I really...I can't comment on that. I really don't know in connection...we deal with local or state approvals,... [LB152]

SENATOR ASHFORD: Right, right. [LB152]

CHARLES HUMBLE: ...and so then it's pretty clear. [LB152]

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SENATOR ASHFORD: Right. [LB152]

CHARLES HUMBLE: But basically my clients don't deal, for the most part, in that kind of...they occasionally but not for the most part. [LB152]

SENATOR ASHFORD: Right. And I think your point is very well taken regarding the permits that are issued by intrastate...by, you know, entities within the state where there's much more control over what's going on. I...this issue that's been raised about "present project" really is the thing that bothers me the most about this whole thing from the very beginning, is just that point. And I think you've underlined the point and what is the difference and how do you...under state law, what can you constitutionally permissibly do with this kind of a federal permitted project before it's permitted. (Laugh) [LB152]

CHARLES HUMBLE: I can say real quickly, my clients take very seriously the expenditure of, for instance, ratepayer monies. And you better darn well have a project... [LB152]

SENATOR ASHFORD: Right. [LB152]

CHARLES HUMBLE: ...and you better be able to go forward with it, because it's a very serious situation. [LB152]

SENATOR ASHFORD: Right. [LB152]

CHARLES HUMBLE: And we take it seriously. [LB152]

SENATOR ASHFORD: Right. And I know you do and so I get it. I'm just...the whole nature of this, from the very beginning, I understand the idea of having to take the product from here to there. I get all of that. But I'm just troubled by the...you know, what the state's constitutionally permissible statutory rights are here. [LB152]

CHARLES HUMBLE: And you can certainly inquire, you know, in great depth with your Attorney General and get, you know... [LB152]

SENATOR ASHFORD: Oh yeah, I know there's people I can ask, but you're the... [LB152]

CHARLES HUMBLE: Sure. Okay. (Laugh) [LB152]

SENATOR ASHFORD: You've been doing this for 40...you've been doing this for 40 years and it just...so I thought I'd ask. No, good points. Thank you very much. Yes...

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[LB152]

SENATOR DAVIS: I just have one question and it just refers to some testimony that came earlier in light of what you have said here, because there was testimony about an NRD and a dam and selling some of that property to a developer. And what you say here is that the condemner can take no more property than the public use requires. So is it permissible for a NRD to condemn and then sell property off on a private basis to an individual after they've done the condemnation? [LB152]

CHARLES HUMBLE: Well, I don't know. I don't represent the NRDs so I don't know if there's any authority or if there's something tied up in, you know, economic development or something that would allow that. I can say that for most of my clients and what we do, particularly in the electric industry, is you acquire them for the public purpose of providing electricity and you don't sell them off to a private developer. But that's what I know about. [LB152]

SENATOR DAVIS: Okay. Thank you. [LB152]

CHARLES HUMBLE: Um-hum. [LB152]

SENATOR ASHFORD: And that's the other aspect. This is...in my...I know it's getting to be a long hearing but this is extremely interesting because when you do have...when the public doesn't know or the private landowner isn't fully informed that this particular taking is going to result in a redevelopment by a developer not by a...you know, not by a political subdivision, that's a different situation and it does create concern in my mind, I mean. [LB152]

CHARLES HUMBLE: And Article 25 provides a step-by-step process. And public hearings and notices and all of that is contained and laid out, and that's worked very well. [LB152]

SENATOR ASHFORD: Yeah. No, I know it has. I... [LB152]

CHARLES HUMBLE: You know, we take that seriously as well. [LB152]

SENATOR ASHFORD: Yeah. We had a...my family's clothing business in downtown Omaha was taken for the Central Park Mall in Omaha, and nobody ever goes there but I'm sure there's a public policy somewhere. (Laughter) Thanks. [LB152]

SENATOR LATHROP: You're not plow it up there, are you? [LB152]

SENATOR ASHFORD: It's gone. [LB152]

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SENATOR LATHROP: You're not going to develop it, are you? [LB152]

GARY KRUMLAND: (Exhibit 21) Senator Ashford and members of the committee, my name is Gary Krumland. It's G-a-r-y K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities and appearing in opposition to LB152. We're having a letter handed out that goes into detail so I won't go into that. I'll just kind of address one issue that kind of was raised by the language and it kind of gets to what you were asking, Senator Ashford, about federal permits. When a city does a road project, street project, there are situations where you are...the city would be eligible for federal funds, and I don't know that you call it a permit, because the city could probably do it without that, but you need to get the funding from the federal government and there's a whole series of requirements that you would have to go through. And some of the projects, it's almost that you have to have the property acquired before you get the final okay. So there's some concerns about just how this process and the language in the bill affects those kind of processes. Another quick example is the cities and counties are responsible for all the solid waste generated in their jurisdictions; and joined together and have created landfills. Part of the purchase...you know, when you build a landfill you buy not only enough just for the immediate needs but a little extra as you expand so that you have a buffer around it. The courts have kind of said that that falls under the definition of the present public purpose. But if we're adding new language, is that going to be something that someone can challenge if you buy a parcel that you may not use for five years; is that present and all that? So there's some questions I guess that have been raised here that may interfere with some things that cities do for the...to provide basic services that we think need to be addressed. And I know Senator Dubas has expressed a willingness to work with us and I appreciate that, so. [LB152]

SENATOR ASHFORD: Thank you. Thanks. I don't see any questions. Next opponent. [LB152]

MADLINE ROEBKE: (Exhibit 22) Thank you. Good afternoon. My name is Madeline Roebke, M-a-d-e-l-i-n-e R-o-e-b-k-e. I am an assistant general attorney at Union Pacific railroad. I support the UP real estate group in my practice at the railroad. Union Pacific is opposed to LB152. UP is making significant investments in its rail network to better meet the needs of industry to move freight across the country. Transportation by rail avoids wear and tear on the roads and is four times more fuel efficient than transportation by trucks. In order to meet the national transportation needs, UP is constantly improving its infrastructure. Sometimes this requires adding additional right of way. UP is typically able to negotiate a voluntary agreement with the property owner when acquiring land. The power of eminent domain is rarely used and it is always the last resort. It would not be uncommon for a landowner to be offered a price in excess of the appraised value just so we can avoid eminent domain proceedings. I haven't heard any complaints from the proponents of LB152 about the use of eminent domain by railroads. LB152 would require UP to have all permits in hand prior to attempting to

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negotiate with the landowner. In our experience, landowners appreciate early contact from the railroad. UP often takes landowners' special concerns and requests into account when preparing plans for the improvements. UP is concerned that LB152 would reduce early contact and communication between the railroad and landowners, and that it would limit our ability to change plans based on landowner feedback. In lieu of productive communication, I'm afraid that UP would be relegated to imposing a set of final permitted plans on the landowner. As a side note, it's not a given that UP gets permits in every situation. We usually do but there could be a situation where the impacts are so small that we're not required to get a permit; for example, if there's no environmental issues, no flood plain issues, etcetera. In addition, some permits like construction permits are typically obtained right before construction begins. It's unclear how Union Pacific would proceed under LB152 in these situations. Union Pacific would welcome the opportunity to work with Senator Dubas and this committee to find a practical solution to the problems raised by proponents of LB152 that does not interfere with our ability to work cooperatively with landowners. We have experience in many different states that may be of value to this committee. I respectfully request that UP be included in discussions concerning revisions of the eminent domain statutes. [LB152]

SENATOR ASHFORD: Thank you. That was very clear. Thank you very much. Any questions of the Union Pacific railroad? (Laugh) [LB152]

MADELINE ROEBKE: For the record, we never condemn that land but we don't need...our shareholders would certainly disapprove of that. [LB152]

SENATOR ASHFORD: You do have a lot of land though. (Laugh) [LB152]

SENATOR LATHROP: Mostly in strips. [LB152]

SENATOR ASHFORD: Yeah. It's in long sort of areas but it's... [LB152]

SENATOR MCGILL: Long strips of land. (Laugh) [LB152]

ANDY POLLOCK: Chairman Ashford, members of the Judiciary Committee, my name is Andy Pollock, A-n-d-y P-o-l-l-o-c-k. I am here as a registered lobbyist for NorthWestern Energy, a natural gas utility that serves about four cities in this state. I have had a chance to share some of my concerns directly with Senator Dubas; and in a nutshell I'll share them with you now and I'd be glad to answer questions, in particular about what the practices of NorthWestern's utility is when it comes to acquiring easements and rights of way. Our principal concern has to do with Section 3 and its specific language that refers to the condemner being found to have acted coercively or threatening the landowner. It's very vague, broad language. It's undefined. And I think if you picked up in listening to some of the proponents of the bill, they spoke, at least two of them spoke of the threat of eminent domain. One of them spoke of the duress of eminent domain.

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And another one spoke about the threatening nature of a 30-day deadline. Now those are real concerns; but it brings up the question of what is threatening, what is duress, what is coercive. And without further definition, NorthWestern just has some serious concerns about the language of the bill, and I expressed that to Senator Dubas. I would say that we take no issue with the legitimacy and the sincerity of the complaints made by the landowners that you heard today. And NorthWestern values and respects the rights and the privileges of not only its customers but the people of the state that it works with, including landowners. They take very seriously the power of eminent domain that they're vested with, and they use it sparingly. In fact, I spoke with a representative of the company today. He's been with the company handling rights of way acquisitions in Nebraska for 33 years. To his knowledge, they've never exercised their power of eminent domain here. They always try to negotiate. If plan A isn't good, they usually look at a plan B. In fact, it's so serious to NorthWestern that it is an issue that whenever they decide to exercise eminent domain, whether it's one landowner, whether it's just one very small tract of land, it goes to their board of directors--and this is a regional company--it goes to their board of directors and they have to approve that particular acquisition by a formal resolution of the board. With that, I'd be happy to answer any questions. [LB152]

SENATOR ASHFORD: Yes, Senator Seiler. [LB152]

SENATOR SEILER: Doesn't the word threatening eminent domain come out of the tax code that you have to have that in your agreement if you settle it so that you can get preferred tax benefits? [LB152]

ANDY POLLOCK: I'm sorry, Senator Seiler. I have no idea where that language came from. If it came from the tax code, it would be language I'm not familiar with. [LB152]

SENATOR SEILER: Okay. [LB152]

SENATOR ASHFORD: Thank you, Andy. I think...I don't see any other questions. Thank you. [LB152]

ANDY POLLOCK: All right. Thank you. [LB152]

SENATOR ASHFORD: Yes, sir. [LB152]

BERNARD in den BOSCH: (Exhibit 23) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Bernard in den Bosch. I am a deputy city attorney with the city of Omaha. Last name is spelled, three words; first word lower case i-n, second word lower case d-e-n, third word capital B-o-s-c-h. And I made sure I didn't come up immediately after Mr. Ashford pointed out the Central Park Mall. (Laughter) I will not reiterate... [LB152]

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SENATOR ASHFORD: You weren't there. [LB152]

BERNARD in den BOSCH: I was not. [LB152]

SENATOR ASHFORD: I mean I... [LB152]

BERNARD in den BOSCH: I will not repeat what everybody else said. What I had handed out was in substance what I intended on saying to the committee. I do think there is certainly an understanding that LB152 addresses some real concerns and that is routes being changed while negotiations are going on and being changed substantially; eminent domain being used as a method of intimidation. I also point out, and certainly in many projects where we're involved, whether it's a road project, a sewer project, building a new library, there are some landowners that are unhappy. Very few, but some landowners are unhappy about the location or the process or they didn't work well with the person who was going to work with them. But those are the rarity and I have some specific information in the handout. Part of the concern that the city of Omaha has with LB152 is the vagueness of the terms. There was some description just a moment ago with the term "threatening a condemner with condemnation." I read that and I say if I included my offer letter letting you know that the city may elect to pursue eminent domain in the event that we don't come up with a price, am I threatening condemnation? Well, in some people's eyes I would be; in other people's eyes I'm just kind of letting you know what the process is. Senator Seiler asked a question about the federal tax code. There is I believe, if you want to do like-kind exchanges, under threat of eminent domain is the standard for which you get preferential tax treatment in some instances. So we have concerns about some of the terminology, and I guess I also want to point out one of the things that's been kind of missed, I think, is this particular statute prohibits the negotiation unless you have a present plan, present public purpose, and all agencies that are required to approve the project, have either approved and all necessary permits have been issued. I guess in my mind that is extremely vague. I don't know if that means if there has to be some overarching permit that has to have been issued. I don't know if it means that every construction permit has to be issued. What I do know is I can't negotiate. I cannot talk to a property owner until all those things have occurred. We are, when it comes to federal funded projects, we have situations where the federal government gives us approval and presumably that doesn't happen until after the right of way has not only been negotiated but been acquired, so. I have more examples in the materials before you and I'd be happy to answers any questions. [LB152]

SENATOR ASHFORD: Any questions of Bernard? Seeing none, thank you. [LB152]

BERNARD in den BOSCH: Notice, I didn't say mayor. [LB152]

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SENATOR ASHFORD: No, no you didn't. Yeah, because it would have made Watchdog or something. (Laughter) [LB152]

CURTIS SMITH: Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Curtis Smith, C-u-r-t-i-s S-m-i-t-h. I'm the executive director of the Nebraska Chapter, Association of General Contractors--the highway guys. And we're here in opposition to LB152 because of the possible delays that can occur in highway construction projects. You've heard some of the previous speakers speaking of the same thing, the fellow from Omaha, the railroad type, the League of Municipalities, so I won't go into that. But it's very common that with, in the highway industry, that the permit would not be acquired until right before the project is ready to go. It goes right up to the time of letting, or trying to get through. The permit comes through, it goes into the next letting. That is almost...it's not...it's so common that it's not usual but it's certainly not unusual. I think the language could be changed somewhat to do something around that to all permitting be in place. And with that, that would...I think we understand the purpose of the bill. And so I'd be happy to try to answer any questions you have. [LB152]

SENATOR ASHFORD: Thanks for your comments, Curtis. Yes, Senator Davis. [LB152]

SENATOR DAVIS: Mr. Smith, have you seen the fiscal note on this bill? [LB152]

CURTIS SMITH: Say what? [LB152]

SENATOR DAVIS: Are you aware of the fiscal note on this bill? [LB152]

CURTIS SMITH: I did see the fiscal note of that, and the highway department, I think...there was two of them, wasn't there? [LB152]

SENATOR DAVIS: Well, \$4 million a year is what the Department of Roads seems to think it's going to cost them. [LB152]

CURTIS SMITH: They said \$4 million, I believe, in delays. [LB152]

SENATOR DAVIS: Do you think that's realistic or do you think that's kind of out there? [LB152]

CURTIS SMITH: Well, I think the follow-up note...and I'm not sure with the other one. The follow-up note from that said that that would be if all projects were delayed. And I...obviously, this wouldn't delay all projects and highways because many projects take very small parcels. I'm sure it would...could have the biggest effect, from my background--I've been around the industry for many, many years--on large projects. New construction is where you have primary bigger condemnation issues and it would



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perhaps delay those. And conceivably it could delay a project--I don't know how much--probably six months, to another construction season perhaps; and that would perhaps add monies, so. But I did see it. I don't know how they arrived at that number. [LB152]

SENATOR DAVIS: Does it seem high to you, I guess is what I'm asking? [LB152]

CURTIS SMITH: It seemed like a lot of money but \$4 million sounds like a lot of money to me, too, so, you know. (Laugh) [LB152]

SENATOR DAVIS: Thank you. [LB152]

CURTIS SMITH: You're welcome. [LB152]

SENATOR ASHFORD: Thank you, Senator Davis. Thanks, Curtis. [LB152]

CURTIS SMITH: Thank you. [LB152]

SENATOR ASHFORD: Any other opponents to this bill? [LB152]

JOHN LINDSAY: Senator Ashford, members of the committee, for the record my name is John Lindsay, L-i-n-d-s-a-y, appearing as a registered lobbyist on behalf of Black Hills Energy, SourceGas, and Northern Natural Gas. I'm not going to repeat, although we concur with much of what has been said as far as some of the technical effects or the problematic effects that the bill would have. But I do want to raise a couple of them or a couple of...one additional and expound on another. With respect to an interstate pipeline like Northern Natural Gas might have, it's...the bill is totally unworkable because FERC, before even applying for a permit from FERC, requires that the landholders be contacted, that they have a general outline of what their thoughts are. More importantly, they want that route worked out before you go to them for that permit. So it puts the company into a kind of a Catch-22 that they can't comply with it. They're going to be out of compliance either at the federal or the state level. Additionally, Section 3, as I think was just noted as well, coercive and threatening is very broad language. It's very vague language. What is coercive or threatening to one person may not be the least bit coercive or threatening to another person. It...again I think when people see in the practice of law, anytime you send a letter people feel threatened. And so it's a question of that just is so broad that again it makes trying to have any activity on these types of pipes just unworkable. I'd be happy to try to answer any questions. [LB152]

SENATOR ASHFORD: I don't see any questions, John. Thank you. Any other opponents? How many other opponents do we have? Okay. [LB152]

LEE HAMANN: Good afternoon, Chairman Ashford, members of the Judiciary

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Committee. My name is Lee Hamann, L-e-e H-a-m-a-n-n. I'm with the McGrath North law firm, and our firm is legal counsel for the TransCanada pipeline in Nebraska. I appreciate the opportunity to appear before your committee and make a few comments. There have been some good comments made by other opponents to LB152 and I will not try to dwell on those. I think just to cut right to some of the core issues, one of the key components of the proposed legislation is to have a present plan and present public purpose. And I think those concerns were addressed very adequately in the special session and then the follow-up session last spring. A lot of these things that we heard discussed today by both opponents and proponents have been talked about, and the amendment...LB1161 put into place the requirement that we have to have either the Governor's approval or the PSC approval in order to move forward with the project. So this provides two things. It provides both public information, public hearings, and governmental oversight on the pipelines, which I think was a big concern that this didn't exist in Nebraska before. So I think that gets to a core issue there. And that language, the present plan and present public purpose, arises mainly out of the Krauter case against the Lower Big Blue NRD litigation. And the court was pretty clear in laying out the standards there and I think what we have on the books now very clearly addresses that. Comments were made earlier about, you know, what happens if it goes away; they can sell these rights of way. Well, we aren't permitted to do anything but build a pipeline in these rights of way that we acquire, whether it's voluntary acquisition or if ultimately it becomes an eminent domain situation. It's for an oil pipeline. So this isn't something that we can go off and sell to others. The other thing that's a concern with this is that with the changes in 57-1101, once we have PSC approval or Governor approval, we have only two years to exercise a right of eminent domain and acquire these properties. Well, if we have to go up and down the line to get local permits and things like that, it's a very time-consuming process. You could run out of time on that. The other part of this about not attempting to negotiate with anybody, as has been pointed out before, particularly interstate linear projects like this, it takes a lot of work; it takes a lot of input to come up with a good route. So this LB152 compresses everything and diminishes the opportunity to educate landowners and to make voluntary acquisitions with them. In closing, I'd just like to say that TransCanada has over 40,000 miles of pipeline, and we work very, very hard to have good landowner relations both on the acquisition and the long-term ownership of the right of way and in the form of an easement. And this...we've heard comments today and before about unhappy landowners. We wish everybody could be happy but they aren't, but we do try very hard to do it. I'd be happy to entertain any questions. [LB152]

SENATOR LATHROP: I do have a question for you just because I don't deal in property rights in my practice, so. Did I hear you say, and is it the case that if you took an easement across farm property for a pipeline, an oil pipeline like the Keystone pipeline, and for some reason it's not approved by the President or whoever out in Washington needs to approve this pipeline ultimately, you can't sell that to somebody else for a natural gas pipeline or anything else? [LB152]

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LEE HAMANN: If the purpose it was acquired for spells out that it was for a crude oil pipeline, for example, which the voluntary easements we've negotiated specifically call out crude oil pipelines. So... [LB152]

SENATOR LATHROP: What about the ones that aren't voluntary? [LB152]

LEE HAMANN: When we go in and file our... [LB152]

SENATOR LATHROP: If you do an eminent domain, is the purpose for which you have "eminent-domained" that easement...so you have an easement to go underneath somebody's cornfield for the purpose of putting a pipeline in; you tear up the field, you bury it, and that's your easement. Right? If you don't do the project, can you come back ten years later and do a project and put a pipeline down there? [LB152]

LEE HAMANN: You know, in an easement situation, there's no black line in the law that says when you've abandoned an easement; so you could get into abandonment issues. But again, the statute requires us to state what the purpose of the acquisition is for, and so that does get into...that will necessarily put limits on... [LB152]

SENATOR LATHROP: But does that become a restriction that runs with the easement? I'm thinking back...I mean, I'm going back 30 years thinking about property class, because I do not do easements or real estate work. [LB152]

LEE HAMANN: Yeah. [LB152]

SENATOR LATHROP: So I'm asking a question that may be really lawyer fundamental and I should know the answer to it. But when you take an easement, whether by eminent domain, or by voluntarily somebody agrees to take your money and grant an easement, does that easement have a restriction for a particular purpose? [LB152]

LEE HAMANN: It's possible to have an easement that has no restriction whatsoever. [LB152]

SENATOR LATHROP: Let me ask you this: Are the ones that Keystone or TransCanada has executed for this pipeline route, is that a restricted easement? [LB152]

LEE HAMANN: Well,... [LB152]

SENATOR LATHROP: In other words, it can never be used...if you don't use it for the XL pipeline, can it be used for a natural gas pipeline without going through another process again? [LB152]

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LEE HAMANN: You know, easements may talk about hydrocarbons and other pipeline commodities. I can't tell you specifically that every easement says you can only use it for crude oil, but it does restrict it to the pipeline. [LB152]

SENATOR LATHROP: My question though was these particular easements. I'm just trying to learn something about the TransCanada. Obviously, that's people's concern that you're hearing today who were proponents, most of them anyway, had to do with the Keystone pipeline. [LB152]

LEE HAMANN: Um-hum. [LB152]

SENATOR LATHROP: Are those restricted easements so that if this project doesn't go through, it reverts back to the landowner and they have no further obligation under the easement? [LB152]

LEE HAMANN: There's not a specific reversion clause in the easements. [LB152]

SENATOR LATHROP: So TransCanada will effectively retain the easement even if you don't get approval from Washington or this project doesn't go through? [LB152]

LEE HAMANN: It could. Yes. [LB152]

SENATOR LATHROP: And if that's the case, could you come back and say, ten years from now, they discover oil...well, they've got some up in North Dakota. Somebody wants to do a pipeline straight from the corner of North Dakota where they're getting oil and bring it right across the property these folks have given up either by agreement or by an eminent domain proceeding. You could do that ten years from now... [LB152]

LEE HAMANN: Yeah, I think so. [LB152]

SENATOR LATHROP: ...without any additional considerations being paid to the landowner? [LB152]

LEE HAMANN: Well, because the consideration was paid upon acquisition of the easement. Yeah. [LB152]

SENATOR LATHROP: Okay. All right, thank you. [LB152]

SENATOR DAVIS: But that easement that we're... [LB152]

SENATOR ASHFORD: Mark. Senator Christensen is here. [LB152]

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SENATOR CHRISTENSEN: Thank you, Chairman. I got here late so I'm going to ask a question. Isn't everything in an easement negotiable? [LB152]

LEE HAMANN: Yes. [LB152]

SENATOR CHRISTENSEN: So if somebody wants a cancellation...I've had easements before that I negotiated cancellations on. Could they negotiate a cancellation if you guys don't build the pipeline in a two-year period or if you don't put it in, in a certain amount of time? [LB152]

LEE HAMANN: Yeah, when you're negotiating an agreement, it's a discussion as to what both parties can agree to and that could be one of the conditions. [LB152]

SENATOR CHRISTENSEN: Do all of your easements end up the same or are there different ones with different landowners? So is there different negotiations in some of them that you have gotten? [LB152]

LEE HAMANN: Every effort is made to keep them as consistent as possible just from an administrative standpoint to know what you have up and down the line. [LB152]

SENATOR CHRISTENSEN: Understand. [LB152]

LEE HAMANN: There may be some differences between one and another, but we try to keep them to very minor differences. [LB152]

SENATOR CHRISTENSEN: Because price can be different. [LB152]

LEE HAMANN: Price can be different. [LB152]

SENATOR CHRISTENSEN: And a cancellation deal. Because I guess what I'm saying, my negotiations I've had to do before, I found people wanted to negotiate rather than use eminent domain, so they were willing to give me an exit clause after three years rather than try to keep that in there and have to use eminent domain. [LB152]

LEE HAMANN: Yes. I mean, I have represented both landowners and condemning authorities, and in my view it's generally advantageous to reach a voluntary settlement, because you have more control over what the terms are going to be. [LB152]

SENATOR CHRISTENSEN: Okay. Thank you. [LB152]

SENATOR ASHFORD: Okay, thanks. Oh, I'm sorry, Senator Davis. Did you have a...? [LB152]

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SENATOR DAVIS: Mark asked the question I was going to ask. [LB152]

LEE HAMANN: Thank you. [LB152]

JEFF DAVIS: Mr. Chairman, may it please you and the members of the committee, my name is Jeff Davis. I'm a registered lobbyist and attorney, as well as a family farmer, here on behalf of BNSF Railway today. I want to say that I support the comments of my colleagues at Union Pacific and just want to add to it. BNSF, we pride ourselves in doing things the right way. Eminent domain is a tool that we have tried to use very sparingly. It's always the absolute last resort instead of the first...you know, the first option. I've gone back through our records. We can only find one instance in more than a decade now where we've used eminent domain here in the state. And just to give you an idea of some of the work that we do up-front, we do an alignment survey, a cultural survey to locate any Native American burial grounds or artifacts that might be there, biological and environmental surveys to identify any endangered plants and animal species, hydraulic surveys to determine water runoff patterns and wetlands, as well as geotechnical tests that involve drilling, gathering core samples, and sending them off for analysis. Oftentimes, in that process, what happens is we discover that we may have to change our route for any number of reasons. And when you do, you do; and we just move forward and we do the best we can. And what we're concerned about here, particularly with this bill, is it would create an unworkable process for us where all of a sudden you would have the landowner or the condemnee going to the judge or somebody else, potentially saying they don't have all of their permits. Well, that's going to create a nightmare. I mean, if the ultimate thing is to get the landowner compensated, we want to make sure that we can do that. Thank you. [LB152]

SENATOR ASHFORD: Thanks, Jeff. Yes, Senator Seiler. [LB152]

SENATOR SEILER: Just go back to curing a problem for Senator Lathrop. Railroads have a little bit different law on abandonment than everybody else. If you condemned it and it goes back...and you abandon it, it goes back one-half to each side of the landowners. Isn't that correct? [LB152]

JEFF DAVIS: I would need to verify that to make sure, because it's different in every state. [LB152]

SENATOR SEILER: Okay, Nebraska, I think is right. [LB152]

SENATOR ASHFORD: Thanks, Jeff. [LB152]

JEFF DAVIS: Thank you. [LB152]

SENATOR ASHFORD: Okay. Any other opponents? Neutral? Senator, do you wish

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to...? [LB152]

SENATOR DUBAS: I will be very brief and appreciate your indulgence. I think the testimony that was brought forward on both sides of this issue today was very good and constructive and I pledge myself to this committee that I'll do whatever I can to find that common ground. As I said, my pledge is to the landowners and their property rights. And whatever it is that we need to do to clarify things, that's what I'm willing to do. So thank you again for your indulgence. [LB152]

SENATOR ASHFORD: (See also Exhibits 24-41) Thank you, Senator Dubas. Also I want to thank everyone in the room. I thought that everybody gave good presentations and they were prepared and the points that were made were important. So I thank everybody for their willingness to do that. Thank you, Senator Dubas. [LB152]