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Natural Resources Committee  
February 27, 2015

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[LB404]

The Committee on Natural Resources met at 1:30 p.m. on Friday, February 27, 2015, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on a confirmation and LB404. Senators present: Ken Schilz, Chairperson; Curt Friesen, Vice Chairperson; Dan Hughes; Jerry Johnson; Brett Lindstrom; John McCollister; and David Schnoor. Senators absent: Rick Kolowski.

SENATOR SCHILZ: Good afternoon, everyone, and welcome to the Natural Resources Committee for today. My name is Ken Schilz, the Chair of the committee. I represent District 47 from Ogallala. And today we have two bills...or one bill on the agenda and a confirmation hearing. But before we get to that, I'd like to do introductions. I see that Senator Kolowski from Omaha is introducing bills, so we'll start with Senator McCollister.

SENATOR MCCOLLISTER: Thank you, Mr. Chairman. John McCollister, District 20, Omaha, Nebraska.

SENATOR LINDSTROM: Brett Lindstrom, District 18, northwest Omaha.

SENATOR JOHNSON: Jerry Johnson, District 23, Saunders County, Butler County and most of Colfax County.

SENATOR HUGHES: Dan Hughes, District 44, Perkins, Chase, Dundy, Hays, Hitchcock, Frontier, Red Willow, Furnas, Gosper, and Harlan Counties.

SENATOR FRIESEN: Curt Friesen, District 34, Hamilton, Merrick, Nance and part of Hall County.

SENATOR SCHILZ: Thank you very much. And I see we have Senator Schnoor who is also introducing a bill in Appropriations Committee today; and Senator Schnoor is from District 15, I believe, Dodge County. So with that, I also have with us today Barb Koehlmoos who is the clerk of the committee, as well as Laurie Lage, who is the committee counsel. And Jake Kawamoto who is our page, who is a sophomore at UNL studying political science. Today we have a hearing for Frank Reida and LB404. And if you're planning on testifying, please pick up a green sheet that is in any corner of the room. If you do not wish to testify, but would like your name entered into the official record as being present at the hearing, there's a form on the table that you can sign and this will become a part of the official record of the hearing. Please fill out the sign-in sheet before you testify, please print and it's important to complete the form in its entirety.

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And when it's your turn to testify, please give the sign-in sheet to the committee clerk and that will help us make a more accurate public record. If you do not choose to testify, you may submit comments in writing and have them read into the official record. If you have handouts, please make sure you have 12 copies for the pages to hand to the committee members. And if you don't have 12 copies, get with the page and he will help make that happen. And when you come up to testify, please speak clearly into the microphone; tell us your name, spell your first and last name, even if it's an easy one. And please turn off cell phones, pagers, anything that would make any noise. You can have them on vibrate, but if you do need to take a call or have conversations, please take it out into the hallways so that we can respect our testifiers and the committee members here. We don't allow any displays of support or opposition to a bill, vocal or otherwise, once again to respect those folks that are giving testimony or introducing bills. We do use the light system in the Natural Resources Committee. We give everybody five minutes to testify. It will go green for four minutes; it will turn yellow for one minute, and then once it turns red, we really encourage you to finish up your comments and be done with them. So with that, we will start out with our confirmation hearing for Mr. Frank Reida for the Nebraska Power Review Board. Mr. Reida, welcome and thank you.

FRANK REIDA: (Exhibit 1) Thank you, Senators. My name is Frank Reida, F-r-a-n-k R-e-i-d-a; 1122 Turner Boulevard, Omaha, Nebraska, 68105. I currently am a member of the Nebraska Power Review Board and currently serve as the vice chair, and I'm here for reappointment. My understanding is you'd like a thumbnail sketch of education, training, and experience, and then what goal that I would seek for myself. So I believe you have my vitae in your handouts, I'm just going to use that as a guide, if you have...as far as the points. So for education--my undergraduate degree is in mechanical engineering from University of Nebraska. I have two advanced degrees: one a master's degree in business administration from Creighton University, and also a law degree from Creighton University. As far as professional experience--right out of engineering school, I had employment with Nebraska Public Power District and this was for about ten years. I, primarily, was in the power generation area. And so I started in power houses with, basically, as an engineer, the mechanical engineer, performance engineer, and then supervise with respect to maintenance of equipment; and was also assistant to the superintendent in that particular facility. Unfortunately, that facility went into mothball status in 1987. And so I left the district and went to law school at Creighton. So that was from '87 to '90. After graduation from law school, I started practice in Omaha with the Baird, Holm Law Firm and was with them for about 15 years. And primarily, I was in the tax section. And so I'm very, very familiar with municipal financings, also regulatory practice, and I did anything that had technology...was technically related, I usually had some involvement with it. In 2005, one of my clients happened to be the Energy Systems Company. I joined them as their general counsel and vice president and was with them for about eight years and, actually, was chief legal counsel when I left there. Now, one of the differences between NPPD, which is an electricity generator, and Energy Systems Company is that Energy Systems Company was a thermal district energy company. And

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by that we mean rather than generating and selling electricity, we would generate steam and chilled water, put it in pipelines and send it out to...in this particular case, downtown Omaha and Creighton University campus. And just by way of reference, this particular building and the Governor's Mansion, the...I don't know what it's called now, it used to be the insurance company across the street and State Office Building are all on a district energy system that would be, basically, generation, a central facility and the pipelines. In 2013, I had been working with Farris Engineering also while I was at Energy Systems, but through them I was a consultant and then was employed by Mainelli Mechanical, which I've been employed with for the past two years. And primarily what I do is commission mechanical equipment at facilities after Mainelli Mechanical installs it, including the piping. And so commissioning is, essentially, ensuring that the particular equipment and the systems operate the way they've been designed with respect to functionality, efficiency, and that sort of thing. As far as professional engineering status, I did become a PE in 1982. I'm also...and this is something that would be in the city of Omaha, it's required if you're an operator of equipment, not that I was a hands-on operator, but I did test in '87 for that and have maintained that. I'm also a Certified Energy Procurement Professional and a LEED AP. As an adjunct, I've taught at Bellevue University, it's enough...it's been awhile since...before law school, as a matter of fact, so I did that as an adjunct. I've taught the Dale Carnegie course for about 30 years. And most recently, I'm an adjunct at Creighton University. And probably this is more in-tune with this particular appointment, I teach an energy policy course. And so the last course I taught I had Senator Ken Haar come and he was one of the guest lecturers at that. I try to give a broad exposure of energy and energy policy to students. Okay, other professional activities that probably you'd have an interest in, in 1997 I was appointed to be on the committee that rewrote the rules and regulations for professional practice of engineers and architects in Nebraska. In 1997, was appointed to be on the advisory committee for...it would be...it was called LR455. This was a study to look at potentially placing Nebraska under retail competition. And I don't know if you recall what happened, basically, it started a movement in California and Nebraska through that study, the end result of that study was a "wait and see." And so, subsequent to that study, I was in on the committee, or the review group, I guess it was called, where every year analysis was done on this wait and see. There was five different factors that were analyzed. As far as appointments, back in 2006, I was appointed by the city of Omaha to be on their board of engineers; and that was by Mayor Fahey. I was reappointed by Mayor Suttle, and then recently Mayor Stothert. And that's all ratified again by the city council. That's the thumbnail. And when I think about the goal: my goal has always been and will continue to be to provide reliable electricity, make it available to Nebraska citizens and to do it at reasonable rates. So with that thumbnail sketch, I'll open it up if you have any questions for me.

[CONFIRMATION]

SENATOR SCHILZ: Thank you, sir. Any questions for Mr. Reida? Senator McCollister.

[CONFIRMATION]

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SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. The Power Review Board, do you see their function as being...a review in a consultation kind of group, or are they a regulator?  
[CONFIRMATION]

FRANK REIDA: Well, the Power Review Board actually serves two purposes. For one thing, we have very strict guidelines so that if utilities want to, for instance, put in new generation and new transmissions, they come to us and we have certain guidelines that we follow to be able to approve or disapprove that new generation or transmission. The other thing, we're also quasi-judicial. And so we would sit as, basically, district court for someone who would come in and have either litigants or something of that nature. Does that answer your question?  
[CONFIRMATION]

SENATOR McCOLLISTER: Well, you're ideally suited to be on that board given your background. Next five or ten years is going to be a tumultuous time for the power industry.  
[CONFIRMATION]

FRANK REIDA: Absolutely, absolutely. [CONFIRMATION]

SENATOR McCOLLISTER: You know, because you're going to have the unbundling of services. We're starting to see some of that already. You're going to have people want to import power into Nebraska and it's going to, perhaps, strand some of those assets of the public utilities. How do you see that playing out? [CONFIRMATION]

FRANK REIDA: Well, when you talk about stranded assets, I guess when I think back to the studies...the LR455 study had, in fact, retail competition been in place, where you would have that competition at the retail level, then without a doubt, it would be very similar to the deregulation of the telecom industry. [CONFIRMATION]

SENATOR McCOLLISTER: Yes. [CONFIRMATION]

FRANK REIDA: Because they physically would have to separate generation from transmission. In the industry, as we see it today, you know, obviously, we did not go to the point of having stranded assets where you'd have to go and physically separate those types of things. But I would say that Nebraska, when you think about the investment that's made, because electric utilities are highly capital intensive, and, typically, when you build a power house, whether it be gas or nuclear or fossil-fired, you're looking at probably a 30- or 40-year BAT. And so...  
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SENATOR McCOLLISTER: So ratepayers ought to be obligated to pay for those stranded assets. [CONFIRMATION]

FRANK REIDA: Well, and I guess that would be the question if you would...that would be something that would be forced upon them, I would say. I mean, is that what you're asking, if the regulation would change such that they would... [CONFIRMATION]

SENATOR McCOLLISTER: I'm just curious about how the Power Review Board would view those stranded assets, whether you say it's acceptable for the utility to take a loss on those assets or as something they could prorate the cost to the ratepayers. [CONFIRMATION]

FRANK REIDA: So let me back up, so the...kind of give the jurisdiction of the Power Review Board. There are districts and energy suppliers across the state; I think it's like 160 of them. Each of those have their own board of directors and that board of directors sets the rates for that particular area or territory, as well as a lot of the major decisions that would be like what you're speaking about. So, that would be something that would be at that level that board would be making those kinds of decisions to...if you're asking would we go and say you should do that or not do that, I don't know that that would be something unless the law changed. I mean, obviously, we do whatever the law would be. [CONFIRMATION]

SENATOR McCOLLISTER: So you don't have that authority? [CONFIRMATION]

FRANK REIDA: I don't believe we have that authority. That's...I mean that's...we're looking at...essentially, we look at boundary lines that...you know, because they have a lot of different territories, we look at those kinds of issues. We look at transmission...new transmission, new generation and that sort of thing. But as far as stranded cost, I mean that would...it seems to me that that would be something that...let's just say that LR455 had played out so that there's retail competition. At that point, the recommendation was that the Power Review Board would be the one that would do those types of things. Very similar to the PUC when telecom came in. So they were the ones that dealt with stranded cost. But when that study looked at those types of issues, what they looked at was they said well even though the PUC has experience with stranded costs at times of dereg, the Power Review Board is more in-tune with the electrical side. So it never came into play. But at least with that particular concept had retail competition come into play, then the Power Review Board would have been given that. But that would have had to been done by legislation. [CONFIRMATION]

SENATOR McCOLLISTER: Do you set boundaries? [CONFIRMATION]

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FRANK REIDA: Say that again. [CONFIRMATION]

SENATOR McCOLLISTER: Does the Power Review Board set boundaries?  
[CONFIRMATION]

FRANK REIDA: Yes, we go...we settle, kind of, disputes between boundaries. And, typically, what happens if...at least what I have seen, is that...and I know that there have been some prior to my time, where there may have been disputes over, but, typically, you have very cooperative districts that come and say--well, we don't, particularly, have a power line to this customer, so why don't you go and serve them until we have someone that would be there. So, but, yes, on our site, we actually have, and it's a live site, that was just made live, I think, in the last year or two years, and so you can actually see where the boundary lines are. But again, it's something flexible where the joining parties can come in and ask permission to do that.  
[CONFIRMATION]

SENATOR McCOLLISTER: Great. [CONFIRMATION]

FRANK REIDA: Typically, it's very congenial, it's not a...my understanding is prior to my time, there had been some adverse ones. But I've not experienced that. [CONFIRMATION]

SENATOR McCOLLISTER: Okay. You're going to have a fun term in office. Thank you. Thanks, Mr. Chairman. [CONFIRMATION]

FRANK REIDA: (Laugh) Thank you. [CONFIRMATION]

SENATOR SCHILZ: Thank you, Senator McCollister. Any other questions? Senator Friesen.  
[CONFIRMATION]

SENATOR FRIESEN: Thank you, Chairman Schilz. Mr. Reida, I guess let me...first of all, I guess I'll say you're very qualified for your position; I'm very impressed. [CONFIRMATION]

FRANK REIDA: Appreciate it. [CONFIRMATION]

SENATOR FRIESEN: Some questions, I guess, on the authority of the Power Review Board. So if the Southwest Power Pool decides to put in a high-voltage transmission line in the state somewhere, does your board have to approve that? [CONFIRMATION]

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FRANK REIDA: As a matter of fact, we just had one that...it's called the "R" Plan, and so, in fact, we did have hearings on that and that was something we had very limited scope as far as jurisdiction of how it's approved. But yes, that was one that came before us.  
[CONFIRMATION]

SENATOR FRIESEN: And so if you would deny the application of one of those, could they not build it? Do you have that authority? Or do you just review it? [CONFIRMATION]

FRANK REIDA: What we would do, is we don't have the authority to say that that is the pathway that you can take. We don't have...we can't do that. But let's say they would come and they would say--this is what we're thinking about doing, here's our plan. And, typically, it's like a corridor. And we look at that and based upon our jurisdiction we say this is how we're going to review this and if it comes up and we say--well, based upon our jurisdiction, it appears to be, you know, that appears to work, then we approve. We could disapprove and then they'd have to...you know, probably, they would go out and look for, maybe, a different pathway and they'd have to file another application. [CONFIRMATION]

SENATOR FRIESEN: Okay, so... [CONFIRMATION]

FRANK REIDA: Does that make sense? [CONFIRMATION]

SENATOR FRIESEN: Yes, I think it does. So, I mean if down the road when you look at what that power line, what impact it will have on that area, you base your decisions on a number of factors, I take it, on how it will impact that area, I take it? [CONFIRMATION]

FRANK REIDA: What we have, again, it's very limited. What we look at is public convenience. We look at duplication. We look at economics. And so...and somewhat on feasibility, in other words, who is the best...what would be the best entity to have that. But those are all set forth in statute. And so our...again, we're very limited on what our jurisdiction is and we follow the law based on, you know, basically the statutes and the court interpretations. [CONFIRMATION]

SENATOR FRIESEN: So when you say it's based on economics, if it would do damage to our industry or our state in some aspect, that's what you... [CONFIRMATION]

FRANK REIDA: No, and I'll just clarify, as far as who would be best economically in the position to provide that is what we do. [CONFIRMATION]

SENATOR FRIESEN: Okay. [CONFIRMATION]

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FRANK REIDA: It wouldn't be that it would have...in other words, we don't have jurisdiction to look at, let's say, a power line going to this...okay, this is going to have a positive or negative impact on economic development, would be an example. [CONFIRMATION]

SENATOR FRIESEN: Okay. [CONFIRMATION]

FRANK REIDA: We do have...one of the things we have is...we always have the Game and Wildlife Commission on almost...well, on every one, transmission line, they'll come in and we'll get their review and then they'll tell us, basically, in a written report that we have endangered or...what the potential impact would be for either a generation facility or a transmission line, you know, the impact it could potentially could have on animals and the environment.  
[CONFIRMATION]

SENATOR FRIESEN: Okay. So most of that criteria is already set in statute then, you just follow that. [CONFIRMATION]

FRANK REIDA: Absolutely, absolutely. We follow the law and we follow the court interpretations of what comes before us. [CONFIRMATION]

SENATOR FRIESEN: Okay, thank you very much. [CONFIRMATION]

FRANK REIDA: You're welcome. [CONFIRMATION]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? [CONFIRMATION]

SENATOR McCOLLISTER: One more. [CONFIRMATION]

SENATOR SCHILZ: Senator McCollister. [CONFIRMATION]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. Following that hearing, using Senator Friesen's example, do they have to get approval from you before they have eminent domain authority? [CONFIRMATION]

FRANK REIDA: I don't know the answer. I know that...like for instance, the utilities have eminent domain. Is that...I mean, I think they... [CONFIRMATION]



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SENATOR McCOLLISTER: I'm just thinking from an operation from out of state, an energy company, primarily, coming here from out of state and they... [CONFIRMATION]

FRANK REIDA: My understanding, is by statute, you have your utilities that have condemnation rights. So that would...is that what you're asking? You're talking about someone out of state having condemnation rights? [CONFIRMATION]

SENATOR McCOLLISTER: Well, I'm just using Senator Friesen's example, some...the power line company wants to come in the state and put in a line. They get approval from the Power Review Board. Then do they have eminent domain authority to go to those landowners and get an easement? [CONFIRMATION]

FRANK REIDA: I don't know the answer to that. I can say that we do have...and this is something...there was a bill that was passed last year that would give the state, you know, whatever the territorial authority would be as far as for utilities, they would have a right of first refusal in order to put that in. So, that's where it stand right now that it's going to be called the ROFR bill. I don't know if you recall, but that came in last year. And so FERC had an issue as to whether or not that right of first refusal should or should not and so by having the state adopt that, that was put in. [CONFIRMATION]

SENATOR McCOLLISTER: Okay. Now in some states, would the function that you provide be part of the utility board or the Public Service Commission? [CONFIRMATION]

FRANK REIDA: I would say probably the PUC, I'd say that's probably true. But usually, like in a PUC, you have...one of their major functions is you'd have the utilities coming in doing rate cases. And so they wouldn't be able to set their own rates because they would be, typically, private. And so they would have rate cases that would come in and the PUC would look at it and say--what is the...you know, reasonable return on investment, (inaudible) everything else. But...whereas with Nebraska, every board sets their own rates; we don't have anything to do with rates. We have...let me back up, we have the ability, let's say, that somebody would come in and say that there's some sort of discrimination in rates, or here is something where you have a class that is a special class that nobody else would fit under. Here's a class that two or three ratepayers fit in but they're not being treated equally. So I believe we would have jurisdiction on that. But we don't have jurisdiction over something where...to actually set the rate. [CONFIRMATION]

SENATOR McCOLLISTER: Thank you very much. Thank you, Mr. Chairman.  
[CONFIRMATION]

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SENATOR SCHILZ: Thank you, Senator McCollister. Any other questions? Seeing none, thank you very much for coming in today. [CONFIRMATION]

FRANK REIDA: Thank you very much, Senators. [CONFIRMATION]

SENATOR SCHILZ: Thank you. At this point, we'll take any supporters of Mr. Reida. Any supporters? Anyone here to testify in opposition to the appointment? Any opposition? Anyone in a neutral capacity? Seeing none, that will end the hearing. And thank you, sir, for coming in today. And congratulations and good luck. [CONFIRMATION]

FRANK REIDA: Thank you. [CONFIRMATION]

SENATOR SCHILZ: And we'll move now to LB404. Senator Davis is here and is welcome to open at his convenience. [CONFIRMATION]

SENATOR DAVIS: Good afternoon, Senator Schilz and members of the Natural Resources Committee. I am Senator Al Davis, D-a-v-i-s, and I represent the 43rd Legislative District. Before we go on, I just want to say I was compelled to listen to the last discussion of confirmation. I learned some things myself, so thank you very much for having this at the same time. I'm here today to introduce LB404, which would allow certain public entities to have a narrowly defined voluntary role in the consideration of certain applications to appropriate water. There is some history behind this bill in its current form and I'll briefly share that with you. Until 2010, any person or entity who could be impacted by the granting of a new water right could object to that water right application and participate as a party in an administrative proceeding before the Department of Natural Resources. Participating in the administrative proceedings allowed the objecting party to present evidence on any relevant issue and gave them a right to appeal any decision rendered by the DNR to the Nebraska Court of Appeals. That process changed dramatically between 2010 and 2013 following a series of decisions by the Nebraska Supreme Court. In those decisions, the court held that neither landowners nor water right holders nor irrigation districts nor natural resource districts possessed standing to participate in the proceedings before DNR. In doing so, the court changed the process that had been in place for over 50 years and effectively barred public entities from being able to effectively voice their concerns. Being respectful of the court's rulings, I introduced LB985 last session to allow certain public entities to provide evidence concerning whether a new water right would be in the public interest. Nebraska's Constitution prohibits a water right from being granted if it is contrary to the public interest, and it seemed logical to allow public bodies to offer evidence on that fundamental issue. That legislation raised several concerns, and so I introduced LR491 to work with the stakeholders to create a process that addressed their issues. The LR491 process consisted of multiple public meetings in Broken Bow and phone conferences with over 30

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stakeholders representing municipalities, public water suppliers, irrigation districts, public power and irrigation districts, uranium miners, and natural resource districts. Taking input from all of those parties, we crafted LB404. Only one of the stakeholders voiced concern with LB404 in our last telephone conference and that was Game and Parks Commission. Despite the many meetings and calls we had to come to consensus, you will hear opposition to the bill today as crafted. Realizing that this is a somewhat technical bill which requires technical legal knowledge, I hope you will rely on your committee legal counsel who has been actively involved with this bill since last year and has a good grasp of the issues and what can be done to answer the concerns you might hear today. The key features of LB404 include allowing a limited scope of public entities to offer limited evidence on whether granting a particular water right application is in the public interest. That public entity is not obligated to offer this information, but they may choose to do so if they will be impacted by a reduction in the water available to them if the water right application is granted. If the public entity does wish to provide public interest information, it must do so through an expert who is qualified to provide such information. After receiving this information, if the DNR finds that the application is in the public interest, DNR must offer the public entity an opportunity for an evidentiary hearing. If the public body does not desire a hearing, it can be waived, but in so doing, the public entity waives any right to a review by a court. If a hearing is conducted, it would be limited to the public interest issues presented by the expert and can be appealed by the public entity only on that basis. In short, the types of parties that would be allowed to participate are limited. The issues they will be allowed to address are narrow; and the scope of appeal is narrow. This evidentiary hearing is subject to the requirements of the Administrative Proceedings Act. Nebraska is the only state that presently precludes parties from participating in administrative actions that can result in significant claims to natural resources. Under Nebraska law, an entire river basin can be forced to nearly a fully-appropriated status through the granting of a new appropriation while no public body is allowed to present evidence as to why doing so may not be in the public interest. LB404 is an effort to give public bodies a limited ability to weigh in on appropriations that can directly impact their interests for the sake of the general public. I hope you will support the legislation and advance it to General File. Thank you very much. [LB404]

SENATOR SCHILZ: Thank you, Senator Davis. Any questions for Senator Davis? Seeing none, thank you. [LB404]

SENATOR DAVIS: Thank you. [LB404]

SENATOR SCHILZ: We'll take our first proponent now. Good afternoon and welcome. [LB404]

DON BLANKENAU: (Exhibit 1) Good afternoon, Mr. Chairman, members of the committee. My name is Don Blankenau, D-o-n B-l-a-n-k-e-n-a-u. And I'm appearing this afternoon on

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behalf of the Nebraska Association of Resources Districts, or NARD. As you heard from Senator Davis, LB404 germinated in the wake of a series of Nebraska Supreme Court decisions that largely precluded anyone, including natural resource districts, irrigation districts, and municipalities from being able to voice concerns about whether the public interest would be satisfied if DNR were to grant a new water rights application. Now, the decisions themselves concern the judicial concept of standing, which is just really a party's ability to participate in a judicial or quasi-judicial proceeding. Hearings before the DNR are operated under the Administrative Procedures Act and are considered a quasi-judicial proceeding. I have handed out a copy of an article that my colleague, Vanessa Silke, had written that appeared in the Nebraska Lawyer Magazine. And she's going to be testifying a little bit later, so you might want to ask her questions about that. But we thought it was important for you to have some of the background information surrounding the genesis of this bill. As you heard from Senator Davis, the jurisprudence of the Supreme Court, largely prevented all these parties, these water managers and water suppliers, from providing evidence to the DNR. The NARD believes that it is important for water managers and water suppliers to have a voice in this process, particularly since the burden of water management, generally, falls on local taxpayers. The NARD also believes that since water resources is...are a public asset, a public benefit, that it's important to have locally-elected bodies have the ability to present evidence in an APA-type process. Now, up until the Supreme Court decided these cases, largely, anyone could be adversely impacted by a decision of DNR to grant a new appropriation, could file an objection with the agency. And by filing that objection, they were allowed to participate as a full party and that would go to an evidentiary hearing where that party could produce evidence. And then once the agency director made their final decision, if it was adverse to any party, those appeals could be taken. And that's really what LB404 attempts to bring back, just in a very narrow format. As you heard from Senator Davis, the issues are relatively narrow. It's whether or not the objecting party will...or their constituents will see a reduction in the amount of water available to them and whether granting that water right is in the public interest. Now some people that we've spoken to about this, some of the stakeholders, initially expressed concern that the expert witness requirement would unnecessarily narrow the field of those who could participate in these proceedings. But frankly, that was the point of it. We didn't want the door opened to every person who might have a concern or fear. We wanted to keep it narrow to those people who had sound, scientific evidence to pursue their claim. Conversely, we've heard the exact opposite that the process opens the door to excessive new litigation. And I think, again, that's simply false. For over five decades, the DNR allowed virtually anyone to come in and object and to have a hearing that would allow them to appeal. I was with the DNR for over eight years when that was going on and at any one time we had no more than three or four hearings that went on in an entire year. Because we've so narrowed the scope of those who can't participate, as well as the issues that can be brought forth to the DNR, I think it's highly unlikely that you would have more than a small handful of these hearings in the future. I would also note that LB404 is constructed in such a way as to honor the jurisprudence of the Nebraska Supreme Court. That is, we're not really carving

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any new ground, but trying to work within the framework created by the Supreme Court. And with that, I see my yellow light is on, and I will conclude. [LB404]

SENATOR SCHILZ: Thank you, Mr. Blankenau. Any questions? Senator McCollister. [LB404]

SENATOR McCOLLISTER: Thank you, Senator Schilz. Expert witnesses--pretty expensive, aren't they? [LB404]

DON BLANKENAU: They can be. And, again, this is not a process...it's not an exclusive process. It's intended to be available, though, to those persons who have really legitimate and precise concerns. [LB404]

SENATOR McCOLLISTER: Well, if you had a landowner that was all of a sudden had concerns about a new application, would that in itself, the cost of that expert witness, preclude him from testifying or being a party to the action? [LB404]

DON BLANKENAU: I don't know the answer to that because it depends on the resources of the individual and what issues they really want to bring forth. It could very well be two expensive for them to participate. But they're excluded from that process today. [LB404]

SENATOR McCOLLISTER: But they weren't before. [LB404]

DON BLANKENAU: And they weren't before the Supreme Court decision, that's correct. [LB404]

SENATOR McCOLLISTER: What's the nature of the evidence that you have to provided? [LB404]

DON BLANKENAU: Well, the way we've constructed it in LB404 is that you have to demonstrate that your constituents will see a reduction in the amount of water available, so that could be some general hydrologic information. And in the second part is that granting the application would be contrary to the public interest. And that really opens the door to a variety of concerns on a case-by-case basis. It could be that you have alternate economic development in mind. For instance, a municipality may be concerned about their ability to increase their water use in the future. [LB404]

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SENATOR McCOLLISTER: Well, they'd have the resources to do that. I'm just concerned about some small landowner that, you know, wouldn't have access to an expert witness. And I would guess that the nature of the evidence would be such that you would really have to generate a lot of study and...geological. [LB404]

DON BLANKENAU: It could be. And frankly, that was the process that, I think, everyone preferred. We were really surprised with the direction the Supreme Court took to kind of cut off that level of participation. [LB404]

SENATOR McCOLLISTER: Okay. Thank you very much. Thank you, Mr. Chairman. [LB404]

SENATOR SCHILZ: Thank you, Senator McCollister. Any other questions? Senator Friesen. [LB404]

SENATOR FRIESEN: Thank you, Chairman Schilz. Mr. Blankenau, I mean, in the past, I know in my experience with the DNR, water rights were granted pretty well with no consideration to anything. And since LB962 has passed, obviously, there's ramifications for issuing more water rights than what a river or stream can support. And so I take it, part of this is going to help clarify a little bit when the DNR does issue water rights when they're probably knowing full and well that there is not enough water in that stream to serve that right. But cities, municipalities, NRDs, larger interests could interject here and at least present a case so that they did not become fully appropriated or overappropriated. And so I look at it, is that kind of what the gist of this is, or is it...? [LB404]

DON BLANKENAU: That's kind of the general direction. Now, LB962 has a provision that says DNR can grant a water right that actually creates a fully appropriated situation. But it doesn't preclude them from granting a water right that takes you to the edge of it. Now, I have a really good working relationship with DNR. I think, right now, they're well staffed, they're smart, they're hardworking. But that doesn't mean that they always get it right or that their direction may change in the future. What this legislation would do would be to allow those public entities with a legitimate concern about their future ability to provide water to their constituents a voice at the table. [LB404]

SENATOR FRIESEN: Because this does impact a lot more people than just the surface water appropriators. [LB404]

DON BLANKENAU: It certainly would. It would, I think, affect municipalities, particularly those who have a groundwater supply that is in close hydrologic connection to surface water. It

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affects NRDs and their ability to manage water resources in the future, because those molecules of water that DNR grants a right to are separated just in time and space from the molecules of water that the NRD have to manage. So that burden then of managing falls on the locals, the local taxpayer. [LB404]

SENATOR FRIESEN: Thank you, Mr. Blankenau. [LB404]

DON BLANKENAU: Thank you. [LB404]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, thank you for your testimony. [LB404]

DON BLANKENAU: Thank you very much. [LB404]

SENATOR SCHILZ: Next proponent. [LB404]

MIKE MURPHY: (Exhibit 2) Good afternoon, Senator Schilz and the Natural Resources Committee. My name is Mike Murphy, M-i-k-e M-u-r-p-h-y. I'm the general manager of the Middle Niobrara Natural Resource District and also a member of the Nebraska Water Resources Association. Middle Niobrara Natural Resource District was the one that worked with Senator Davis to introduce LB985 last year and with LB404 this year and supports this bill. The district feels it is our duty and responsibility, being a political subdivision, and the ability of such entities to participate as parties in legal actions which are established by statute. Recent case law indicates an explicit statutory amendment is necessary, at least as to natural resource districts and other entities to enable political subdivisions to participate as parties before the Nebraska Department of Natural Resources and appellate courts. Currently, non-applicants are only able to offer comments to the Department of Natural Resources as to the public interest. Such comments are not evidence and do not provide any right of review for a political subdivision whose duties and responsibilities are triggered by the Department of Natural Resources' actions. NRDs are open to include other political subdivisions. Because NRDs, irrigation districts, public power and irrigation districts, and other political subdivisions are comprised of locally-elected officials whose job is to manage water, we believe they are best situated to offer evidence on what is in the public interest. The district does not want to dictate a particular result as to whether an application will be granted by the Nebraska Department of Natural Resources, but wants an open avenue to the presentation of evidence and a right to appeal. Without it, only the applicant and the Department of Natural Resources will be able to provide evidence and only the applicant can appeal. The Department of Natural Resources has now ruled, and the Nebraska Supreme Court agreed, that if an NRD or anyone else has a water right, they have no standing to object to an application to appropriate water before the Department of Natural Resources. The court

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concluded that if you have a water right already, you can't be harmed by a new one. In a true Catch-22 type of situation, they also ruled that if you don't have a water right, you can't object to an application to appropriate because you don't have any rights to the water. So NRDs and other entities now have no standing to object to new appropriations before the Department of Natural Resources under any circumstances. So therefore in the interest of all of our taxpayers and constituents, we support LB404 to allow NRDs and the other agencies the ability to have standing with the Nebraska Department of Natural Resources. I'd like to thank you for this opportunity. [LB404]

SENATOR SCHILZ: Thank you, Mr. Murphy. Any questions? Seeing none, thank you for your testimony. [LB404]

MIKE MURPHY: (Exhibit 3) And then for the record, I'd also like to introduce some written testimony on behalf of the Niobrara River Basin Alliance. Thank you. [LB404]

SENATOR SCHILZ: Very good. Further proponents? Good afternoon and welcome. [LB404]

VANESSA SILKE: Good afternoon. My name is Vanessa Silke, V-a-n-e-s-s-a S-i-l-k-e. I'm an attorney with Blankenau Wilmoth Jarecke here in Lincoln; and on the board of the Nebraska Water Resources Association. I'm here today to testify on behalf of the NWRA in support of LB404. And I have two main points that I want to highlight and then I want to take any questions that you might have about the background of the bill. First of all, the NWRA wants to thank Senator Davis for his efforts over the past legislative season and, of course, over the summer with LR...the legislative study, to determine how best to incorporate a very broad base of stakeholders in a very long process to figure out how to handle the issues that were raised in the wake of the Supreme Court case that's highlighted in the article that Don gave to you. I also want to highlight that the members of the NWRA include members representing Nebraska's river basins, surface water and groundwater users, electric power, industrial, professional, conservational, municipalities, recreation, and financial institutions all responsible for managing water in Nebraska. And many, if not all of those stakeholders participated in this process to come to LB404 and the language that's in that bill in front of you today. So I want to highlight that process. And again, thank Senator Davis for his help and assistance in that. And the second idea that I want to highlight actually goes to Senator Friesen's discussion of LB962. Conjunctive management is a huge effort in Nebraska to figure out how to manage water resources between surface and groundwater management schemes. It's a difficult process and it requires deliberation and cooperation from a number of different water users. And the idea behind LB404 is that we have to incorporate those same stakeholders in the process when DNR undertakes to consider a surface water appropriation. You've heard from other testifiers here today that Nebraska is the only state where we have an agency issuing a water right without other parties participating, with



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party status, in that process. And what you see in LB404 is the very limited right for parties to participate in that process and continue that effort towards conjunctive management. Because the reality is, when DNR issues a surface water right application, it creates a domino effect on other water users within that basin to issue stepped-up regulatory measures, impose additional taxes, or undertake different types of water management efforts. And they don't get to weigh in on the process that actually triggered those duties. So that's what that effort is and that's what the bill accomplishes. And with that I'll take any questions that you might have. [LB404]

SENATOR SCHILZ: Thank you, Ms. Silke. Any questions? Seeing none, thank you for your testimony, appreciate it. Next proponent. Good afternoon. [LB404]

JOHN HANSEN: Mr. Chairman, members of the committee, for the record my name is John Hansen, J-o-h-n, Hansen, H-a-n-s-e-n. I'm the president of Nebraska Farmers Union. From our vantage point, as I reread the transcript of the previous bill on this topic, it seems to us that there are...as we're looking at the granting of water rights, remembering that there are pluses and minuses to every single piece of public policy that we do. But in this case, when you look at the advantage of involvement of more stakeholders, when you look at the creation of more standing, a more clear process, and certainly transparency to everyone involved, while there are, I'm sure, minuses that will probably be brought up after I testify, but those positives are enough to cause us to think that this is an improvement in the water rights process. And we would be in support of LB404. And with that I would end my testimony and answer any questions in the off chance that I might be able to. [LB404]

SENATOR SCHILZ: Thank you, Mr. Hansen. Any questions for Mr. Hansen? Seeing none, thank you for your testimony. [LB404]

JOHN HANSEN: Thank you. [LB404]

SENATOR SCHILZ: I appreciate it. Further proponents. Senator, welcome to the Natural Resources Committee. [LB404]

NORM WALLMAN: Thank you, Chairman Schilz, members of the committee. Glad to be here and I'm a proponent of this bill as well. And...can you hear me? [LB404]

SENATOR SCHILZ: Oh, I can hear you. You need to spell your name for us. (Laugh) [LB404]

NORM WALLMAN: Oh, Norm Wallman, W-a-l-l-m-a-n. I'm representing myself. [LB404]

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SENATOR SCHILZ: Thank you, sir. [LB404]

NORM WALLMAN: Thank you, Senator. And I admire you guys. This is probably the hardest task there's going to be--water rights. I was in my NRD office this last summer when some wells were going dry and some guys weren't. And so whose water rights are these? So the more you can get involved in this...and I got involved in it somewhat. And there's no winners and losers here. But I think we have to have...our aquifer has to be protected somewhat. And if it's depleted any bit we have to set some kind of guidelines. And I think Senator Davis' bill would, hopefully, tackle some of these tough issues. It's going to be tough. So please don't ask any questions, Senators. (Laughter) [LB404]

SENATOR SCHILZ: Thank you, Senator Wallman. Any questions? We'll let you off easy. Thank you, Senator Wallman. Any further proponents? Proponents? Seeing none, we have...no, we don't have anything here. [LB404]

MIKE DRAIN: Did you say opponents? [LB404]

SENATOR SCHILZ: Opponents now, there you go. Mr. Drain, good afternoon. [LB404]

MIKE DRAIN: Thank you, Senator. My name is Mike Drain, M-i-k-e D-r-a-i-n. I'm here to testify today on behalf of the Nebraska State Irrigation Association in opposition to LB404. Nebraska State Irrigation Association is an organization that's been around for more than a hundred years. We represent the interests of approximately three-quarters of the surface water irrigated lands and their customers in the state of Nebraska. Some of what you heard in the proponent...we do not disagree with. There have been recent court cases which have limited the ability of political subdivisions, irrigation districts, power and irrigation districts, NRDs to get involved in these quasi-judicial proceedings. And the legislation is drafted to narrowly open some of that back up. The reason we oppose is the same reason we opposed a year ago and an issue we tried throughout the interim study process to get moved forward and were unsuccessful, and that is, it is so narrowly constrained that it's written to apply only in the instances of applications for new appropriations. Now, if you looked, though, at the court cases that have raised these issues, the first one, and more often than not, it doesn't have to do with the granting of new appropriations, but it has to do with other proceedings in front of the department. For example, the department's decisions to approve or deny integrated management plans in the state of Nebraska. Now, much of the state of Nebraska is already fully or overappropriated and the more pressing concern with regard to the management of water resources is not the granting of new appropriations where the basin is already overappropriated or fully, but rather how should we manage those integrated resources. We proposed a year ago and tried proposing throughout the interim study that this concept of allowing for introduction of evidence and the ability to ask

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for hearings and to appeal decisions be not narrowly restricted to just the granting of appropriations, but to all of the proceedings that the department has. Otherwise, what we are doing is not narrowly fixing a problem, but rather we are tilting the table. We are lowering the bar in only one area and leaving everyone else at a disadvantage in the rest of the areas of management of water resources in the state of Nebraska. We appreciate that there was an interim study. We had thought that the intent of that study was to broaden the scope of this. Unfortunately, what they did was they just broadened the list of entities that could participate, but kept narrow that it is only focused on the granting of new appropriations. We don't believe a partial fix is a fix at all. We think that if you fix it in one area but not the other, you actually make things disproportionately worse for certain sets of water users in the state of Nebraska. This is pretty fundamental, we think. And while we involved ourselves in the interim study process, at no time did we agree to the drafting of the final language which was, essentially, put forward by two parties of the interim study when nobody else could come to agreement. Nebraska State Irrigation Association was not one of the two parties that drafted this and we have not agreed. One other thing that I would just quickly like to mention is that the legislation also proposes, in one part you'll notice, hey, if you do not ask for...in even this proceeding, and a water right application proceeding for a hearing, you then waive your ability to appeal the decision at the end. This also is a fundamental change from what we have in current legislation. Right now, you can wait until the department grants an appropriation before it's necessary for you to appeal. Now that may sound like a bad idea to folks who are not familiar with the process. But what this really does is it allows you to not have to intervene in every single water right application that comes forward out of fear for what might be in the final order. The director of the Department of Natural Resources has the authority under state law to impose additional conditions as he or she sees fit in the granting of an appropriation. And if you don't know what the final condition of an appropriation is going to be, you may feel as an appropriator or as one of these subdivisions now a need to object and ask for a hearing in every single water right proceeding that comes forward rather than waiting and just seeing whether or not the final decision is adverse. As was mentioned before, even when the rules were much freer, we had very few actions that actually came forward, because nobody felt a need that they had to intervene at the onset in order to protect their rights at the end. So we are also opposed to that. Until we see other parties willing to expand the balancing of...or the introduction and the ability for all the entities to participate in all the proceedings at an equal level, we will continue to object to this process. And I will take any questions. [LB404]

SENATOR SCHILZ: Thank you, Mr. Drain. Any questions? Senator Johnson. [LB404]

SENATOR JOHNSON: You changed my questions into, I guess, some comments. When the presenter...introducer started talking...talking about limited, limited, limited and narrow, narrow, narrow, and it continued to repeat, I think eight times that I counted and five times, and you've addressed that a little bit. I mean it's...Senator McCollister talked a little bit about the cost of

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specialists, which I think narrows it. I mean, that might be one of the narrows. But I was glad for you to respond a little bit to some of those concerns. Thank you. [LB404]

MIKE DRAIN: You're welcome. [LB404]

SENATOR SCHILZ: Thank you, Senator Johnson. Any other...Senator McCollister. [LB404]

SENATOR McCOLLISTER: Thank you for appearing. Thank you, Mr. Chairman. One of the, I think, the favorable features of LB404 is the fact that it seems to recognize and push the concept of integrated water management--surface water and groundwater. Is that true? And what's the current status of that in Nebraska? [LB404]

MIKE DRAIN: Well, already in Nebraska we have LB962, that was one of our more recent efforts to recognize the connection between groundwater and surface water. And I think today most of the entities that are involved here clearly understand that. I think that LB404 is, in fact, an outcome of the recognition of the connection that if an appropriation, for example, a lot of this stemmed from up on the Niobrara. An appropriation was granted that was felt that...by an NRD, would be adverse to its future planning. Yet at the same time, LB404 ignores the integrated management consequences that management of groundwater that's hydrologically connected to the river has on existing appropriated uses. And that's what we're asking for, we're asking for this to not be just in the granting of appropriations, but also in the decisions by the DNR to approve or to deny integrated management plans on the decisions of the department when they are looking at transfers of surface water or transfers of groundwater on any adjudication process. It's basically, if there's a proceeding before the department, we think it makes sense that these political subdivisions should have the opportunity, just like it's proposed in the granting of appropriations, to come in and talk about, and maybe appeal on the issue of the public interest because these resources are tied. [LB404]

SENATOR McCOLLISTER: Would there be any way that you could see that you could figure out a repair, or at least add to this bill such that you could approve it? [LB404]

MIKE DRAIN: Good question, Senator. And it's always one that you have a little concern about answering because you don't want to make it sound like, you know, it's...maybe it's close to good enough. The biggest problem is its focus. It's written in a place where it goes right into the part of the statute that is specific to the granting of appropriations. If we were talking about, I think, something where it said--these entities, same list of entities, could have the same rights, that is introduce evidence and ask for a hearing and appeal decisions, but have it outside of the appropriation granting and as just a fundamental process of all proceedings before the department, I think that that would be the kind of approach that we could take that would make it

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acceptable. Right now what I hear is everybody is excluded from participating in each of these rooms, they just want to open the door to only one room. We think it should be open to all. [LB404]

SENATOR McCOLLISTER: Thank you. [LB404]

SENATOR SCHILZ: Thank you, Senator McCollister. Senator Friesen. [LB404]

SENATOR FRIESEN: Thank you, Chairman Schilz. Mr. Drain, I guess I need...when I'm thinking through this process, I mean, I can see where the need for this is. So I will address that first, I guess, so the way it looks at just new appropriations and how it might impact a groundwater user or whatever. To me, this here takes good care of that. And it opens it up, it doesn't deny a permit or anything else, but it allows some testimony from the impacted parties which the groundwater user would be at that point, I mean, they would have to expend tax dollars to maybe implement a plan because of that appropriation was granted. So looking backwards, the DNR, obviously, issued on some river systems more appropriations to water rights than there was available water. And so now what you're saying is you want outside people or more people to be able to enter testimony in when they look at those existing permits that are on the river? I take it that the DNR in the past is supposed to adjudicate those permits regularly or make sure that they're valid and used. And so do you want more oversight into that? [LB404]

MIKE DRAIN: Sure, and let me provide some clarification. For example, in a hypothetical world, which we don't have in Nebraska, where maybe you had a river basin and no hydrologically connected groundwater wells. It's all of...all water use is just through appropriations. Well, the department could grant 100 more appropriations after the stream is dry and not hurt anybody's rights because everybody's right is accorded their appropriation. If you just got a really old appropriation that never gets water, one more really old appropriation after that...or really new appropriation after that that also doesn't get water doesn't hurt you. The problem we have in Nebraska is we have both surface water and groundwater. Those uses interact. One use can take from the other; one use can also benefit the other depending on how things work hydrologically in any particular area. So the problem we have...one of the problems...big problems we have in Nebraska, and the reason we have overappropriated basins, fully-appropriated basins, is because you have...you have places where there's surface water uses in the basin and there's also groundwater uses in the basin. And the groundwater uses can grow...be newer uses that didn't exist when the appropriation came into play, and eventually so much use is going on that a new use is interfering with an old one. Because groundwater wells are not constrained to the same prior appropriation doctrine as surface water is. And I'm not proposing in my testimony any change in that; I'm just saying that that's the condition we have in Nebraska. So now, if you are a surface water user, for example, in an overappropriated basin in

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Nebraska, your use...your regular right to use water is, presumably, because the basin has been declared overappropriated, must be being impacted, hurt, having some of your water taken away because of some of these other groundwater uses. So what one of the solutions supposed to be to that is that the state and the NRDs together have a proceeding where they decide on an integrated management plan. There's basin-wide plans and then there's individual plans. And that a plan that's supposed to sort of decide how are we going to manage the hydrologically connected groundwater, and to what extent are we going to try to manage that use in a way that starts to recover the stream or recover the injured water rights of the surface water party. Well, that's another proceeding, it's another decision of the department in approving or developing these plans that right now that injured party, which can often be constituents, customers of these political subdivisions, haven't been told by the courts--you can't appeal the decision of the department, even though what decision they make on integrated management is of direct interest to your constituents. Just in the same way, I mean it's the flip of a decision to grant a new water right, could come back and cause the need for management in the future of a natural resource district, of groundwater uses. So that part is missing. So I'm not suggesting, Senator, I'm sorry for the long answer, I'm not suggesting there's a need to come back and reevaluate the existing appropriations, but rather the opportunity when the department is making decisions that impact those existing appropriations. There needs to be, in that process, again the ability for introduction of evidence, asking for hearings, and appeal the decision. [LB404]

SENATOR FRIESEN: But in the integrated management plan when it was built, I mean a lot of input was given by all these parties. They were a part of that and all the DNR is doing is approving it. [LB404]

MIKE DRAIN: Well, the department does approve it. It's a process that they have. There's opportunity for input in all of these processes today, as was testified before. NRDs today can, even in the granting of a new appropriation, provide input to the department, but it's not considered evidence, it's not something on which they can ask for a hearing, it's not something on which they can appeal. The same is true on the integrated management plan side. Political subdivisions, our irrigation district, for example, by law they're supposed to consult with us. But again, any information we give them is not considered evidence, it's not something on which we can appeal, it's not something on which we can get a hearing, because the courts have said the bar is very high. If they are going to lower the bar here, we think they need to lower the bar throughout. And this isn't...we don't think unconnected items. If you look today, most appropriations that are sought in this state are usually sought by political subdivisions. Very often there are new appropriations that are intended to make up for, or better make use of, or to counteract some loss that has occurred because of integrated management use somewhere else. So often, it's the same parties. But they're trying to say--well, we want to expand our ability to play in this area, but not in this. And that's the part that we object to. [LB404]

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SENATOR FRIESEN: I guess, yeah, and the part I see, though, is that in a granting of a water right that is not fully appropriated yet, typically no one would want any say in that, but when you start to reach that level of fully appropriation, by granting that water right when you surpass that amount, that's when you subject this new user to a...because of the new user, the new water right, you're creating some damage to other parties. [LB404]

MIKE DRAIN: And, Senator, I don't think...I was not trying to suggest that's not the case. We...I tried to acknowledge at the start of my testimony that we recognize some of those problems. But the same is also true where there's potential new surface water uses downstream even in a not-yet-declared area, maybe they want to look upstream and say--what should the integrated management be so that there remains enough stream flow left not depleted by wells for the next applicant that might be a political subdivision. [LB404]

SENATOR FRIESEN: Okay. That's the process I thought the integrated management plan addressed with everybody having input and everybody reaching agreement; where DNR is the overseer of that and makes the decision based on evidence presented. [LB404]

MIKE DRAIN: And if that's the process we want, there's no need for a change in the law today anywhere. Because today, someone concerned about whether or not the next granting of an appropriation will have that affect, can submit that information. There's a process already, the courts haven't ruled against it, that says--anybody can provide information for the department to consider. You can submit something to the department that says--here is why I think the granting of this appropriation would be bad for the public interest. The department can consider that. The department has it as one of their obligations under the statute to consider the public interest. What is being asked for is the ability to say--if we think the department has made the wrong decision regarding the public interest, we want the ability to also have had the hearing and maybe be able to appeal it. And we think if you're going to do that, you need to do it in all proceedings. [LB404]

SENATOR FRIESEN: Okay. I'll have to read it further; it's not the way I see it right now, but that's fine. Thank you very much. [LB404]

MIKE DRAIN: Thank you, Senator. [LB404]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, thank you, Mr. Drain, appreciate it. [LB404]

MIKE DRAIN: Thank you. [LB404]

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SENATOR SCHILZ: Further opposition? Good afternoon. [LB404]

BRIAN BARELS: (Exhibit 4) Good afternoon. Chairman Schilz and members of the Natural Resources Committee, my name is Brian Barels, B-r-i-a-n B-a-r-e-l-s. I'm the water resources manager for Nebraska Public Power District. NPPD has a number of operations throughout the state that utilize water resources, including electric power generation and irrigation delivery facilities. I have been responsible for managing NPPD's water rights for nearly 20 years and been involved in many of the task forces and have also worked with Senator Davis on the LR491 work group this summer. Last year, LB985 proposed similar provisions as LB404 to the statutes governing the decisions made by the DNR for new water appropriations or permits. As a result of concerns raised with LB985, as Senator Davis indicated, a work group was formed to address...and many issues were raised, talked about, and discussed. I participated in that work group, as I mentioned before. A conference call of the working group was held in January to receive feedback on language similar to that provided for in LB404. A number of concerns and questions and recommendations were discussed by the group on that call. However, none of those concerns or questions were addressed in the proposed legislation. I am testifying today in opposition to LB404 in order to bring my concerns and recommendations to this committee for your consideration. Part of the concerns relate and part of the discussions that occurred is--is this opening the door to evidentiary hearings, or is this opening the door to a public hearing process? And that is not clear. I think that you can get both interpretations from this proposed legislation. And my understanding of a consideration that the committee had and would recommend this committee is that this be clarified to provide that the department will hold a public hearing. And this would be a public hearing to take testimony from the water managers and consider in their decision. This necessarily wouldn't lead to a contested case-type provision and lawsuits with experts, engineers, and things like that. This kind of a procedure is presently provided for in the statutes under Section 46-713 2(a) and 46-714 paragraph (4), both related to the integrated management of surface water and groundwater that you have discussed previously here today. Additionally, I believe clarification is necessary as to how this bill relates to the existing statutes and rules of the department related to surface water appropriations or permits. For example, the language on page 6, lines 24 through 28, would be interpreted to limit those existing processes if a public manager does not submit a written analysis as identified in line 16. I have asked Steve Mossman, an attorney with significant experience in working with the existing statutes and rules to further describe this concern and he will, hopefully, follow my testimony here with that additional information for your consideration. I'm also concerned with two terms in the legislation. One that you brought up, Senator McCollister, has to do with the term of a qualified expert. As these are all public water managers, they carry a fair amount of expertise and should be able to provide that information to the department. As such, I would recommend that the words "that has been prepared by one or more qualified experts" be eliminated from the statute. I would also urge the committee to include a definition for "public interest" if we're going to pass this legislation forward. The existing statutes don't have a general definition of "public interest."



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But those statutes having to do with the interstate transfer of surface water, in-stream flows, and induced groundwater recharge all have their own definition of "public interest." Attached to my testimony, I have some proposed "public interest" language for your consideration. This was taken from a paper from Sandra Zellmer, a professor at the University of Nebraska, College of Law. And it's actually a subset and some provisions of the state of Alaska's provisions related to "public interest." And the last item I would bring for your attention is that the provisions for public water managers would be applicable to groundwater permits; or as Mr. Drain just said, all permits or appropriations issued by the department. With that I'd be glad to answer any questions the committee might have. [LB404]

SENATOR SCHILZ: Thank you, Mr. Barels. Any questions? Must have done a good job, thank you for your testimony. [LB404]

BRIAN BARELS: Thank you. [LB404]

SENATOR SCHILZ: Further opposition? Good afternoon. [LB404]

STEVE MOSSMAN: (Exhibit 5) Good afternoon. Chairman Schilz, members of the Natural Resources Committee, my name is Steve Mossman, S-t-e-v-e, Mossman is M-o-s-s-m-a-n. I'm an attorney at the Mattson Ricketts Law firm here in Lincoln and I'm appearing in opposition to LB404 on behalf of NPPD. I've been NPPD's outside water counsel for approximately 15 years. I've also previously served as both the chair of the Nebraska State Bar Association's natural resources and environmental law and its agricultural law sections. In the past two decades I've practiced water law in Nebraska. I've also served as the attorney in two of the leading Nebraska Supreme Court cases involving where the parties have standing to participate in water rights applications before the Department of Natural Resources, Ponderosa Ridge, LLC v. Banner County in 1996 and In Re Application A-18503 in 2013; first one involving groundwater and the second surface water. And as we've been talking about, standing is a legal right to participate in a lawsuit or an administrative hearing. Under existing Nebraska law, the right for parties to participate in most types of surface water applications before DNR does not rise explicitly under statute. Instead, it comes from department's rules of practice and procedure, specifically Chapter 7 of Title 454 dealing with what are called "contested cases." There's also Nebraska Statute, Neb.Rev.Stat. 61-206(1) which allows parties to request a hearing, generally, on DNR decisions. The Nebraska Supreme Court has made it clear, including in those two cases that I was involved in, that to have standing a party must show that they will suffer injury if granted. The problem that I see with LB404, as drafted, is that it would set up two processes for objections to surface water rights applications. First, the current process under Title 454 allowing parties with standing to object and have a contested case hearing, which is the explicit provision now. And then the second one that I think LB404 sets up is a process allowing a public water rights manager or user

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the right to provide a written analysis and request a second or single evidentiary hearing. And in looking at the bill, and I've looked at it on behalf of NPPD for...as it went through the drafting provision with LR491 and specifically what came out of LR491, the problem that I see with the bill, as it's drafted, is there are actually two processes that are here that could involve two separate evidentiary hearings, two separate records being created before the DNR, two separate appeals, all of them arising out of the same application. But those would have different parties challenging the application and these two separate proceedings. And as it is right now, again, parties with standing can object and request a hearing and introducing the water use managers and not integrating the two is the problem that I flagged for NPPD and the reason I was here today. Having long represented applicants for surface water appropriations before DNR, and we talked about how many of those are held, I represented a farmer in southeast Nebraska, his...a father-and-son farmer, at a hearing on an application for an appropriation and we had a trial in October. Four of the neighboring farm families objected and were found to have standing. We had a hearing then. At a hearing in the summer of 2013, up in Norfolk, involving objections to appropriations on a small creek up in north central Nebraska; so that's two that I've been involved in in the last two years. But I see this legislation as drafted as really presenting a problem to applicants for appropriations again, because there's two separate processes. And with those, that really kind of specific concern, I'd be happy to answer any questions that the committee might have about the process. [LB404]

SENATOR SCHILZ: Thank you, Mr. Mossman. Any questions? Senator Friesen. [LB404]

SENATOR FRIESEN: Thank you, Chairman Schilz. Mr. Mossman, so...I'm not an attorney so I won't question whether or not there's going to be two separate processes or any of that. So I'm more interested now, and I guess in the past when a surface water right was granted, unless you're another surface water right holder, you did not have standing to object, is that correct? [LB404]

STEVE MOSSMAN: Generally, the Supreme Court has said...the Nebraska Supreme Court has said the same...had the same standard for standing for a number of years. But it has been presented, certainly, recently with cases...with situations that have narrowed the group that is able to have standing to object and request a hearing. That's certainly accurate. I don't know that it would be technically limited to only other surface-water holders, but it would certainly be limited to parties or entities that could show that they would be injured by the granting of that appropriation. [LB404]

SENATOR FRIESEN: So let's go back to the time when there were probably some streams, we could look at the Platte River, whatever, where there were numerous groundwater irrigators and, obviously, with LB962 it required an integrated management plan because they are

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interconnected. So by granting more appropriations on that river, they were...they would have been damaging a groundwater pumper also, but the groundwater irrigator would have had no standing to object to any water right issuance. [LB404]

STEVE MOSSMAN: Well again, if the groundwater irrigator could put together a scenario where they could show that they'd be injured by the granting of the appropriation by a limitation on their ability to pump groundwater, that could be an injury, hypothetically, under that scenario. [LB404]

SENATOR FRIESEN: So they could have introduced evidence at that time and would have standing in the suit? [LB404]

STEVE MOSSMAN: Again, it's a hypothetical answer to that question, because I...you'd have to have some ability to show that they had an injury that could be...and the other language that the Supreme Court uses is that it can be redressed by participating in the proceeding and being heard on that application. [LB404]

SENATOR FRIESEN: But it probably never happened. There's never been a case like that. [LB404]

STEVE MOSSMAN: Not that I...I'm trying to think back to some of the appropriation cases. And part of it might have been the court has not, maybe, focused on standing as much as they have now. The first case that I was talking about, the Ponderosa Ridge case involved an application to transfer groundwater out of the state of Nebraska for a hog operation in Wyoming. And it was interesting because the Banner County itself was a party to that. They objected to the application; they came to the hearing; nobody raised standing at the DNR level. They get down to the Supreme Court and one of my law school classmates, who is now a judge, was representing Banner County, and he stood up and before he got his name out, the Chief Justice leaned over and said--why are you here? And eventually when that opinion came down, both Banner County, a political subdivision, and the North Platte NRD were found by the Supreme Court to not have standing. But nobody had ever raised that through the course of the proceeding. [LB404]

SENATOR FRIESEN: Okay. Thank you. [LB404]

STEVE MOSSMAN: Thank you. [LB404]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none... [LB404]

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STEVE MOSSMAN: Thank you. [LB404]

SENATOR SCHILZ: (Exhibits 6, 7, 8, and 9) Further opposition? In opposition, we have a couple of letters: one from Stu Lutich from Geneva in opposition; Duane Hovorka with the Nebraska Wildlife Federation; and Steven Smith from Scottsbluff, all in opposition to LB404. Any neutral testimony? Any neutral testimony? Seeing none, we also have one letter of neutral testimony from Timothy McCoy with the Nebraska Game and Parks Commission. With that we would welcome Senator Davis back to close, if he would wish. [LB404]

SENATOR DAVIS: I'm not going to say a whole lot, because as I said, it's a very technical issue and I think that you need to spend some time with your legal counsel and a few other things. If there are issues that we can address, we will do so. But the thing I do want to...there's several things I do want to say--we really worked awfully hard with all of these entities to try to put together something that everyone could...would support and would help everyone, because, really, that's the objective here. It's not to put one against the other, but to help everybody. We weren't able to really get that done. And so you have a letter from Steve Smith who in opposition, Steve was one of the people that worked hard on this with Don in trying to construct something. And then we had further objection that came along from municipalities; we tried to work through that. We did have a conference call the first part of the year and very little concern about that. So I will just touch on a few things. One of the...those in opposition talked about why...about that IMPs should have been included. But IMPs were not in the scope of what the LR was; that was not what we were trying to do. So we had no...there was no reason for us to touch on the IMPs, it was not applicable. Senator McCollister, with regard to the expert witness and the cost of it--of course, that's the case, but right now there isn't any ability for them to have any witnesses anyway, expert or not, because they don't have standing. So, you know, this is an improvement, in my opinion. It gives them something, but it doesn't open the door to everybody on earth coming in and saying I'm an expert witness and how does the court make that decision. So there was discussion about submitting documentation that would be in the public interest and why that would be one solution to that. And that's true, that would be a good solution. But that's not an appealable solution. You can't appeal that anywhere else; once they make their decision, that's the end of the line. So that's part of what we're trying to do is give another door...open another door in case the public entity finds that that really is not...that the courts...or the DNR finds that it's not in the best interest. So we had, as I said, we had a lot of work that was done. And I guess the last thing I'm going to say is LB404 gives you a limited statutory right to standing. That's all it really does. I hope that you'll look hard at this bill. We worked hard at it this summer trying to get everybody on board. Sorry we weren't able to do that. I am a little put out that we didn't have more cooperation all the way through. One of the testifiers earlier, I remember sending an e-mail out early and saying--I need to know what your problems are. And we just didn't get any input. So then it comes to this day right here and people show up negative. Thank you. [LB404]

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SENATOR SCHILZ: Thank you, Senator Davis. Any questions? So you would expect us to find out that information that you were looking for as well to move forward on this? [LB404]

SENATOR DAVIS: Well, I would like to, yes. [LB404]

SENATOR SCHILZ: So you think... [LB404]

SENATOR DAVIS: I think it's a legitimate case. And I think it really benefits everyone. [LB404]

SENATOR SCHILZ: Yeah. And it's...you think it's appropriate. [LB404]

SENATOR DAVIS: It looks to me as though some people are trying to hook into this bill to get what they want. And some of the things that they want we can't give them. [LB404]

SENATOR SCHILZ: Yeah. Senator Friesen. [LB404]

SENATOR FRIESEN: Chairman Schilz, thank you. Senator Davis, would it be fair to say if...if we get this piece done, is there more work that needs to be done to change some other parts of it? I mean, I...you said this opens a small door in a part of it. If we can get that portion done, is there other stuff that we should be looking at down the road to address? [LB404]

SENATOR DAVIS: Well, certainly, I think so. Steve Mossman talked about Banner County and not having standing and that issue. I mean, that's kind of like right along the same line as what we're trying to do here, because these public bodies do have an interest and they need to have a way to make their interests known before the DNR. So I think, yes, I think so. I think this bill might be able to do that if we can resolve the last little issues. [LB404]

SENATOR FRIESEN: Okay. [LB404]

SENATOR DAVIS: But maybe we're not going to be able to resolve them all. [LB404]

SENATOR FRIESEN: Well, I typically am one that likes to...you take small steps sometimes and you can accomplish some big goals. But if you recognize that it is just a step, that's one thing. So, appreciate that. Thank you. [LB404]

SENATOR DAVIS: Thank you, sir. [LB404]

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SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, thank you Senator Davis. [LB404]

SENATOR DAVIS: Thank you. [LB404]

SENATOR SCHILZ: That will close the hearing for today. Thank you for everyone coming and have a good weekend. (Also see Exhibit 10.) [LB404]