

EIGHTY-SEVENTH DAY - MAY 31, 2023

LEGISLATIVE JOURNAL

**ONE HUNDRED EIGHTH LEGISLATURE
FIRST SESSION**

EIGHTY-SEVENTH DAY

Legislative Chamber, Lincoln, Nebraska
Wednesday, May 31, 2023

PRAYER

The prayer was offered by Pastor William Miller, Faith Lutheran Church, Lincoln.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was offered by Senator Lowe.

ROLL CALL

Pursuant to adjournment, the Legislature met at 9:00 a.m., Speaker Arch presiding.

The roll was called and all members were present except Senators Blood, Bosn, Brewer, Briese, Day, Hunt, Linehan, Raybould, and Slama who were excused until they arrive.

CORRECTIONS FOR THE JOURNAL

The Journal for the eighty-sixth day was approved.

RESOLUTIONS

Pursuant to Rule 4, Sec. 5(b), LRs 249, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272 and 273 were adopted.

SPEAKER SIGNED

While the Legislature was in session and capable of transacting business, the Speaker signed the following: LRs 249, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272 and 273.

BILLS ON FINAL READING**Dispense With Reading at Large**

Pursuant to Rule 6, Section 8, the Legislature approved the dispensing of the reading at large of LB138 with 36 ayes, 3 nays, 3 present and not voting, and 7 excused and not voting.

The following bill was put upon final passage:

LEGISLATIVE BILL 138. With Emergency Clause.

A BILL FOR AN ACT relating to transportation; to amend sections 3-107, 13-1205, 29-431, 39-1348, 60-484.05, 60-484.06, 60-4,120, 60-4,142, 60-4,144, 60-4,172, 60-4,181, 60-601, 60-605, 60-611, 60-640, 60-678, 60-6,279, 60-6,282, and 66-4,100, Reissue Revised Statutes of Nebraska, and sections 39-847, 39-1351, 60-107, 60-119.01, 60-169, 60-302.01, 60-336.01, 60-386, 60-3,113.04, 60-3,193.01, 60-462, 60-462.01, 60-479.01, 60-4,111.01, 60-4,115, 60-4,122, 60-4,132, 60-4,134, 60-4,138, 60-4,147.02, 60-4,168, 60-501, 60-628.01, 60-6,265, 60-2705, 60-2909.01, 75-363, 75-364, 75-366, 75-369.03, 75-392, and 75-393, Revised Statutes Cumulative Supplement, 2022; to provide for the use of the Highway Cash Fund for administrative costs of the Division of Aeronautics of the Department of Transportation; to provide powers and duties; to change the required county contribution for bridge replacement; to provide for adjustments to threshold amounts for road construction contracts; to adopt updates to federal law and update certain federal references; to change provisions of the Motor Vehicle Operator's License Act as prescribed; to define and redefine terms; to provide for the regulation of electric bicycles as prescribed; to change and provide for certain penalties; to change provisions relating to helmets and eye protection as prescribed; to harmonize provisions; to provide operative dates; to repeal the original sections; and to declare an emergency.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass with the emergency clause attached?' "

Voting in the affirmative, 41:

Aguilar	Cavanaugh, J.	Fredrickson	Linehan	Vargas
Albrecht	Clements	Halloran	Lippincott	von Gillern
Arch	Conrad	Hansen	Lowe	Walz
Armendariz	DeBoer	Hardin	McDonnell	Wayne
Ballard	DeKay	Holdcroft	McKinney	Wishart
Bostar	Dorn	Hughes	Moser	
Bostelman	Dover	Ibach	Murman	
Brandt	Dungan	Jacobson	Riepe	
Briese	Erdman	Kauth	Sanders	

Voting in the negative, 0.

Present and not voting, 2:

Bosn Cavanaugh, M.

Excused and not voting, 6:

Blood	Day	Raybould
Brewer	Hunt	Slama

A constitutional two-thirds majority having voted in the affirmative, the bill was declared passed with the emergency clause and the title agreed to.

The following bill was read and put upon final passage:

LEGISLATIVE BILL 138A. With Emergency Clause.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 138, One Hundred Eighth Legislature, First Session, 2023; and to declare an emergency.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass with the emergency clause attached?' "

Voting in the affirmative, 42:

Aguilar	Briese	Erdman	Kauth	Sanders
Albrecht	Cavanaugh, J.	Fredrickson	Linehan	Vargas
Arch	Clements	Halloran	Lippincott	von Gillern
Armendariz	Conrad	Hansen	Lowe	Walz
Ballard	DeBoer	Hardin	McDonnell	Wayne
Bosn	DeKay	Holdercroft	McKinney	Wishart
Bostar	Dorn	Hughes	Moser	
Bostelman	Dover	Ibach	Murman	
Brandt	Dungan	Jacobson	Riepe	

Voting in the negative, 0.

Present and not voting, 1:

Cavanaugh, M.

Excused and not voting, 6:

Blood	Day	Raybould
Brewer	Hunt	Slama

A constitutional two-thirds majority having voted in the affirmative, the bill was declared passed with the emergency clause and the title agreed to.

Dispense With Reading at Large

Pursuant to Rule 6, Section 8, the Legislature approved the dispensing of the reading at large of LB298 with 37 ayes, 3 nays, 3 present and not voting, and 6 excused and not voting.

The following bill was put upon final passage:

LEGISLATIVE BILL 298.

A BILL FOR AN ACT relating to education; to amend section 79-101, Revised Statutes Cumulative Supplement, 2022; to require each school district to collect and provide information regarding learning disabilities and the school board of each school district to adopt a written dress code and grooming policy as prescribed; to require the State Department of Education to provide a report and to develop a model dress code and grooming policy for schools as prescribed; to adopt the Interstate Teacher Mobility Compact; to provide a duty for the State Board of Education; to define and redefine terms; to harmonize provisions; and to repeal the original section.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass?' "

Voting in the affirmative, 44:

Aguilar	Briese	Dungan	Jacobson	Raybould
Albrecht	Cavanaugh, J.	Erdman	Kauth	Riepe
Arch	Cavanaugh, M.	Fredrickson	Linehan	Sanders
Armendariz	Clements	Halloran	Lippincott	Vargas
Ballard	Conrad	Hansen	Lowe	von Gillern
Bosn	DeBoer	Hardin	McDonnell	Walz
Bostar	DeKay	Holdcroft	McKinney	Wayne
Bostelman	Dorn	Hughes	Moser	Wishart
Brandt	Dover	Ibach	Murman	

Voting in the negative, 0.

Excused and not voting, 5:

Blood Brewer Day Hunt Slama

A constitutional majority having voted in the affirmative, the bill was declared passed and the title agreed to.

The following bill was read and put upon final passage:

LEGISLATIVE BILL 298A.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 298, One Hundred Eighth Legislature, First Session, 2023.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the bill pass?' "

Voting in the affirmative, 44:

Aguilar	Briese	Dungan	Jacobson	Raybould
Albrecht	Cavanaugh, J.	Erdman	Kauth	Riepe
Arch	Cavanaugh, M.	Fredrickson	Linehan	Sanders
Armendariz	Clements	Halloran	Lippincott	Vargas
Ballard	Conrad	Hansen	Lowe	von Gillern
Bosn	DeBoer	Hardin	McDonnell	Walz
Bostar	DeKay	Holdcroft	McKinney	Wayne
Bostelman	Dorn	Hughes	Moser	Wishart
Brandt	Dover	Ibach	Murman	

Voting in the negative, 0.

Excused and not voting, 5:

Blood Brewer Day Hunt Slama

A constitutional majority having voted in the affirmative, the bill was declared passed and the title agreed to.

REFERENCE COMMITTEE REPORT

The Legislative Council Executive Board submits the following report:

LB/LR **Committee**
LR274 Judiciary

(Signed) Tom Briese, Chairperson
Executive Board

MOTION - Override Line-Item Veto on LB814

Senator Clements offered the Appropriations Committee motion, [MO1150](#), found on page 1760, to override the Governor's line-item veto of LB814, Section 96, Agency 25, Department of Health and Human Services, Program 344, Children's' Health Insurance.

Section 98, Agency 25, Department of Health and Human Services, Program 348, Medical Assistance.

Pending.

SPEAKER SIGNED

While the Legislature was in session and capable of transacting business, the Speaker signed the following: LBs 138e, 138Ae, 298, and 298A.

MOTIONS - Override Line-Item Vetoes on LB814

The Appropriations Committee motion [MO1150](#) found on page 1760 and considered in this day's Journal, to override the Governor's line item veto on LB814, was renewed.

Senator Clements moved for a call of the house. The motion prevailed with 23 ayes, 3 nays, and 23 not voting.

Whereupon the President stated: "The question shall be, 'Shall those portions of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 22:

Aguilar	Conrad	Fredrickson	Raybould	Wayne
Blood	Day	Hughes	Riepe	Wishart
Bostar	DeBoer	Hunt	Slama	
Brandt	Dorn	McDonnell	Vargas	
Cavanaugh, J.	Dungan	McKinney	Walz	

Voting in the negative, 24:

Albrecht	Brewer	Erdman	Jacobson	Moser
Armendariz	Briese	Halloran	Kauth	Murman
Ballard	Clements	Hansen	Linehan	Sanders
Bosn	DeKay	Hardin	Lippincott	von Gillern
Bostelman	Dover	Holdcroft	Lowe	

Present and not voting, 3:

Arch	Cavanaugh, M.	Ibach
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Having failed to receive a constitutional three-fifths majority voting in the affirmative, those portions of the bill failed to pass notwithstanding the line-item objections of the Governor.

The Chair declared the call raised.

Senator Clements offered the Appropriations Committee motion, [MO1151](#), found on page 1760, to override the Governor's line-item veto of LB814, Section 254, Agency 72, Department of Economic Development, Program 601, Community and Rural Development.

Pending.

EXPLANATION OF VOTE

Had I been present, I would have voted "aye" on final passage of LB138.

(Signed) Julie Slama

PRESENTED TO THE GOVERNOR

Presented to the Governor on May 31, 2023, at 9:55 a.m. were the following: LBs 138e, 138Ae, 298 and 298A.

(Signed) Jamie Leishman
Clerk of the Legislature's Office

MOTION - Override Line-Item Veto on LB814

The Appropriations Committee motion [MO1151](#) found on page 1760 and considered in this day's Journal, to override the Governor's line item veto on LB814, was renewed.

Pending.

EXECUTIVE BOARD REPORT

Senator Briese, Chairperson of the Executive Board, reported the appointments of the following members of the Legislature to the following select interim committee:

LR135 Select Interim Committee

Senator Blood
Senator Brandt
Senator Dover
Senator Hughes
Senator Moser

(Signed) Tom Briese, Chairperson
Legislative Council, Executive Board

EXPLANATIONS OF VOTES

Had I been present, I would have voted "aye" on final passage of LBs 754 and 754A.

(Signed) Jen Day

COMMITTEE REPORT

General Affairs

The General Affairs Committee desires to report favorably upon the appointment listed below. The Committee suggests the appointment be confirmed by the Legislature and suggests a record vote.

Brian Botsford - Nebraska Arts Council

Aye: 8. Brewer, Cavanaugh, J., Day, Hardin, Holdcroft, Hughes, Lowe, Raybould. Nay: 0. Absent: 0. Present and not voting: 0.

(Signed) John Lowe, Chairperson

ATTORNEY GENERAL'S OPINIONSOpinion 23-006

SUBJECT: LB396 – Whether an NRD can sell its land and retain the ability to use ground water for augmentation.

REQUESTED BY: Senator Steve Erdman
Nebraska State Legislature

WRITTEN BY: Mike Hilgers, Attorney General
Joshua E. Dethlefsen, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office about whether an entity formed pursuant to the Interlocal Cooperation Act, Neb. Rev. Stat. § 13-801 *et seq.* (2021), can be compelled to sell real property but retain and reserve the right to use ground water associated with that property. You refer specifically to the N-CORPE project, which was undertaken by four natural resources districts to augment surface water flows in the Republican River to ensure compliance with the Republican River Compact, and in the Platte River. Your question relates to LB396, which you introduced to specifically authorize natural resources districts ("NRDs") to enter into augmentation projects and to require the NRDs to sell the overlying land after the

augmentation project has been developed. Although your request mentions only "interlocal agreements," after reviewing your bill it is our understanding that you are asking specifically about NRD-led augmentation projects which may (like N-CORPE) or may not (like the Rock Creek augmentation project in the Upper Republican NRD) be accomplished by using an interlocal agreement. At root, your request implicates the more basic question of whether the right to use ground water can be severed from the overlying land. At common law, the right to use ground water is tied explicitly to the land, and therefore would preclude selling the land but reserving the right to use the ground water.

BACKGROUND

Your question implicates the legal relationship between an owner's rights in their land and corresponding rights to water. To help address that question, a brief description of the law regarding the right to use ground water is necessary.

Common Law Right to Use Ground Water

Under Nebraska common law, ground water is subject to the modified correlative rights doctrine. This approach is distinct from the English Rule, the American Rule, and the general correlative rights doctrine, also called the California Rule, that are used to regulate ground water in other places.

English Rule

Under the English Rule, also called the absolute ownership rule, "a landowner ha[s] absolute ownership of the waters under his or her land." *Spear T. Ranch v. Knaub*, 269 Neb. 177, 186, 691 N.W.2d 116, 127 (2005) ["*Spear T.*"]. Texas administers its ground water this way. See Texas Water Code Ann. § 36.002 ("The Legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."); *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 75 (1999) ("For over ninety years, this Court has adhered to the common-law rule of capture in allocating the respective rights and liabilities of neighboring landowners for use of groundwater flowing beneath their property. The rule of capture essentially allows, with some limited exceptions, a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells."). However, "[m]ost American courts . . . have criticized the English Rule, recognizing that the rule protected landowners from liability even when water was diverted for malicious purposes" and that "the overlying owner with the deepest well or largest pump could control water that would otherwise be available to wall." *Spear T.*, 269 at 187, 691 N.W.2d at 127.

American Rule

Under the American Rule, "the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others." *Id.* The American Rule "does not consider a balancing of the parties' interests." *Id.* at 188. "Under the American rule, a person who is deprived of surface water because of the use of ground water by a nearby landowner will recover only when the water was not used for a beneficial purpose on the ground water user's land." *Id.* at 188, 691 N.W. 2d at 128.

California Rule

The California Rule "provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal." *Id.* at 188, 691 N.W. 2d at 128. "[T]he overlying landowners have no proprietary interest in the water under their ground and each owner over a common pool has a correlative right to make a beneficial use of the water on his or her land. Priority of use is irrelevant because in times of shortage, the common supply is apportioned among the landowners based on their reasonable needs." *Id.* at 188, 691 N.W. 2d at 128.

Nebraska's Rule – Modified Correlative Rights

Under Nebraska common law, ground water is subject to the modified correlative rights doctrine, which pulls from both the American Rule and the California Rule. Under this doctrine:

[T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole....

Sorenson v. Lower Niobrara Nat. Resources Dist., 221 Neb. 180, 188, 376 N.W.2d 539, 546 (1985) ["*Sorenson*"] (quoting *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)). Put otherwise, "[q]ualified by the requirement of a reasonable, proportionate sharing during shortage of ground water, Nebraska's common law permits a landowner to use ground water extracted from beneath the owner's land, provided such landowner's extraction does not exceed a reasonable and beneficial use on the landowner's property." *Id.* at 189, 376 N.W.2d at 546 (citing *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933)). This rule takes the "reasonable and beneficial use on the user's land" aspect from the American

Rule and the entitlement "to a reasonable proportion of the whole" during times of shortage from the California Rule.

This doctrine has been recognized by the Legislature in the Ground Water Management and Protection Act: "Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient to meet the reasonable needs of all users." Neb. Rev. Stat. § 46-702 (2021); *see also* Richard S. Harnsberger & Norman W. Thorson, *Nebraska Water Law and Administration*, p. 249 (Butterworth Legal Publishers, 1984) (referring to an earlier version of the above-quoted language as "notable" because "the legislature specifically accept[ed] the correlative-rights doctrine as defining the underlying system of groundwater property rights").

Under Nebraska common law, the right to use ground water has always been tied explicitly to ownership of the overlying land. *See, e.g., Sorenson*, 221 Neb. at 191, 376 N.W.2d at 547 ("[T]he right to use ground water is a derivative right immediately dependent on ownership of the surface over a source of ground water."). In fact, the Supreme Court has gone so far as to hold that the right to use ground water cannot be separated from ownership of the overlying land. In *Upper Republican Natural Resources District v. Dundy County Board of Equalization*, 300 Neb. 256, 912 N.W.2d 796 (2018), the Court considered the question of whether property was being used for a public purpose when the primary purpose for owning the property was for the ground water underneath the land, rather than for the surface estate. The Court found that there was "no reason to treat underground uses – in this case, the aquifer, wells, and pipeline system – differently from any other use of the property." 300 Neb. at 285; 912 N.W.2d at 814. The Court further stated: "[I]t is clear that the right to use ground water is an attribute of owning fee simple title to land overlying a source of ground water **and is inseparable from the land to which it applies.**" 300 Neb. at 285, 912 N.W.2d at 814-15 (*quoting Sorenson*, 221 Neb. at 191, 376 N.W.2d at 548) (emphasis added). There is no support in case law or current Nebraska statute for the proposition that the right to use ground water can be severed from ownership of the overlying land.

In addition, the right to appropriate ground water is a usufructuary right, which is a legal term meaning it is a right to use rather than an absolute ownership right. So a landowner has a right to use ground water, but does not actually own the ground water under the land. *See, e.g., Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 313, 512 N.W.2d 642, 652 (1994) ("[G]round water, as defined in § 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water."). This is different than states like Texas that use the English Rule, where the ground water is owned as part of the real property.

These features distinguish ground water from other subterranean interests, such as mineral interests, which can be owned, sold, resold, leased, or subleased separately from the overlying land. *See, e.g.*, Neb. Rev. Stat. §§ 57-227 to 57-239. A mineral right can be severed from ownership of the overlying land. *See, e.g.*, Neb. Rev. Stat. §§ 57-227 to 57-231. "When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate of inheritance subject to the laws of descent, devise, and conveyance." *Wheelock v. Heath*, 201 Neb. 835, 841, 272 N.W.2d 768, 771 (1978) (quoting 54 Am.Jur.2d, Mines and Minerals, s. 116, p. 298). Further, "[a] grantee of the minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. The minerals thus severed become a separate corporeal hereditament. Their ownership is attended with all the attributes and incidents peculiar to ownership of land, and they may be embraced in the terms 'land' or 'real property' in a subsequent conveyance." *Id.* Therefore, mineral interests differ from the right to use ground water both because they can be severed from the surface estate and because an interest can be held in the minerals themselves, rather than simply a right to use the minerals.

At common law, the use of ground water is tied to the land and cannot be separated, as it could be in states that consider ground water to be owned by the landowner as real property. Therefore, under Nebraska's common law, an NRD could not separate water rights from the ownership of the land for projects such as N-CORPE.

Legislative Abrogation of Common Law

The Nebraska Legislature may alter the common law through statute. The Supreme Court has specifically noted the primacy of the Legislature in making policy decisions regarding the use of ground water. *See, e.g., In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 801, 140 N.W.2d 626, 637 (1966) (Describing its limited decision as "thus preserving the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use."); *Estermann v. Bose*, 296 Neb. 228, 258, 892 N.W.2d 857, 877 (2017) ("We have previously stated that Nebraska's common law does not allow water to be transferred off overlying land. However, we have made it clear that the Legislature may provide exceptions to this common-law rule." (internal citations omitted)).

Such alterations to the common law can be through authorizing actions not previously recognized by the common law or by abrogating the common law through specific statutory language. There are at least two examples where the Legislature has authorized actions not recognized by the common law regarding land ownership and the ability to use ground water for specific purposes on that land. The first is the Municipal and Rural Domestic Ground Water Transfers Permit Act ("Municipal Transfers Act"), Neb. Rev. Stat. § 46-638 *et seq.* (2021), which allows a public water

supplier to apply to the Department of Natural Resources ("DNR") for a permit to pump ground water to be transported off the overlying land to serve other areas beyond that owned by the applicant. The applicant must show the amount of water requested, maps of all water wells, and any other necessary information. Neb. Rev. Stat. § 46-639 (2021). After public notice, DNR evaluates the application to determine if "the withdrawal and transportation of ground water requested by the applicant are reasonable, are not contrary to the conservation and beneficial use of ground water, and are not otherwise detrimental to the public welfare." Neb. Rev. Stat. § 46-642 (2021).

The second is the Industrial Ground Water Regulatory Act ("Industrial Transfers Act"), Neb. Rev. Stat. § 46-675 *et seq.* (2021), which allows industrial users to apply to DNR for a permit to pump and transfer ground water. Again, DNR must evaluate the application for a number of factors, including "[p]ossible adverse effects on existing surface or ground water users," "[t]he effect of the withdrawal and any transfer of ground water on surface or ground water supplies needed to meet reasonable anticipated domestic and agricultural demands in the area of the proposed ground water withdrawal," "[t]he availability of alternative sources of surface or ground water reasonably accessible to the applicant in or near the region of the proposed withdrawal or use," and "[t]he effects on interstate compacts or decrees and the fulfillment of the provisions of any other state contract or agreement." Neb. Rev. Stat. § 46-683 (2021). Although these Acts authorize actions not previously authorized by the common law, they do not abrogate the nature of the use right under common law.

Statutes that purport to alter or abrogate the common law, as opposed to statutory authorizations not previously recognized by the common law, are strictly construed and a statute will not be interpreted to remove a common law right unless the plain words of the statute require such an interpretation. *See In re 2007 Administration of Appropriations of the Waters of the Niobrara River*, 283 Neb. 629, 653, 820 N.W.2d 44, 64 (2012) ["*Niobrara River*"] ("Furthermore, statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it."). For example, in *Niobrara River*, the Supreme Court determined that a statute regarding cancellation of water rights did not abrogate common law methods of cancellation because the plain language of the statute did not compel such a conclusion:

The plain and unambiguous language of §§ 46-229 to 46-229.05 merely provides the procedure by which the Department must abide when terminating an owner's or a successor's appropriation right. This language does not explicitly address the common-law theories of abandonment and nonuse. Absent express statutory provision, we must construe § 46-229 in a manner which does not restrict or remove the common-law method of cancellation. As

such, we determine that § 46-229 is a procedural provision that does not abrogate the common law.

Id. The Court has further made clear that "the common law will be abrogated no further than expressly declared or than is required from the clear import of the language employed by the statute." *Dykes v. Scotts Bluff County Agr. Society, Inc.*, 260 Neb. 375, 383, 617 N.W.2d 817, 823 (2000).

The force of these decisions is clear: if the Legislature chooses to alter or abrogate the common law, it must do so clearly and explicitly by declaring with specificity what aspects of the common law the statute intends to abrogate. It is within this framework that we analyze LB396.

ANALYSIS

Having concluded that the Legislature has the power to authorize actions not previously recognized by the common law or that abrogate the common law, we turn now to the language of LB396. We presume that your intent was to abrogate the common law connection between land ownership and the ability to use ground water to "reserve and retain" the right for the NRDs exclusively, meaning that the new owners of the augmentation project property would not reserve the right to use ground water themselves. LB396 includes three provisions. We discuss each of them in turn.

LB396 first provides express authority to NRDs to "develop augmentation projects as described in subdivision (3)(e) of section 46-715 and to acquire real property for such augmentation purposes." LB396, at ¶ 1. This would explicitly codify the Nebraska Supreme Court's ruling in *Estermann v. Bose* that the NRDs already have this power under various Nebraska statutes. *See Estermann*, 296 Neb. 228, 892 N.W.2d 857. This section does not purport to modify the common law.

Next, LB396 provides that "[a]fter an augmentation project has been developed, the natural resources district or districts owning such project shall sell the overlying surface interest but may retain and reserve the right to ground water located beneath such land." *Id.* at ¶ 2. We conclude that this provision does not expressly abrogate the common law with regard to whether the new owners of the augmentation property could use ground water. Rather than include express language to that end, the provision operates mostly by implication—it introduces a (new) concept in the ground water context, the "retain and reserve" language from law relating to mineral rights. This may authorize an action not previously authorized by common law, but probably does not abrogate the common law connection between land ownership and ground water use for the new owners of the augmentation property.

The final section of LB396 states that "[t]he owner or owners of the augmentation project are entitled to the reasonable and beneficial use of ground water to which such right was retained and reserved pursuant to

subsection (2) of this section. The quantity of such ground water available to the augmentation project shall be the same as if the overlying surface interest had been retained by the owner or owners of the augmentation project." *Id.* at ¶ 3.

This section, like the others, does not purport to directly abrogate the common law connection between land ownership and ground water use for the new owners of the augmentation property. Instead, this section attempts to define the nature of the right held by the NRD after sale of augmentation property. While such a reservation is common in the realm of mineral interests, this would appear to be unique in Nebraska water law and it is not defined. *See generally* Neb. Rev. Stat. § 57-229 (2021) (referring to "rights conveyed or reserved" in the context of mineral rights). We conclude that this section, like the others, is not sufficiently explicit and clear in its attempt to abrogate the common law connection between land ownership and ground water use for new owners of the augmentation property.

First, the section lacks any explicit language abrogating the common law rights; if it purports to do so at all, it does so only by implication. And even this implication is unclear, as there is a lack of direction for how this term could be used in the ground water context. Because ground water has never been classified or treated as a mineral interest in Nebraska, its use here in the ground water context does not define the scope of an NRD's right to continue withdrawing ground water for augmentation purposes after a forced sale is completed and therefore cannot form an explicit and sufficient basis on which a statutory abrogation of the common law could rest.

Second, even assuming that there existed an explicit authorization to abrogate the common law in this way, the current language presents multiple potential conflicting interpretations regarding this phrase. For example, as indicated above, this language could be interpreted such that the NRD "retains and reserves" the ability to use ground water as if it still owned the overlying land, but that the new owners of such land would still be able to use ground water consistent with the common law right—particularly because the language used is probably not sufficient to sever the connection between land ownership and ground water use for the new owners of the augmentation property. At the same time, it is possible that the language "retain and reserve" is meant to sever the common law right to use ground water associated with the overlying land and allocate such ground water rights to the NRD exclusively. These are conflicting interpretations which create an inherent ambiguity.

Third, the use of the phrase in this paragraph is inconsistent with the use of the phrase in the previous paragraph. Paragraph 2 mentions "the right to the ground water beneath such land." That language would tend to indicate an interest in the water itself, as a landowner would have in a state that follows the English Rule, as opposed to the use of the water. This would contradict the usufructuary, or use, nature of a ground water right. At the same time, Paragraph 3 refers to "the reasonable and beneficial use of

ground water," which would appear to refer to the normal right to use under the modified correlative rights doctrine, rather than an interest in the actual water. And paragraph 3 also refers to "the quantity of ground water available," which seems to refer to an interest in a specific amount of water rather than a use right limited by the effect of that use on other ground water users. This conflict—between a modification of the right to use the water and an attempted creation of an ownership interest in the water—creates a structural ambiguity and conflict in the law that is inconsistent with the mandate that the Legislature act "clearly and expressly" in order to abrogate the common law.

We conclude from these factors, considered independently and in combination, that LB396, if strictly construed, does not explicitly abrogate the common law modified correlative rights doctrine. To the extent it purports to authorize an action not previously recognized by the common law, the bill contains no details with regard to how such authorization would operate.

We note that there are additional follow-on questions that are not addressed in LB396 and therefore outside the scope of this analysis. For instance:

- If both the landowner and the NRDs have equal entitlement to use ground water from the same parcel, how would the correlative rights doctrine be applied?
- Would the augmentation project be prohibited or limited from the use of ground water, or owe damages, due to its effect on the use by the landowner?
- If the right to use ground water is severed from the land and only the NRDs retain the right to use, what happens if the NRD abandons the augmentation project?
- Is that right then held by the NRD for another purpose? Can it be transferred further? Does it revert to the purchasers of the overlying acres?
- If LB396 legally severs the ability to use ground water on those acres, by what mechanism could that right be granted again?

Because you specifically mentioned N-CORPE in your request, we would also mention that there is no language in the bill that indicates whether LB396 is intended to be retroactive in effect. Thus, it is unclear whether LB396 would apply to N-CORPE. We have not addressed the constitutionality of retroactive application of LB396.

CONCLUSION

At common law, the ability to use ground water has always been tied to ownership of the overlying land and so would not allow N-CORPE or other similarly situated augmentation projects to sell the land and retain the ability

to pump ground water as if they still owned the land. The Legislature has the authority to abrogate the common law by statute but must do so with clear and express language. We conclude that the language of LB396 is not sufficiently clear and express so as to abrogate the common law.

Sincerely,
MIKE HILGERS
Attorney General
(Signed) Joshua E. Dethlefsen
Assistant Attorney General

pc Brandon Metzler
Clerk of the Legislature

Opinion 23-007

SUBJECT: Constitutionality of Legislation Authorizing the Award of Punitive Damages for the Support of the Common Schools (LB 25).

REQUESTED BY: Senator Teresa Ibach
Nebraska Legislature

WRITTEN BY: Mike Hilgers, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

LB 25 proposes to authorize the award of punitive damages in civil actions when a party "has displayed actual intent to cause harm or causes an injury through action taken in reckless disregard for the lives and safety of others." LB 25, § 3. "Punitive damages" are defined as "damages that a party in a civil action are ordered to pay (a) based on aggravating circumstances, (b) to penalize such party, or (c) to provide additional deterrence and discourage similar conduct in the future." LB 25, § 5(3). LB 25 includes legislative findings that "Article VII, section 5, of the Constitution of Nebraska provides in part that all fines, penalties, and license money arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed..." and that this constitutional provision "further provides that all such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." LB 25, § 1(1), (2). It further declares that "[p]unitive damages are in the nature of fines or penalties." LB 25, § 1(3). If punitive damages are awarded, the county attorney must be notified, and "may become a party solely to protect the interests of the common schools

in such damages." LB 25, § 4(2). "Any award of punitive damages shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska." LB 25, § 6.

You request our opinion on the constitutionality of the bill's authorization of an award of punitive damages for the support of the common schools. You also ask us to address whether punitive damages are fines or penalties within the meaning of Neb. Const. art. VII, § 5, and, if so, may the county attorney be made a party to the civil action in which punitive damages are awarded to protect the interests of the common schools in such damages.

ANALYSIS

Neb. Const. art. VII, § 5 [the "Penalties Clause"], provides, with certain exceptions, that:

all fines, penalties, and license money arising under the general laws of the state. . . shall belong and be paid over to the counties respectively where the same may be levied or imposed,.... All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue,....

LB 25 would allow the award of punitive damages in civil actions, with the damages treated as fines or penalties required to be distributed to the common schools as directed under art. VII, § 5. Before addressing your questions related to the bill, we begin with a summary of the Nebraska Supreme Court's caselaw addressing the constitutionality of punitive damages.

A. Nebraska Caselaw Addressing the Constitutionality of Punitive Damages.

The Nebraska Supreme Court has identified two separate bases for finding punitive damages unconstitutional under the Nebraska Constitution. The first is the due process clause; the second is the Penalties Clause. We discuss each in turn.

1. The Court's first recognition of punitive damages as a violation of the due process clause.

In *Boyer v. Barr*, 8 Neb. 68 (1878) ["*Boyer*"], the Nebraska Supreme Court considered whether punitive damages could be awarded in a civil action for assault and battery. The jury was instructed that, if it found the defendant acted deliberately and maliciously, it could award punitive or exemplary damages in addition to compensating the plaintiff for the actual injury. The Court noted that "the adjudicated cases" and "conclusions of eminent text writers of either this country or England" were "pretty evenly divided both in numbers and weight of authority" on whether "punitive or

exemplary damages can be allowed in a civil action," and that this was "the first time" it had considered "the question of punitive, vindictive, or exemplary damages." *Id.* at 71, 73. Discussing authorities from other jurisdictions disapproving the practice of awarding punitive damages in civil actions, the Court, "[a]pproving...the law as laid down in" those cases, found the jury instruction on punitive damages improper. *Id.* at 75. While not expressly citing the due process clause as the basis for its holding, the cases relied on by the Court in *Boyer* included a New Hampshire Supreme Court decision rejecting punitive damages in civil actions "to keep the civil and criminal process and practice distinct and separate" and characterizing such damages as "destroy[ing] every constitutional safeguard within their reach." *Id.* at 72 (quoting *Fay v. Parker*, 53 N.H. 342, 397 (1872)).¹

The Court's reliance on due process as the basis for rejecting the award of punitive damages to private parties in civil cases was repeated in *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881) [*"Riewe"*]. Finding a request "for instructions as to exemplary damages" was "properly refused" in a replevin action, the Court cited *Boyer* in holding "that in addition to full compensation for the injury sustained there cannot be added a further sum as a fine for the punishment of the defendant." *Id.* at ___, 9 N.W. at 89. Explaining its rationale, the Court stated:

Damages should be equal in amount to the injury sustained; but upon what principle should they be given in excess of that amount? In law the injured party, upon being paid the damages sustained by the injury, has received full compensation therefor. Why then should the property of the party causing the injury be taken from him and given to another without compensation? Constitutional guarantees of the rights of private property amount to but little if courts sanction its practical confiscation under the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do, without regard to the amount of the injury. If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals. *Id.* at ___, 9 N.W. at 89-90.

The early decisions in *Boyer* and *Riewe* rejected punitive damages on due process grounds. Neither case relied on or mentioned the Penalties Clause in disapproving punitive damages.

2. *The Court's first recognition of punitive damages as a violation of the Penalties Clause.*

Unlike *Boyer* and *Riewe*, one early case relied on the Penalties Clause in finding a punitive damage provision unconstitutional. In *Atchison & Nebraska R.R. Co. v. Baty*, 6 Neb. 37 (1877) [*"Baty"*], the Court held a statute giving owners of livestock "double the value of the property injured,

killed, or destroyed" on a railroad track was unconstitutional. After an extensive discussion of the constitutional right to due process, the Court stated it was "an established maxim in the polity of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of a crime, or when the sacrifice of his property is demanded by a just regard of the public welfare." *Id.* at 45. The Court then noted:

Again, it seems clear that the statute in question is incompatible with another provision of the constitution. It will not be pretended that the act was intended to define a statutory criminal offense. Still, it is impossible to regard the excess beyond the value of the property in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment; but this penalty or fine is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the constitution which declares that "all fines and penalties," etc., "shall be appropriated exclusively to the use and support of common schools." *Id.*

Two years after deciding *Baty*, the Court modified the rule in that case and upheld the constitutionality of a statute requiring officers charging fees greater than allowed by law to forfeit and pay the injured party fifty dollars. *Graham v. Kibble*, 9 Neb. 182, 2 N.W. 455 (1879) ["*Graham*"]. Discussing the constitutional provision requiring that "[a]ll fines, penalties, and license moneys arising under the general laws of the state...shall be appropriated for use exclusively to the usual support of common schools," it stated that, "[o]n mature reflection we are not prepared to say, nor do we think it was intended by this provision of the constitution to deprive the legislature of the power to pass statutes like the one in question, whereby a fixed sum, in the nature of liquidated damages, is given to one who has suffered injury by the wrongful act or oppression of a public officer." *Id.* at ____, 2 N.W. at 456. The Court further explained:

This section of the constitution, as we understand it, has no reference to those damages, whether limited in the amount recoverable or not, which a private person may sustain, but solely to such as under the law of the land are given to the public, and go into the public treasury. Its object, doubtless, was to correct what was considered abuses in the disposition of public moneys realized from the several sources therein mentioned, and to ensure their proper expenditure in the future. Its evident scope is to give direction to the distribution of the several funds belonging under the law to the public at large, or to a particular subdivision thereof, and thereby insure an equitable distribution, viz.: to the particular subdivision of the public upon whom rests the chief responsibility and expense of enforcing the criminal laws and police regulations of the people. *Id.* ____, 2 N.W. at 456-57.

While decided around the same time as *Boyer* and *Riewe*, *Baty* cited both the due process clause and the Penalties Clause in finding a punitive damage provision unconstitutional. Further, in *Graham*, the Court recognized that a reasonable amount fixed as liquidated damages was not a penalty subject to the Penalties Clause.

3. *Subsequent case law affirming that punitive damages are violations of both the due process clause and Penalties Clause.*

In *Sunderland Bros. Co. v. Chicago, B. & Q. R.R. Co.*, 104 Neb. 319, 177 N.W. 156 (1920), the Court considered the constitutionality of a statute allowing shippers to recover from railroads, in addition to actual damages, one dollar per day for delay in the shipment and delivery of goods. In its original opinion, the Court determined that, if the statute provided a fine or penalty in addition to actual damages, it violated the constitutional requirement that all fines and penalties arising under the general laws of the state go to the school fund. *Id.* at 321, 177 N.W. 157. "If treated as liquidated damages, the Legislature [was] acting beyond its authority in seeking to appropriate private property to private use." *Id.* Because the statute sought "to impose a greater liability in damages than compensatory damages," the Court found "it [was] taking private property for private use, which is unconstitutional." *Id.* at 322, 177 N.W. at 157.

On rehearing, the Court issued an opinion concluding that the statute imposed a fine or penalty recoverable by a private party in violation of the constitutional mandate that all fines and penalties arising under the state's general laws be used to support the common schools. *Sunderland Bros. Co. v. Chicago B. & Q. R.R. Co.*, 104 Neb. 319, 179 N.W. 546 (1920) [*"Sunderland Bros."*]. The Court noted its earlier decision in *Baty* holding a statute compelling a railroad company to pay double the value of livestock killed upon the track created an unconstitutional penalty. *Id.* at 324, 179 N.W. at 547. In response to the claim that the rule in *Baty* was "out of line with the general holding in other states," the Court disagreed, stating:

It is true that in other states penalties have been imposed for a violation of statutory duty, and these penalties have been, in many instances, recoverable by the individual, instead of by the state. Those states, however, do not, so far as our attention has been called, have such a constitutional provision as the one we have in this state, providing that all fines and penalties shall be appropriated exclusively to the use and support of the common schools. The cases in other jurisdictions discuss the validity of penalty statutes, as affected by general constitutional provisions, such as the requirement of due process of law and equal protection of the law, and under those constitutional provisions such penalty statutes are not prohibited. *Id.* 328, 179 N.W. at 548.²

The Court later relied on *Sunderland Bros.* in holding unconstitutional a statute providing for the recovery of treble damages in an action against an attorney for deceit. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 926 (1960) [*"Abel"*]. Noting there was "confusion in the cases as to the meaning of the words 'fines, penalties, and license money' contained in Article VII, section 5 of the Constitution..." the Court, citing *Sunderland Bros.*, explained:

The holdings of that case are: A statute which imposes a liability for actual damages and in addition thereto a penalty to be paid to the injured party is repugnant to section 5, Article VIII, now Article VII, of the Constitution, which requires all fines and penalties arising under the general laws to go exclusively to the school fund. A statute which imposes liability for actual damages and additional liability for the same act provides a penalty. 170 Neb. at 930, 104 N.W.2d at 688.

The Court drew a distinction between permissible legislation providing for "liquidated damages in favor of a private person, although in the form of a penalty, if the amount provided bears a reasonable relation to the actual damages," and improper legislation providing "for the payment of an amount clearly in excess of compensatory damages," which constituted "a penalty and violates the due process clause of the Constitution when considered with Art. VII, section 5." *Id.* at 931, 104 N.W.2d at 689. While noting courts in other jurisdictions had upheld similar statutes against due process and equal protection clause challenges, it stated "such has not been the holding when the Constitution contains a provision similar to that in Article VII, section 5, of the Constitution." *Id.* The Court concluded that,

[w]hether or not the granting of double or treble damages is a violation of the due process clause standing alone, it is a violation of such clause when considered with Article VII, section 5 of the Constitution. Since all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is violative of the cited constitutional provisions....The effect of the statute is to authorize the actual compensatory damages to be determined, and then arbitrarily requires the defendant to pay to the plaintiff three times that sum. It therefore exceeds compensatory damages three time over and is a penalty prohibited by the due process clause, Article I, section 3, and Article VII, section 5, of the Constitution of Nebraska. *Id.* at 932, 104 N.W.2d at 689.

Addressing what it called "[a]rguments...advanced by text writers and case reviewers that compensatory damages include not only the actual damages sustained, but include actual cumulative harm and incentive liability..." the Court stated:

The adoption of such a theory as reason for sustaining double and treble damages to private persons would inject into the law a

recovery of damages for reasons that were purely speculative and conjectural. It would be an excuse for permitting punitive and exemplary damages, the recovery of which has been consistently condemned by the law of this state. We find no logic in the argument that a statute may properly permit the recovery of such damages in view of our cited constitutional provisions prohibiting penalties in favor of private persons. If any such damages could be established, they must be recovered as actual compensatory damages.

We necessarily conclude that penalties in favor of private persons are prohibited by the two cited sections of the Constitution. That necessarily requires us to hold that the recovery of double or treble damages, that is, damages which double or treble the actual compensatory damages established, are in contravention of the same sections of the Nebraska Constitution. *Id.* at 932-33, 104 N.W.2d at 690.

Abel recognized that "impos[ing] liability for actual damages and additional liability for the same act provides a penalty." 170 Neb. at 930, 104 N.W.2d at 688. The *Abel* Court relied on *Sunderland Bros.* to reinforce the connection between the due process clause and Penalties Clause in striking down a treble damage statute as an impermissible penalty recoverable by a private party.

4. *Post-Abel decisions interpreting the Penalties Clause.*

The Court distinguished *Abel* in holding that damages above actual damages allowed under the Workers Compensation Act to compensate for delay in payment did not authorize recovery of a penalty by a private person in violation of art. VII, § 5 because "[t]he Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit....Compensation under the act need bear no relationship to actual damages resulting from the injury." *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 843-44, 212 N.W.2d 704, 706 (1973). Subsequently, the Court found that, because the parental liability statute imposed liability only for actual damages, it did not establish a fine or penalty prohibited by art. VII, § 5. *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). More recently, the Court held a Consumer Protection Act statute authorizing the Attorney General to seek civil penalties did not violate art. VII, § 5. *State ex rel. Stenberg v. American Midlands, Inc.*, 244 Neb. 887, 509 N.W.2d 633 (1994). While noting it held in *Abel* "that a statute which provides for a penalty in excess of actual damages paid to an injured party in a civil action violates" art. VII, § 5, the Court found that "[u]nlike *Abel*, the present case does not involve the payment of civil penalties to a private plaintiff." *Id.* at 893, 509 N.W.2d at 637. The Court's post-*Abel* decisions, however, do not address punitive damages in relation to the due process clause in the Nebraska Constitution.⁵

B. Nature of Punitive Damages and the Constitutionality of the Award of Punitive Damages Under LB 25.

1. LB 25 under the Penalties Clause.

LB 25 would authorize the award of punitive damages in civil actions as penalties to be distributed to the common schools in accordance with art. VII, § 5. In light of the authority relating to the Penalties Clause discussed above, we will address whether the punitive damages proposed are "fines" or "penalties" within the meaning of this constitutional provision.

Punitive damages are defined in LB 25 as "damages that a party in a civil action are ordered to pay (a) based on aggravating circumstances, (b) to penalize such party, or (c) to provide additional deterrence and discourage similar conduct in the future." LB 25, § 2(3). Punitive damages do "not include compensatory or nominal damages." "Compensatory damages means damages intended to make whole the loss of an injured party and no more." LB 25, § 2(1). "Nominal damages are damages that are not designed to compensate an injured party and are less than one thousand dollars." LB 25, § 2(2). Under *Abel*, "[a] statute which imposes liability for actual damages and additional liability for the same act provides a penalty." 170 Neb. at 930, 104 N.W.2d at 688. As the punitive damages authorized by LB 25 impose liability in addition to actual damages for the same act, they are a penalty under art. VII, § 5.⁴

While a penalty to a private litigant consistently has been held unconstitutional, that restriction does not create a *per se* bar to punitive damages under the Penalties Clause. Powers, Vincent M., *Punitive Damages in Nebraska*, *The Nebraska Lawyer* 18, 19 (June 2003) ["Powers"] (arguing that punitive damages are not prohibited but, because they are a penalty, they cannot be recovered by a private litigant and must be paid into the school fund).

Because LB 25 would not permit the award of punitive damages to private litigants, but instead to the common schools in accordance with art. VII, § 5, we think that LB 25 would likely be constitutional under this constitutional provision.⁵

2. LB 25 under the Due Process Clause.

The other constitutional barrier to punitive damages is the due process clause. As noted previously, the decisions in *Boyer* and *Riewe* rejected punitive damages on due process grounds. Other decisions, however, cited both the due process clause and Penalties Clause in finding punitive damages unconstitutional. *Baty* discussed due process extensively but also mentioned the requirement that penalties be used to support the schools. The original opinion in *Sunderland Bros.* relied on both constitutional provisions, while on rehearing the Court emphasized the requirement that penalties be appropriated for the common schools. And *Abel* held the treble

damage statute created a penalty which "violated the due process clause of the Constitution when considered with Art. VII, section 5." 170 Neb. at 931, 104 N.W.2d at 689 (emphasis added). The Court has characterized such damages as "purely speculative and conjectural" (*Abel*, 170 Neb. at 933, 104 N.W.2d at 690), and has never expressly or impliedly overruled either *Boyer* or *Riewe*. Unless and until those precedents are overturned, we conclude that punitive damages are unconstitutional under the due process clause.

C. Role of the County Attorney Under LB 25.

Finally, you ask if there are "legal concerns" in "essentially [joining] the schools and county attorney as interested parties in a civil matter?"

LB 25 does not make school districts a party to any civil action asserting a claim for punitive damages. The question has been raised whether a claim for punitive damages to benefit the schools gives the school fund "an interest in the litigation that is protectable," and, "[i]f so, how is that interest protected?" Introduction—Nebraska, 1 Punitive Damages: Law and Prac. 2d § 11:28 (2022). As the bill does not attempt to make the schools or school districts parties to civil cases where punitive damages are sought, however, it is not necessary to address this question.

The bill does provide that, "[u]pon an award of punitive damages," the county attorney must be notified and "may become a party solely to protect the interests of the common schools in such damages." LB 25, § 4(2). Under art. VII, § 5, fines and penalties must "be paid over to the counties" where they are levied or imposed, and "shall be apportioned exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue...." The committee records indicate the purpose of providing the county attorney party status after an award is made is primarily to represent the schools' interest in the award in the event of potential settlement. Committee Records on LB 25, 108th Leg., 1st Sess. 40, 42, 44 (Jan. 25, 2023).

There may well be practical concerns regarding whether the county attorney should be placed in this role or may be able to impact settlement in cases where punitive damages are awarded, and the reason for placing this duty on the county attorney is unclear. Under art. VII, § 5, penalties are to be paid over to the counties and appropriated for the use and support of the schools. Apparently, the county attorney was designated a party because the county where fines and penalties are imposed receives the funds which are distributed to the schools. County attorneys, however, have the duty "to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or county is a party or interested." Neb. Rev. Stat. § 23-1201(2) (2022). County attorneys do not advise or represent school districts, which are separate corporate bodies and political subdivisions. *See* Neb. Rev. Stat. § 79-405 (2014). Requiring county attorneys to represent the interests of the schools in punitive damage awards is thus not compatible with the duties currently placed on county attorneys. The statute, however, does not mandate that a county attorney serve this role, as it provides the county

attorney "may" become a party to protect the interest of the schools. *Pepitone v. Winn*, 272 Neb. 443, 447, 722 N.W.2d 710, 713 (2006) ("[T]he word 'may,' when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.").

Other states have enacted statutes providing for a "split recovery" which allocates a portion of a claimant's punitive damage award to the state or an administrative fund.⁶ Some provisions expressly limit the state's status or right to the judgment. Rather than making the county attorney a "party" upon an award of damages, LB 25 could be amended to give the county attorney or affected school districts the right to enforce the judgment⁷ or to collect the penalty required to be paid over to the county under art. VII, § 5.

CONCLUSION

Article VII, § 5, mandates that fines and penalties be appropriated solely for the use and support of the common schools. "A statute which imposes liability for actual damages and additional liability for the same act provides a penalty." *Abel*, 170 Neb. at 929, 104 N.W.2d at 688. Because the punitive damages authorized by LB 25 impose a liability in addition to actual damages for the same act, they are a penalty under art. VII, § 5. The Nebraska Supreme Court has held statutes imposing penalties in the form of punitive damages in favor of private parties unconstitutional relying on the due process clause alone or, in some cases, the due process clause and art. VII, § 5. While LB 25's directive that punitive damage awards be paid to support the common schools removes the constitutional barrier created by art. VII, § 5, under the Court's existing precedent we conclude that such damages violate due process given its long line of cases relying on the due process clause to hold punitive damages unconstitutional. Finally, while there may be no legal impediment to allowing the county attorney to become a party to a case in which punitive damages are awarded to protect the interests of the schools, this role does not fall within a county attorney's current statutory duties. The Legislature may wish to consider a more limited role, such as providing the county attorney or school districts with authority to enforce or collect a punitive damages judgment.

Very truly yours,
 MIKE HILGERS
 Attorney General
 (Signed) L. Jay Bartel
 Assistant Attorney General

pc Brandon Metzler
 Clerk of the Legislature

07-1521-30

1. *Boyer* did not mention or rely on the constitutional provision allocating penalties arising under the general laws to the school fund, but, rather, rested on the notion "that provisions for exemplary damages involved penalties so oppressive as to

constitute violations of the due process clause of the Constitution.” Vold, Lawrence, *Constitutionality of Statutory Double or Treble Damages Provisions in Nebraska*, 19 Neb. Law Bull. 63, 84 (1940); see Neb. Const. of 1875, art. I, § 3 (“No person shall be deprived of life, liberty, or property without due process of law.”). The Nebraska Constitution currently provides: “No person shall be deprived of life, liberty, or property without due process of law, nor be denied equal protection of the laws.” Neb. Const. art. I, § 3.

2. The dissenting opinion of Justice Letton noted that similar demurrage statutes had been upheld in a number of states, with courts concluding “the state has power to impose a penalty for a violation of a duty imposed by statute and that the disposition of the penalty, whether it shall go to the state or one of its subdivisions, to a private informer, or to the person actually damaged, is entirely within the discretion of the lawmaking power.” 104 Neb. at 330-31, 179 N.W. at 549 (Letton, J., dissenting). He asserted the majority’s reliance on *Baty* was improper, and that *Graham*, which modified *Baty*, recognized the constitutional provision requiring fines and penalties go to support the common schools “ha[d] no reference whatever to those damages whether limited in the amount recoverable or not, which a private party may sustain, but solely to such as, under the law of the land, are given to the public and go into the public treasury.” *Id.* at 332, 179 N.W. at 549 (Letton, J., dissenting (quoting *Graham*, 9 Neb. at ___, 2 N.W. at 456)). Citing other state court decisions holding that similar penalty provisions did not fall within constitutional provisions requiring fines, penalties, and forfeitures to be paid to school funds, he asserted such provisions were properly read to “refer[] to penalties accruing to the public, and not to penalties recovered by private persons for their own use.” 104 Neb. at 334, 179 N.W. at 550 (Letton, J., dissenting).
3. A Nebraska federal district court decision dismissed a bad faith counterclaim seeking to recover punitive damages for the schools in a civil action for declaratory judgment regarding insurance coverage and policy rescissions. *Factory Mutual Ins. Co. v. Nebraska Beef, Inc.*, 2009 WL 2886315 (D. Neb. 2009). Relying on *Abel*, the defendants argued they were “entitled to punitive damages if the money goes to the local county school district.” *Id.* at *1. The district court found no authorization in Nebraska law for defendants’ counterclaim, stating: “If the State of Nebraska wants to carve out an exception to allow private parties to pursue punitive damages on behalf of local school districts, it will have to explicitly say so.” *Id.*

4. Because they are a penalty, it is not necessary to consider if punitive damages may also be considered a “fine” under this constitutional provision.
5. Consistent with this position, the Nebraska Wage Payment and Collection Act grants courts discretion to require employers found to be liable for nonpayment of wages to pay a penalty to the school fund equal to the judgment recovered by the employee or, if the nonpayment is willful, an amount up to two times the amount of unpaid wages. Neb. Rev. Stat. § 48-1232 (2021); *see Kinney v. H.P. Smith Ford, L.L.C.*, 266 Neb. 591, 600, 667 N.W.2d 529, 537 (2003) (“The amount of the penalty ordered to be paid to the fund to the common schools of the state [under § 48-1232] is a matter left to the discretion of the trial court.”).
6. *See* Ga. Code Ann. § 51-12-5.1(e)(2) (Seventy-five percent of punitive damages award, less proportionate share of costs, including attorney’s fees, paid to the state); Ind. Code § 34-51-3-6(a)(2) (Seventy-five percent of punitive damages award paid to state for deposit in the violent crime victims reparation fund); Iowa Code Ann. § 668A.1.2b. (Amount not to exceed twenty-five percent of punitive damages award may be ordered to the claimant, with the remainder to be paid into a civil reparations fund); Mo. Rev. Stat. § 537.675.3 (Fifty percent of punitive damages award to be deposited into the tort victims’ compensation fund); Or. Rev. Stat. Ann. § 31.735(1) (Punitive damage award allocated with thirty percent to prevailing party, sixty percent for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims’ Assistance Section, and ten percent to the State Court Facilities and Security Account); Utah Code Ann. § 78B-8-201(3) (Punitive damage award amount over \$50,000 divided equally between the state and injured party)
7. *E.g.*, Ga. Code Ann. § 51-12-5.1(e)(2) (State not “a party in interest and the sole right of the state is to the proceeds.”); Mo. Rev. Stat. § 537.675.4 (“The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding pursuant to this section, except to enforce its lien rights as provided in subsection 3 of this section.”); *but see* Utah Code Ann. § 78B-8-201 (“The state shall have all rights due a judgment creditor to collect the full amounts of both punitive damage judgments until the judgements are fully satisfied).

VISITOR

Visitor to the Chamber was Dan McMahan.

RECESS

At 11:58 a.m., on a motion by Senator Kauth, the Legislature recessed until 1:00 p.m.

AFTER RECESS

The Legislature reconvened at 1:00 p.m., Speaker Arch presiding.

ROLL CALL

The roll was called and all members were present except Senators Briese, Dover, B. Hansen, Holdcroft, Hunt, Ibach, and Slama who were excused until they arrive.

MOTION - Print in Journal

Speaker Arch filed the following motion:

Suspend Rule 6, Sections 3 and 5, and Rule 7, Sections 3 and 7, and to indefinitely postpone the following bills whose provisions have been included in other enacted legislation or whose companion bill has been indefinitely postponed: LB 3, 4, 11, 14, 27, 28, 30, 33, 35, 35A, 45, 45A, 59, 63, 68, 74, 75, 81, 81A, 84, 90, 91, 93, 97, 98, 116, 122, 123, 123A, 124, 153, 155, 160, 170, 181, 183, 199, 201, 206, 207, 214, 217, 220, 222, 223, 240, 245, 249, 256, 260, 261, 265, 267, 269, 278, 278A, 286, 289, 300, 314, 315, 329, 337, 342, 344, 345, 346, 356, 357, 359, 372, 384, 385, 395, 395A, 402, 412, 413, 414, 419, 419A, 425, 426, 427, 431, 436, 438, 447, 452, 453, 460, 462, 465, 474, 480, 495, 505, 516, 520, 524, 532, 536, 544, 548, 552, 552A, 572, 580, 584, 585, 586, 587, 590, 603, 616, 617, 626, 629, 630, 632, 639, 647, 647A, 666, 671, 684, 684A, 698, 703, 706, 708, 709, 712, 722, 724, 738, 740, 757, 762, 765, 769, 769A, 772, 774, 787, 787A, 792, 796, and 805.

MOTIONS - Override Line-Item Vetoes on LB814

The Appropriations Committee motion [MO1151](#) found on page 1760 and considered in this day's Journal, to override the Governor's line item veto on LB814, was renewed.

Whereupon the President stated: "The question shall be, 'Shall that portion of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 25:

Aguilar	Cavanaugh, M.	Dungan	Lippincott	Slama
Blood	Conrad	Fredrickson	McDonnell	Vargas
Bostar	Day	Hardin	McKinney	Walz
Brandt	DeBoer	Hughes	Raybould	Wayne
Cavanaugh, J.	Dorn	Hunt	Riepe	Wishart

Voting in the negative, 23:

Albrecht	Bostelman	Erdman	Jacobson	Murman
Arch	Brewer	Halloran	Kauth	Sanders
Armendariz	Briese	Hansen	Linehan	von Gillern
Ballard	Clements	Holdcroft	Lowe	
Bosn	DeKay	Ibach	Moser	

Present and not voting, 1:

Dover

Having failed to receive a constitutional three-fifths majority voting in the affirmative, that portion of the bill failed to pass notwithstanding the line-item objections of the Governor.

Senator Clements offered the Appropriations Committee motion, [MO1149](#), found on page 1760, to override the Governor's line-item veto of LB814, Section 35, Auditor of Public Accounts, Program 506, State Agency and County Post Audits. Section 36, Auditor of Public Accounts, Program 525, Cooperative Audits.

Senator Clements moved for a call of the house. The motion prevailed with 36 ayes, 2 nays, and 11 not voting.

Senator Erdman requested a roll call vote, in reverse order, on the motion to override the Governor's line-item veto.

Whereupon the President stated: "The question shall be, 'Shall those portions of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 31:

Aguilar	Cavanaugh, J.	Dungan	Lowe	Vargas
Albrecht	Cavanaugh, M.	Erdman	McDonnell	Walz
Blood	Conrad	Fredrickson	McKinney	Wishart
Bostar	Day	Halloran	Murman	
Bostelman	DeBoer	Hardin	Raybould	
Brandt	DeKay	Hughes	Riepe	
Brewer	Dorn	Hunt	Slama	

Voting in the negative, 14:

Arch	Briese	Ibach	Linehan	von Gillern
Armendariz	Clements	Jacobson	Lippincott	Wayne
Ballard	Holdercroft	Kauth	Sanders	

Present and not voting, 4:

Bosn	Dover	Hansen	Moser
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Having received a constitutional three-fifths majority voting in the affirmative, those portions of the bill passed notwithstanding the line-item objections of the Governor.

The Chair declared the call raised.

COMMITTEE REPORTS

Judiciary

LEGISLATIVE BILL 184. Placed on General File with amendment.

[AM1834](#)

1 1. On page 4, strike lines 4 through 10 and insert the following new
2 subsection:

3 "(5)(a) Except as provided in subdivision (5)(b) of this section,
4 any admission, confession, or statement made by the accused to a
5 psychiatrist, psychologist, therapist, or licensed mental health
6 practitioner for purposes of a motion to transfer a case from county
7 court or district court to juvenile court shall be inadmissible in any
8 criminal or civil proceeding.

9 (b) Subdivision (5)(a) of this section does not prevent any such
10 admission, confession, or statement from being:

11 (i) Admissible in proceedings relating to such motion to transfer;
12 (ii) Admissible in disposition proceedings of such accused under the
13 Nebraska Juvenile Code if the case is transferred to juvenile court;
14 (iii) Included in any presentence investigation report for such
15 accused if the case is not transferred to juvenile court; and
16 (iv) Admissible in such case to impeach such accused during cross-
17 examination if the accused testifies at trial or during juvenile court
18 proceedings and such testimony is materially inconsistent with a prior
19 statement made by the accused to a psychiatrist, psychologist, therapist,
20 or licensed mental health practitioner for purposes of the motion to
21 transfer such case."

22 2. On page 7, strike lines 27 through 31 and insert the following
23 new subdivision:

24 "(d)(i) Except as provided in subdivision (5)(d)(ii) of this
25 section, any admission, confession, or statement made by the juvenile to
26 a psychiatrist, psychologist, therapist, or licensed mental health
27 practitioner for purposes of a motion to transfer a case from juvenile
1 court to county court or district court shall be inadmissible in any
2 criminal or civil proceeding.

3 (ii) Subdivision (5)(d)(i) of this section does not prevent any such
4 admission, confession, or statement from being:

5 (A) Admissible in proceedings relating to such motion to transfer;
6 (B) Admissible in disposition proceedings for such juvenile under
7 the Nebraska Juvenile Code if the case is not transferred to county court
8 or district court;

9 (C) Included in any presentence investigation report for such
 10 juvenile if the case is transferred to county court or district court;
 11 and
 12 (D) Admissible in such case to impeach such juvenile during cross-
 13 examination if the juvenile testifies at trial or during juvenile court
 14 proceedings and such testimony is materially inconsistent with a prior
 15 statement made by the juvenile to a psychiatrist, psychologist,
 16 therapist, or licensed mental health practitioner for purposes of the
 17 motion to transfer such case."
 18 3. On page 8, strike lines 1 and 2.

(Signed) Justin Wayne, Chairperson

General Affairs

The General Affairs Committee desires to report that the committee voted to make no recommendation on the appointment listed below. The Committee suggests the appointment be voted on by the Legislature and suggests a record vote.

Trent Loos - State Racing and Gaming Commission

Aye: 8. Brewer, Cavanaugh, J., Day, Hardin, Holdcroft, Hughes, Lowe, Raybould. Nay: 0. Absent: 0. Present and not voting: 0.

(Signed) John Lowe, Chairperson

MOTIONS - Override Line-Item Vetoes on LB814

Senator Dungan offered [MO1148](#) found on page 1752, to override the Governor's line-item veto of LB814, Section 21, Supreme Court, Operations.

Senator Dungan moved for a call of the house. The motion prevailed with 21 ayes, 3 nays, and 25 not voting.

Senator Dungan requested a roll call vote, in reverse order, on the motion to override the Governor's line-item veto.

Whereupon the President stated: "The question shall be, 'Shall that portion of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 20:

Aguilar	Cavanaugh, J.	DeBoer	Hunt	Vargas
Blood	Cavanaugh, M.	Dorn	McDonnell	Walz
Bostar	Conrad	Dungan	McKinney	Wayne
Brandt	Day	Fredrickson	Raybould	Wishart

Voting in the negative, 23:

Albrecht	Brewer	Hardin	Linehan	Sanders
Arch	Clements	Holdcroft	Lippincott	Slama
Armendariz	DeKay	Ibach	Lowe	von Gillern
Ballard	Erdman	Jacobson	Moser	
Bostelman	Hansen	Kauth	Murman	

Present and not voting, 4:

Bosn	Briese	Hughes	Riepe
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Excused and not voting, 2:

Dover	Halloran
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Having failed to receive a constitutional three-fifths majority voting in the affirmative, that portion of the bill failed to pass notwithstanding the line-item objections of the Governor.

The Chair declared the call raised.

Senator Walz offered [MO1155](#) found on page 1806, to override the Governor's line-item veto of LB814,
 Section 13, Legislative Council, Program 122, Legislative Services.
 Section 14, Legislative Council, Program 123, Clerk of the Legislature.
 Section 15, Legislative Council, Program 126, Legislative Research.
 Section 16, Legislative Council, Program 127, Revisor of Statutes.
 Section 17, Legislative Council, Program 129, Legislative Audit.
 Section 19, Legislative Council, Program 504, Office of Public Counsel.
 Section 20, Legislative Council, Program 638, Fiscal and Program Analysis.

SENATOR DEBOER PRESIDING

Whereupon the President stated: "The question shall be, 'Shall those portions of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 22:

Aguilar	Cavanaugh, M.	Dungan	McDonnell	Walz
Blood	Conrad	Fredrickson	McKinney	Wishart
Bostar	Day	Halloran	Raybould	
Brandt	DeBoer	Hughes	Slama	
Cavanaugh, J.	Dorn	Hunt	Vargas	

Voting in the negative, 21:

Albrecht	Brewer	Hardin	Lippincott	von Gillern
Armendariz	Briese	Holdcroft	Lowe	
Ballard	Clements	Jacobson	Moser	
Bosn	DeKay	Kauth	Murman	
Bostelman	Hansen	Linehan	Sanders	

Present and not voting, 3:

Ibach	Riepe	Wayne
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Excused and not voting, 3:

Arch	Dover	Erdman
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Having failed to receive a constitutional three-fifths majority voting in the affirmative, those portions of the bill failed to pass notwithstanding the line-item objections of the Governor.

Senator Conrad offered [MO1156](#) found on page 1807, to override the Governor's line-item veto of LB814, Section 252, Foster Care Review Office, Program 317, Court Appointed Special Advocate State Aid.

Whereupon the President stated: "The question shall be, 'Shall that portion of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 17:

Blood	Conrad	Fredrickson	Raybould	Wishart
Bostar	Day	Hunt	Vargas	
Cavanaugh, J.	DeBoer	McDonnell	Walz	
Cavanaugh, M.	Dungan	McKinney	Wayne	

Voting in the negative, 22:

Aguilar	Bostelman	Halloran	Linehan	Sanders
Albrecht	Brewer	Hardin	Lippincott	von Gillern
Armendariz	Briese	Holdcroft	Lowe	
Ballard	Clements	Jacobson	Moser	
Bosn	DeKay	Kauth	Murman	

Present and not voting, 5:

Brandt	Dorn	Hughes	Ibach	Riepe
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Excused and not voting, 5:

Arch Dover Erdman Hansen Slama

Having failed to receive a constitutional three-fifths majority voting in the affirmative, that portion of the bill failed to pass notwithstanding the line-item objections of the Governor.

Senator Conrad offered [MO1157](#) found on page 1807, to override the Governor's line-item veto of LB814, Section 100, Department of Health and Human Services, Program 354, Child Welfare Aid, as follows: General Fund and Program Total for FY2023-24 only; Earmark amount in first paragraph, second line; Earmark amount in fifth paragraph, second line.

Whereupon the President stated: "The question shall be, 'Shall that portion of the bill pass notwithstanding the line-item objections of the Governor?'" "

Voting in the affirmative, 19:

Blood	Cavanaugh, M.	Dorn	Hunt	Walz
Bostar	Conrad	Dungan	McKinney	Wayne
Brandt	Day	Fredrickson	Raybould	Wishart
Cavanaugh, J.	DeBoer	Hughes	Vargas	

Voting in the negative, 27:

Aguilar	Bostelman	Halloran	Kauth	Riepe
Albrecht	Brewer	Hansen	Lippincott	Sanders
Arch	Briese	Hardin	Lowe	von Gillern
Armendariz	Clements	Holdcroft	McDonnell	
Ballard	DeKay	Ibach	Moser	
Bosn	Dover	Jacobson	Murman	

Present and not voting, 2:

Erdman Linehan

Excused and not voting, 1:

Slama

Having failed to receive a constitutional three-fifths majority voting in the affirmative, that portion of the bill failed to pass notwithstanding the line-item objections of the Governor.

Senator Wayne offered the following motion to LB814:

[MO1158](#)

Override the Governor's line-item veto in Section 105, Department of Health and Human Services, Program 502, Public Health Aid.

Senator Wayne withdrew his motion to override the Governor's line-item veto.

MESSAGES FROM THE GOVERNOR

May 31, 2023

Brandon Metzler
Clerk of the Legislature
State Capitol, Room 2018
Lincoln, NE 68509

Dear Clerk Metzler:

Engrossed Legislative Bills 754e, 754Ae, 243e, 243Ae, 583e, 583Ae were received in my office on May 25, 2023.

These bills were signed and delivered to the Secretary of State on May 31, 2023.

Sincerely,
(Signed) Jim Pillen
Governor

May 31, 2023

Mr. President, Speaker Arch
and Members of the Legislature
State Capitol
Lincoln, NE 68509

Dear Mr. President, Speaker Arch, and Members of the Legislature:

On August 30, 2022, former Governor Ricketts appointed Gwenniviere Aspen to the Coordinating Commission for Postsecondary Education. Ms. Aspen has recently submitted her resignation effective May 9, 2023. Accordingly, I hereby respectfully request you withdraw her from consideration for confirmation. Her contact information is as follows:

Gwenn Aspen
850 Fair Acres
Omaha, NE 68132

Please contact my office if you have any questions.

Sincerely,
(Signed) Jim Pillen
Governor

Cc: Paul Von Behren, Chairman - Coordinating Commission for Postsecondary Education

MOTIONS - Override Line-Item Vetoes on LB818

Senator Clements offered the Appropriations Committee motion, [MO1152](#), found on page 1760, to override the Governor's line-item veto on LB818, Section 34(32).
Section 34(33).

Whereupon the President stated: "The question shall be, 'Shall those portions of the bill pass notwithstanding the line-item objections of the Governor?' "

Voting in the affirmative, 1:

Raybould

Voting in the negative, 30:

Aguilar	Brandt	Dover	Hughes	Moser
Albrecht	Brewer	Erdman	Jacobson	Murman
Arch	Clements	Halloran	Kauth	Riepe
Ballard	DeBoer	Hansen	Lippincott	Sanders
Bosn	DeKay	Hardin	Lowe	von Gillern
Bostelman	Dorn	Holdcroft	McDonnell	Walz

Present and not voting, 17:

Armendariz	Cavanaugh, J.	Dungan	Linehan	Wishart
Blood	Cavanaugh, M.	Fredrickson	McKinney	
Bostar	Conrad	Hunt	Vargas	
Briese	Day	Ibach	Wayne	

Excused and not voting, 1:

Slama

Having failed to receive a constitutional three-fifths majority voting in the affirmative, those portions of the bill failed to pass notwithstanding the line-item objections of the Governor.

Senator Wayne offered the following motion to LB818:

[MO1159](#)

Override the Governor's line-item veto in Section 15.

Senator Wayne withdrew his motion to override the Governor's line-item veto.

MOTIONS - Confirmation Reports

Senator B. Hansen moved the adoption of the Health and Human Services Committee report for the confirmation of the following appointment found on page 1764:

Board of Emergency Medical Services
Noah Bernhardson

Voting in the affirmative, 40:

Aguilar	Bostelman	DeBoer	Holdcroft	McDonnell
Albrecht	Brandt	DeKay	Hughes	Moser
Arch	Brewer	Dorn	Ibach	Murman
Armendariz	Briese	Dover	Jacobson	Raybould
Ballard	Cavanaugh, M.	Erdman	Kauth	Riepe
Blood	Clements	Halloran	Linehan	Sanders
Bosn	Conrad	Hansen	Lippincott	von Gillern
Bostar	Day	Hardin	Lowe	Walz

Voting in the negative, 0.

Present and not voting, 7:

Cavanaugh, J.	Fredrickson	McKinney	Wayne
Dungan	Hunt	Vargas	

Excused and not voting, 2:

Slama	Wishart
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The appointment was confirmed with 40 ayes, 0 nays, 7 present and not voting, and 2 excused and not voting.

Senator B. Hansen moved the adoption of the Health and Human Services Committee report for the confirmation of the following appointment found on page 1764:

Division of Public Health-Department of Health and Human Services
Timothy A. Tesmer

Voting in the affirmative, 29:

Aguilar	Bostelman	Dorn	Ibach	McDonnell
Albrecht	Brandt	Erdman	Jacobson	Moser
Arch	Brewer	Halloran	Kauth	Murman
Armendariz	Briese	Hansen	Linehan	Riepe
Ballard	Clements	Holdcroft	Lippincott	Sanders
Bosn	DeKay	Hughes	Lowe	

Voting in the negative, 11:

Blood	Conrad	Dungan	Raybould
Cavanaugh, J.	Day	Fredrickson	Wayne
Cavanaugh, M.	DeBoer	Hunt	

Present and not voting, 7:

Bostar	Hardin	Vargas	Walz
Dover	McKinney	von Gillern	

Excused and not voting, 2:

Slama	Wishart
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The appointment was confirmed with 29 ayes, 11 nays, 7 present and not voting, and 2 excused and not voting.

Senator Conrad offered her motion, found on page 1806, to reconsider the vote on the confirmation report of the Nebraska Retirement Systems Committee found on page 1742 regarding the appointment of Jason Hayes, Nebraska Public Employees Retirement Systems.

SPEAKER ARCH PRESIDING

The Conrad motion to reconsider prevailed with 30 ayes, 10 nays, 8 present and not voting, and 1 excused and not voting.

Senator McDonnell reoffered the motion to adopt the Nebraska Retirement Systems Committee report for the confirmation of the following appointment found on page 1742:

Nebraska Public Employees Retirement Systems
Jason Hayes

Voting in the affirmative, 20:

Aguilar	Brandt	Erdman	Ibach	Murman
Arch	Brewer	Halloran	Jacobson	Raybould
Ballard	DeKay	Hardin	Lippincott	Walz
Bostelman	Dorn	Hughes	McDonnell	Wayne

Voting in the negative, 14:

Albrecht	Dover	Hunt	Moser	Slama
Cavanaugh, M.	Hansen	Kauth	Riepe	von Gillern
Conrad	Holdercroft	Linehan	Sanders	

Present and not voting, 11:

Armendariz	Briese	Day	Lowe
Blood	Cavanaugh, J.	DeBoer	McKinney
Bosn	Clements	Fredrickson	

Excused and not voting, 4:

Bostar	Dungan	Vargas	Wishart
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The Nebraska Retirement Systems Committee confirmation report was not adopted with 20 ayes, 14 nays, 11 present and not voting, and 4 excused and not voting.

Pursuant to Rule 3, Sec. 4(e)(iv), the appointment was rejected

COMMUNICATION

May 31, 2023

The Honorable Robert Evnen
Secretary of State
2300 State Capitol
Lincoln, NE 68509

Dear Mr. Secretary:

Pursuant to the provisions of 84-503, R.R.S., we are forwarding LB814e with a certificate attached thereto signed by the President of the Legislature, certifying the passage of certain line-item vetoes as set forth on the attached certificate, notwithstanding the objections of the Governor.

Sincerely,
(Signed) Brandon Metzler
Clerk of the Legislature

BM:jl
Enc.

CERTIFICATE

Legislative Bill 814e, having been returned by the Governor with his signature, but with certain items therein line-item vetoed, the Legislature by the constitutional majority, has overridden said line-item vetoes as follows, and having passed the Legislature by the constitutional majority the bill has become law this 31st day of May 2023.

Section 35, Auditor of Public Accounts, Program 506, State Agency and County Post Audits, and Section 36, Auditor of Public Accounts, Program 525, Cooperative Audits.

(Signed) John Arch
President of the Legislature

May 31, 2023

The Honorable Robert Evnen
Secretary of State
2300 State Capitol
Lincoln, NE 68509

Dear Mr. Secretary:

Inasmuch as the Legislature did not override the line-item vetoes by Governor Pillen of LB818e, and consistent with our rules, I am delivering the bill for filing in the form and amounts as prescribed by the Governor.

Sincerely,
(Signed) Brandon Metzler
Clerk of the Legislature

BM:jl

COMMITTEE REPORTS

Agriculture

The Agriculture Committee desires to report favorably upon the appointments listed below. The Committee suggests the appointments be confirmed by the Legislature and suggests a record vote.

Dawn Caldwell - Nebraska State Fair Board
Brett R. Lindstrom - Nebraska State Fair Board
Beth Smith - Nebraska State Fair Board

Aye: 8. Brewer, Halloran, Hansen, B., Holdcroft, Hughes, Ibach, Raybould,
Riepe. Nay: 0. Absent: 0. Present and not voting: 0.

The Agriculture Committee desires to report favorably upon the appointments listed below. The Committee suggests the appointments be confirmed by the Legislature and suggests a record vote.

Marie A. Farr - Nebraska Brand Committee
Steven F. Stroup - Nebraska Brand Committee

Aye: 8. Brewer, Halloran, Hansen, B., Holdcroft, Hughes, Ibach, Raybould,
Riepe. Nay: 0. Absent: 0. Present and not voting: 0.

(Signed) Steve Halloran, Chairperson

UNANIMOUS CONSENT - Add Cointroducers

Unanimous consent to add Senators as cointroducers. No objections. So ordered.

Senator Bosn name added to LB76.
Senator Jacobson name added to LB384.
Senator Lippincott name added to LB384.
Senator Bosn name added to LB447.
Senator Vargas name added to LB705.
Senator Ballard name added to LB732.
Senator Wishart name added to LB732.
Senator von Gillern name added to LR229.

VISITORS

Visitors to the Chamber were Krista, Isaac, Eli, and Eden Zobel.

The Doctor of the Day was Dr. George Voigtlander of Lincoln.

ADJOURNMENT

At 5:07 p.m., on a motion by Senator Raybould, the Legislature adjourned until 10:00 a.m., Thursday, June 1, 2023.

Brandon Metzler
Clerk of the Legislature