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Natural Resources Committee  
February 07, 2008

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[LB924 LB975 LB1041]

The Committee on Natural Resources met at 1:30 p.m. on Thursday, February 7, 2008, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB924, LB975, and LB1041. Senators present: Carol Hudkins, Vice Chairperson; Tom Carlson; Mark Christensen; Annette Dubas; Deb Fischer; Gail Kopplin; and Norman Wallman. Senators absent: LeRoy Loudon. [LB924]

SENATOR HUDKINS: Ladies and gentlemen, if I may have your attention. We are ready to start today's hearing. I am Carol Hudkins from Malcolm. I'm the vice chair of the Committee. Our chairman had to be gone this afternoon so you get to hear me talk. To my right is our committee counsel, Jody Gittins; next to her is Gail Kopplin from Gretna; and Tom Carlson from Holdrege; and Norm Wallman from Cortland. And to my left is Senator Deb Fischer from Valentine; and Mark Christensen from Imperial; and on the far end is Barb Koehlmoos, our committee clerk. We welcome all of you today and most of you that are here probably know the rules but if there are new people present, we'll go over them again. If you have cell phones, turn them off. It's just much easier. And if you wish to testify on a bill, please work your way to the front of the room when that bill is heard and when someone finishes testifying, please fill in the chair immediately after them. If you don't want to testify but would like to have your name entered into the record as being present, there is a form, I think, at both doors where you can sign and then this will be part of the official record. This year we're using a computerized transcription program so it's very important that you fill in the green sign-in sheet before you testify. They too are on the tables by the doors and they needed to be completed by everyone wishing to testify, including senators and staff. If you are testifying on more than one bill, you need to fill out a sheet on each bill. When you come up to testify, give the green form to the committee clerk and then be seated to testify. Use your best handwriting or print and if our transcribers have trouble understanding what you have said, and sometimes that happens, they may contact you to get your records on the, the record completely accurate. As you begin your testimony, make sure you tell us your name and spell it, even if it is an easy name. Try not to repeat what someone has said before you. We have heard a lot of these bills before. We are interested in new information and if you have said what the person before you has said, and that person's repeated what the person before them has said, you'll find we start to glaze over (laughter) and we don't want to do that. We want to give you our attention. If there are large numbers of people wishing to testify on a specific bill it may be necessary for us to place time limits on you. I'm not sure yet if that's going to happen. We'll take it as it goes. If you have handout material for the committee, give it to the page and by the way, our page today is Kristen Erthum from Ainsworth and she is a sophomore at Doane College. If you don't wish to testify but you have written remarks, also those may be handed in and they will be read into the official record. We do not allow booing or hissing or cheering and so there will be no signs of support or nonsupport. If you need a drink of water, ask the page and if you need anything else be

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sure and ask someone, we'll be glad to help you. So the first bill that we're going to hear today is LB924 sponsored by Senator Fischer and it would provide for streamflow depletion offsets. So when Senator Fischer is done, those that wish to testify in support, please be ready to come to the front of the room. Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins, members of the committee. For the record, my name is Deb Fischer, F-i-s-c-h-e-r, and I am the senator representing the 43rd District in the Nebraska Unicameral. As with many of you, water issues have been a focus of mine since before I was ever elected to the Legislature. For the past three years that I've been here, I've been working with a number of my different interests from my district on this issue. My legislative district as my colleagues know is the largest in the state and I do have seven NRDs within my legislative district. I've been in conversations with them about water issues for the past three years. My district also includes the Dismal River, the Niobrara River, and the north and middle Loup Rivers among others and so I've had discussions with people in recreation, those interested in wildlife, and also conservation interests. LB924 focuses on several subjects including offset depletions to streamflow and modifying the state endangered species act to more closely resemble the federal act. It also requires agreement between the natural resource districts and Game and Parks Commission for instream flow rights and it lastly requires the Department of Natural Resources to review existing surface water rights nonuse prior to a preliminary determination that a basin is fully appropriated. Sections 1 and 2 of this bill allow for a change in water uses to occur in fully and overappropriated basins where otherwise such an opportunity does not exist. LB924 would allow depletions to streamflow created by new uses to be offset by corresponding groundwater controls. Natural resources districts would be allowed to offset depletions by acquiring surface and groundwater rights and retiring the rights on a temporary or a permanent basis. Existing law does not provide such procedure to follow. The NRDs would be required to quantify the amount of gain to streamflow as a result of the discontinued use and file a notice of offset with the Department of Natural Resources. The notice will include the location and quantification of the gain and the retired use. For instance, this technique could be applied for new uses such as an ethanol plant. Water necessary for an ethanol plant would be acquired by retiring an existing use of the same quantity. Section 3 modifies the state endangered species act to more closely resemble the federal act by allowing the Game and Parks Commission to develop reasonable and prudent alternatives to a project that has been judged to jeopardize the continued existence of a protected species or adversely impacts designated critical habitat. A committee to grant exemptions for projects that may harm a species is also created. When the Nebraska Game and Parks Commission consults with other state agencies to ensure that actions authorized, funded or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of the habitat of such species, the commission would be required to submit a written statement setting forth the commission's opinion and a summary of the information on which that opinion is based. The opinion should include

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details of how the state agency action affects the species or its critical habitat. If the commission finds jeopardy or adverse modification will result and there are no reasonable and prudent alternatives with an application, a procedure is established to allow the applicant to appeal the decision to a newly created exemption committee. An exemption would be allowed if, one, granting the exemption does not result in the extinction of a species, two, reasonable mitigation and enhancement measures can be reasonably taken by the applicant, and three, the applicant's project is of significant importance to the economic well-being of the state. The exemption committee will consist of the Governor or his or her designee, the director of the state agency, or his or her designee, and one designee by each natural resource district within which the applicant's project is located. Because of the passage of LB962 in 2004, NRDs have many responsibilities to regulate hydrologically connected waters. An instream flow permit has the potential to propel the NRDs to have further responsibility because it can lead to a basin being fully appropriated and the cost and impact of this designation falls on the local taxpayers. In order to address this concern, Section 4 would require the Nebraska Game and Parks Commission and the natural resources district to agree on an instream flow right application prior to filing the application with the Department of Natural Resources. The parties would have to work together no matter which entity initially is seeking the flow right. Section 5 addresses the Department of Natural Resources adjudication process. This creates an additional step before a preliminary determination can be made. The change would require the Department of Natural Resources to review existing surface water rights nonuse prior to the department making a preliminary conclusion that a river basin, subbasin or reach presently is fully appropriated. If the right has been forfeited or abandoned, the rights would be appropriately adjudicated under Section 46-229.02. This is necessary to make certain that paper water rights are not resurrected to undercut subsequent uses of water. In order to save a water right, the right must actually be used. The last change in this section eliminates the reference to "all other applicable state or federal laws for the department to consider for determining whether a basin, subbasin or reach is fully appropriated." This change eliminates uncertainty and/or interpretation of which other laws to consider. This was originally included in LB962 as a catchall phrase and what is essentially accomplished by removing this language is to eliminate added weight that appropriation determinations are not otherwise subjected to. Mr. Don Blankenau, an accomplished attorney who practices water law, will be the first proponent for the bill and he will be giving the committee a thorough briefing on this bill and will be able to address your specific questions. I understand that there are number of testifiers here today and I would like for everyone to have the opportunity to address their interests. I then believe the committee will be able to move forward with a better sense of direction once all of these perspectives are made known. Thank you. [LB924]

SENATOR HUDKINS: Thank you, Senator Fischer. Are there questions at this time?  
Thank you. [LB924]

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SENATOR FISCHER: Thank you. [LB924]

SENATOR HUDKINS: Thank you. And Mr. Blankenau should come up. Could I see a show of hands of those who wish to testify in support. Oh my, okay, one, two, six, seven. How about in opposition? About the same. Okay, so as I said before, try to keep your remarks concise, try to keep them to five minutes and I know that's very hard to do so if I tend to feel that you're rambling, I may stop you. So keep that in mind. Mr. Blankenau. [LB924]

DON BLANKENAU: Thanks, Senator. Again my name is Don Blankenau, my last name is spelled B-l-a-n-k-e-n-a-u. I'm appearing here today on behalf of the Nebraska Association of Resources Districts. I also wear another hat and that is for the League of Nebraska Municipalities who asked me to also provide support on their behalf. Senator Fischer, I want to thank you for that introduction. You can introduce me any day of the week. (laugh) As Senator Fischer spoke, this bill has many components to it and it really accomplishes many purposes. The first sections 1 and 2 are designed around a difficult situation that exists in areas that have been designated fully and overappropriated. As this committee knows in those areas, there can be no new net increases to consumption that would deplete streamflow. The DNR in developing their IMPs, their Integrated Management Plans with the NRDs, has requested or required that any new uses that occur that depletes streamflow have those depletions be replaced in both quantity, time and location. And that's a perfectly reasonable requirement because what it does is protect downstream water users from any harm associated with that new depletion. Right now, however, there's no real vehicle in place to allow the replacement for those depletions or the offset in any reasonably short time frame. A very basic example might be a city that has a new ethanol plant move to town. They will have a new increase in consumptive use and that would have to be offset. That facility probably can't wait for a permit to be issued from DNR under 46-252 which is one possible option. That permit might take 18 months to 2 years before it ever gets issued and by that time the ethanol plant has already either begun consuming water or has located somewhere else. So the idea is not to stand in the way of those IMP's. NRDs will still be required to go out and get their water use in a state of equilibrium but in addition to that, you don't want to stand in the way of economic development with changed uses. And Section 1 of the bill deals expressly with groundwater if you have a new use that's going to occur. Ideally you would find an existing use nearby that would give up their right to use water for some payment I'm sure. But oftentimes there isn't going to be anyone near by so you have to go upstream. When you cease using groundwater on a field, the consumptive use associated with that will impact streamflow somewhat. That impact of streamflow needs to be quantified and if that amount of gain to streamflow associated with that ceased use is adequate for the new use, there has to be some vehicle to protect that quantity of water as it moves downstream to the point of new use. Section 2 does the same thing only with surface water. Now I know that there are concerns about how the calculations will be done and whether that will be done in a way that satisfies

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everyone. We selected a term, the best science, I think, available...the best available science and that was chosen specifically because under existing statutes when DNR makes a determination of a fully appropriated basin, they're required to use the best scientific methodologies available. We realize that can be a high standard and obviously if the standard needs to be reduced, we're happy to do that. But the point is, we want to make sure that we get at the right answer. That we determine exactly what the impacts to streamflow are, from both the new use and the retired use, and that gets fully offset. Let me switch then to Section 3, if I may. As the old Monty Python skit went, now for something completely different. As Senator Fischer indicated, this was a change to the Threatened and Endangered Species Act, the state act. Today when you consult with Game and Parks and you're project results in a jeopardy opinion being issues, to their credit, they will work with you to develop a reasonable and prudent alternative. And if you look through their rules and regs, you'll see that they bear a striking resemblance to the federal rules and regs which require or allow the agency to write a reasonable and prudent alternative. The difficulty is that the state law itself doesn't expressly allow the agency to write one of those reasonable and prudent alternatives. So the idea is just to make this act mirror more closely the federal act. Similarly the provision of the so-called God squad. Under the federal law there is an allowance to create cabinet level committees to approve a project even when there's no reasonable and prudent alternative readily available. In the history of the federal law, there have only been three occasions where the God squad has been convened. I suspect you will see a similar number of invocations of that committee at the state level. It's probably not something that's going to occur very often but it's probably also something that's good to have when you need it. And again, the whole idea is to make the state law more closely resemble federal law. Section 4 is the instream flow portion. I talked to a lot of people about this aspect and there is, I think, a belief that an instream flow appropriation is the same as a minimum streamflow and that's not the case. All an instream flow appropriation allows you to get is an increment of water that is presently unappropriated. And sometimes that can be a little bit of water, sometimes it can be a lot. And in the case of the Niobrara River, that river today is fully appropriated and no instream flow appropriation can be granted at least during the summer months when the river appears to be fully appropriated. In other parts of the state, however, like the Loup River Basin or the Elkhorn, there still is unappropriated water available. And Game and Parks or an NRD could go in and request the full amount of the unappropriated water available for an instream flow. And if they got that right issued, then that basin would be fully appropriated. Once a basin is declared fully appropriated, of course you get into the whole regulatory network that comes with it. The requirement for the offsets that we talked about in Sections 1 and 2 and the whole certifying of acres, all this permutations. And they all costs money and they all result typically in property tax revenues increasing. So the concept here was to have Game and Parks Commission go to the entity that would have the duty of the obligation to regulate groundwater, possibly then the need to increase property taxes and work with them to determine whether this is really a good idea for that particular area or whether a lesser amount might be more

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appropriate. Similarly, because turnaround is fair play, the change in law requires the NRDs to go to Games and Parks and seek their approval before they seek an instream flow application. Only two entities in Nebraska today can get an instream flow, NRDs and the Game and Parks Commission. So it seemed to us since many of their duties do overlap, that they ought to work together on these sorts of application. Section 5 is the requirement that the Department of Natural Resources conducts an adjudication before it declares a basin fully appropriated. And when I say adjudication, there's a lot of misconception on that. I talk to lots of lawyers around the country and in every state but Nebraska, an adjudication means the quantification and prioritization of water rights. While most western states have a prior appropriation doctrine in theory on the books, (laugh) very few actually have reviewed their water rights, prioritized them and quantified them. So if you go to Arizona for instance, there's no regulation on a first in time, first right basis other than individuals suing each other and asserting their respective rights against one another. There isn't a state agency that goes out and does it like here in Nebraska. And that's obviously to Nebraska's credit. The way adjudication is used in this bill, Section 5, is to look at whether water rights have been cancelled... or excuse me, have been forfeited or abandoned through nonuse. There are many people in Nebraska who have surface water appropriations who irrigate only a fraction of the lands that they presently have under right. And that's okay, except that if those unused rights get resurrected, they again could trigger a fully appropriated basin determination. They could also in an area already determined to be fully appropriated exasperate water shortages in that area. So it seems prudent at least to have DNR cancel any of those unused rights to prevent that from occurring. Now I know that there are concerns that will be expressed about the cost of doing that. Traditionally, DNR went out and did these adjudications on a very regular routine basis. In recent years, that process has been scaled back, I think in part because of cost concerns. But Section 5 of the bill doesn't require it be done statewide, only in those basins that have not yet been determined fully appropriated. So you've taken already off the table those basins that have already been judged fully or overappropriated. Although I would add, I think it would be a good idea to look at those basins as well. What that means, I think, in practical terms is that DNR would have to adjudicate basins that are most likely next on the list like, perhaps, the Loup River Basin or the Elkhorn Basin. And that's where they could direct their resources. Lastly, Section 6, as Senator Fischer indicated, is to strike six words and I think there's been a lot of confusion as to what those six words are or what they mean rather. As Senator Fischer indicated, those words were added as sort of a catchall. In the event Nebraska is obligated to actually provide streamflows for any other state or federal law they didn't know about at the time, that was intended to catch them. Well I don't think that there are any such laws out there and they would certainly be well known to everyone if they were to come along, and it seems appropriate to get rid of that language at this point. If there would be some federal obligation coming along it would be in terms of a compact which you would all know about or a federal decree which should be many years down the road. In the meantime, I think that eliminating that language eliminates some of the confusion around it. I think DNR's 2007 report or

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determination of fully appropriated basins referred to that language as not having any context outside of state and federal endangered species acts. And I think even in that context, it is not applicable. Under neither of those acts is the state of Nebraska in noncompliance if it fails to provide optimal streamflows. In fact, if you look at the history of federal decisions on the Endangered Species Act, no state has ever been required to provide streamflows or found to be in noncompliance for not regulating hydrologically connected groundwater to provide habitat for species so it just seems to eliminate that ambiguity. And with that I hope I haven't been too redundant. [LB924]

SENATOR HUDKINS: All right. Are there questions? I have one and maybe I'm being very simplistic. If a particular area is considered to be fully appropriated, then if there's going to be a new use, then an old use has to be deleted. Okay. Are there going to be any kind of methods to determine the economic impact of the new use versus economic impact of the old use? [LB924]

DON BLANKENAU: There's nothing in this bill that would address that. [LB924]

SENATOR HUDKINS: Okay. [LB924]

DON BLANKENAU: Presumably, you know, NRDs have the authority to condemn water rights and I suppose they could do that. They certainly wouldn't want to do that. [LB924]

SENATOR HUDKINS: So isn't that taking away property rights of one to give to the property rights of another? [LB924]

DON BLANKENAU: Exactly. And that's why they don't want to do that. But bear in mind, Senator, that under existing state law, if the city puts in a new well, the NRDs are obligated to offset that new use, not the city. So they have to have some vehicle to accomplish that. Otherwise they're put in a position where they simply can't comply with the law. [LB924]

SENATOR HUDKINS: All right. And then as far as the surface water users are concerned, I don't know what my notes mean now...let's say that you have your senior surface water right person on a particular creek and for three years you have had a terrific drought, and the creek has gone dry so you can't use the water because it's not there. So would those three years be considered nonuse? [LB924]

DON BLANKENAU: For purposes of cancellation? [LB924]

SENATOR HUDKINS: Uh-huh. [LB924]

DON BLANKENAU: No, they're not. There is an exemption for that under state law today. [LB924]

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SENATOR HUDKINS: Okay. All right. Other questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Thank you, Mr. Blankenau for your explanation. Could you clarify...there's concerns in my legislative district for economic development and I think you just touched on it with your example of a city putting down a well and it's up to the NRD then to find the offset, is that correct? Did I hear you? [LB924]

DON BLANKENAU: That's correct. [LB924]

SENATOR FISCHER: In my area there's concerns because we don't have a lot of irrigation development and so if there is a new business that may want to come in such as an ethanol plant, if we're looking at other uses for water, we're going to have problems finding offset. That's not covered under current law, is it? [LB924]

DON BLANKENAU: No, it is not. [LB924]

SENATOR FISCHER: And this bill would help in explaining how that...the procedure is going to be followed in it? [LB924]

DON BLANKENAU: Yeah, and I think, you know the real advantage of this bill, the first two sections, is that it allows for the quick assessment of how much water is needed and then if an NRD can find a willing buyer, willing seller out there, somebody who will give up their water right for presumably a fee so long as that increment of new use is adequate to offset...excuse me, that increment of retired water, that new inflow to streams is enough to offset for that depletion of streamflow, this should allow that to occur in a fairly quick fashion. [LB924]

SENATOR FISCHER: Thank you. [LB924]

SENATOR HUDKINS: Senator Wallman. [LB924]

SENATOR WALLMAN: Thank you, Chairman. Would you say getting down to the bottom line, the chief for this all is Game and Parks then, water control, you know, water quantity? [LB924]

DON BLANKENAU: Well, not in respect to the first two portions. Game and Parks has a unique role to play because of their ability to get an instream flow. Historically, that's been some pretty large flows. They've got, I think, and I'm sure these guys will know, I think, four instream flows across the state today. Some of those are for substantial quantities of water. [LB924]

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SENATOR WALLMAN: Thank you. [LB924]

SENATOR HUDKINS: Senator Dubas. And I neglected to say that for the record you had joined the committee. I'm sorry. [LB924]

SENATOR DUBAS: That's fine. Thank you. Thank you, Senator Hudkins. Thank you Mr. Blankenau. I'm hoping I can ask this question so it makes sense because I'm trying to sift through all of this so it makes sense in my mind. Now we do have priority uses for water, correct? [LB924]

DON BLANKENAU: Correct. [LB924]

SENATOR DUBAS: And it's individual water? [LB924]

DON BLANKENAU: It's called preferences. And it's domestic uses, that water that you need for, you know, your day-to-day operations of your household and probably a small number of cattle. It was designed initially for farmers and small farmsteads. Second, is agricultural use and that's agricultural production, and then third on the list is manufacturing and that preference stands for both ground and surface waters. [LB924]

SENATOR DUBAS: Okay. So would this become an issue if you're looking at offsetting an ag use for a manufacturing use or vice-a-versus or a domestic, I mean, does that preference still stay in play? [LB924]

DON BLANKENAU: That's a great question. With respect to surface water uses, you would probably have to stay within the same preference categories. With groundwater, I don't think the law is really particularly clear on that point. But obviously, you're not going to take domestic water. Number one, it just doesn't amount to much and it just isn't politically or otherwise a good thing to do. So you're really talking probably changes from ag to manufacturing as a practical sort. Or perhaps ag to municipal which would include domestic as well. Because of that shift, so long as you have a willing buyer, willing seller that shouldn't really stand in the way. But I think that's really key. [LB924]

SENATOR DUBAS: Yeah, I guess that's what I was wondering, if this was agreeable on both parts if it would come into play or if down the road we could run into some issues of challenges to what was done. [LB924]

DON BLANKENAU: Yeah, I think you would only want to condemn if you were within the same preference category or a lower preference category to a higher use. [LB924]

SENATOR DUBAS: Okay. Thank you very much. [LB924]

DON BLANKENAU: You're welcome. [LB924]

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SENATOR HUDKINS: Senator Carlson. [LB924]

SENATOR CARLSON: Senator Hudkins. Help clear this up for me. In going through the order, domestic, agriculture, manufacture. So for domestic use, agriculture has to provide the offset? [LB924]

DON BLANKENAU: Well, all new uses whether they're domestic or otherwise need to be offset. [LB924]

SENATOR CARLSON: But the offset doesn't necessarily go in order. [LB924]

DON BLANKENAU: No, no. All new uses need to be offset. [LB924]

SENATOR CARLSON: Let's go down to manufacturing then because you said something and I just...created a little haze for me. So we have manufacturing and ethanol because they take a lot of water. So obviously domestic cannot be held responsible to offset anything there. The only other choice is agriculture. [LB924]

DON BLANKENAU: Well, again because we're...if I have a new household well, say I'm really...like the guy in Atlanta who pumps, you know, 10,000 gallons a day and that use was so substantial it would need to be offset as even domestic needs to be offset under the existing law. As the NRD I could go out and find anybody who was willing to provide that offset. It could be a manufacturer, it could be an ag user, it could be another domestic user. So long as they were willing to give up their use and that amount of use was equal to that increment of new use, and this is actually impact to streamflows, then there shouldn't be any issue. [LB924]

SENATOR CARLSON: So regardless of the use, the NRD is required to find the offset. [LB924]

DON BLANKENAU: Correct. [LB924]

SENATOR CARLSON: Okay. Thank you. [LB924]

SENATOR HUDKINS: Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Just to follow up with Senator Carlson, what if the NRD cannot find any user to give up their use? [LB924]

DON BLANKENAU: Then they have to tell that new use, sorry you can't occur which is, of course, impossible for municipalities. They now have the right to do it so it puts the NRDs in a position where they're simply going to be in violation of the law. They've got

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no vehicle to correct it. [LB924]

SENATOR FISCHER: Thank you. [LB924]

SENATOR HUDKINS: So if there's a new use coming on, they can come on. No questions asked? [LB924]

DON BLANKENAU: With certain users, industrial and municipality. Those uses can come on almost without any consideration. Now they may need some permits from DNR depending on what their system is like. But they may within their own municipal borders sink a new well and there is no real permitting that's required there other than to make sure it's up to drinking water standards. [LB924]

SENATOR HUDKINS: All right. Thank you very much. Any other questions? All right. Thank you for your time. [LB924]

DON BLANKENAU: Thank you very much. [LB924]

SENATOR HUDKINS: Now Mr. Blankenau has given us a lot of information and with our questions it has taken 25 minutes so keep that in mind. [LB924]

MIKE MURPHY: (Exhibit 1) Good afternoon. My name is Mike Murphy and I'm here to testify on behalf of the Middle Niobrara NRD in Valentine, Nebraska. I'd like to thank Senator Fischer and the entire committee for allowing me to visit with you this afternoon and testify in support of LB924. I'm just going to hit a few highlights. Like you said, Don did an excellent job. In regard to Section 1, as you all know, the Niobrara River Basin has just been determined fully appropriated by the Department of Natural Resources. This determination is the direct result of the department's decision to recognize a water right that was granted in 1942 but never used to regulate other waters. Although Nebraska Public Power District could have objected to other water right applications, they did not. As a result, the Middle Niobrara NRD will now need to offset any new depletions created by any new development as you heard, including municipal growth. In order to offset water at the place, time and location of any new use, the district will need to locate existing users of water who are willing to sell their water rights. Water that would have been consumed by existing use will then be transported to a location of the new use to provide the offset. Section 1 of LB924 will aid in that process and ensure us the protection the offset flows to the place of the new use. In regards to Section 4, NPPD's call for water regulation in May 2007, Nebraska Game and Parks Commission asked for our assistance in developing studies determine whether an instream flow appropriation would be appropriate in the Niobrara River Basin, and if so, what amounts. I like you to refer to attachment number one, dated February 2007, the letter from Rex Amack. The Middle Niobrara NRD willingly agreed to assist the commission in this effort. You'll see that on attachment two, our April 2007 letter. Unfortunately, the

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commission's solicitation of our assistance appears to have been insincere. To begin with, after the commission received our agreement to assist them they ceased all further contact with us on that subject, but continued to publicize our agreement by listing us as a partner. We then, as a Niobrara Basin NRDs, adopted a Coordination Resolution to Nebraska Game and Parks Commission. Attached that as attachment number three, dated September 2007. As Don stated, with the designation of the river basin being fully appropriated, no water is available for an instream flow now. This is because of the Supreme Court decision that's been previously determined. And that, we included as an attachment in a letter that we sent to Game and Parks also. Section 4 of the bill requires NRDs and the commission to agree to any instream flow appropriation request and assures a cooperative effort that better serves the people most impacted by the appropriation. And that's something all of us Niobrara NRDs have wanted to do, are willing to do and would love to have the opportunity to work with the commission together on that process. I've also included in your packet because there's been a lot of attention that's been brought on the Niobrara River this past year because of the concern about decreasing flows in the Niobrara River. So what I've done on the back, separate stapled attachment, I've included gauging station information from the gauging stations on the Niobrara River. These are all USGS gauging stations on the Niobrara River. As you can see on the front page, you have the Sparks gauging station which is right near Valentine. Your top chart shows flows from 1946 to 1963. That was the time period when the gauging station was first put in until Merritt Reservoir come on line. Your next...your middle graph shows the line from 1964 to 2006 after Merritt was established. The one down at the bottom from 1946 to 2006 is the graph that the park service and others have been using to try to show a decreasing flow on the Niobrara River. But as you can see when you look at it and the two time periods ahead of that, you know, your flows show increases. Merritt Reservoir had a significant impact on the river flows at that gauging station. Flipping to the back side of that page and looking at Long Pine Creek which is a major tributary down where Merritt Reservoir's water drains to the east, you see how that transfer of water has caused a significant increases in flows. Looking at your flows from 1949 to 1963 on Long Pine, they're very stable. From 1964 to 2006 you see that increase and that's due to the recharge of that surface water being transferred down to that area to the point where around northern Brown County has had numerous flooding events and we have a lot of environmental concerns. Seasonal streams have become perennial and we have a lot of degradation and erosion issues and you can see that trend when you look at long-term. Going to the next page, the next gauging station that's on the river is the Spencer gauging station and the Spencer dam. This gauging station in operation, looking at it from 1928 to 1963, you see increases, 1964 post-Merritt to 2001, when that gauging station was taken off line, continued to show increases as does when you look at that entire time period of record, pre-development to post-development. Flipping to the back side is the last gauging station before the Niobrara River enters the Missouri River for delegating stations come on line in 1959. So 1959 to 2007 long-term period of record, you continue to see increasing flows on the Niobrara River. Also you see that increase when you look at it

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post-Merritt Reservoir. So I just wanted to let you...and share that information with you that the Niobrara River is adding stream. It's been very well documented about the importance of its waterfalls and everything. Our groundwater levels in the district are going up which is probably why our surface water flows are increasing. In regards to Section 5, for 65 years the water right held by NPPD was not exercised against other users. Because of NPPD's inaction, the department continued to grant water rights and in its 2006 determination of fully appropriated basins, the department concluded that the Niobrara River Basin had a great deal of unappropriated water available for use. But in 2007 the basin became fully appropriated because of a single party decided to call for regulation on what considered to be a paper water right, one in name only. Department has been charged with examining water rights to determine whether they have been abandoned or forfeited. That's the adjudication process that's set up. By regularly examining water rights and cancelling unused rights, paper water rights will be eliminated and they will not have the ability to be recognized after years of neglect. Had this been done in the Niobrara Basin, a portion of NPPD's rights may have been cancelled and the conclusions may have been different for us. In any event, before any basin is judged to be fully appropriated, the DNR should make a complete and thorough investigation of water rights to determine whether they have been abandoned or forfeited. Doing so will prevent water rights from arising to undercut subsequent investments. In conclusion, LB924 firmly defines the wise use of resources, partnerships, and gives the ability of decision makers to make sure that all aspects of related resources are being analyzed. This is exactly what each of you do every day when you debate all sides of a legislative bill and determine a decision that is best for the entire state of Nebraska and that's all we want to be able to do with working with the Game and Parks on the instream flow process. Thank you for your time and I'd like to answer any of your questions, if you have any. [LB924]

SENATOR HUDKINS: Are there questions for Mr. Murphy? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. I just want to thank you, Mike, for coming down today and I see you have board members here too for making this trip, and I really appreciate the information you give us. The Niobrara is my home and it's hard to explain to people that much of what we read in the paper and letters to the editor, etcetera, are sometimes based on emotion. And we all love the river and we all know it's a treasure and I think we always need to keep in the forefront of our minds that we make decisions based on facts. So thank you. [LB924]

MIKE MURPHY: You're welcome. Very true. Thank you for your time. [LB924]

SENATOR HUDKINS: Further questions? Thank you. Next testifier in support. Welcome. [LB924]

JAY REMPE: Thank you, Senator Hudkins, members of the Natural Resources

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Committee. My name is Jay Rempe, R-e-m-p-e. I'm state director of governmental relations for Nebraska Farm Bureau Federation, here today to offer our support for LB924 and I'll try to be as brief as possible to keep the afternoon moving. As you know, LB924 has many different sections and I'll just touch on a couple of them real briefly. First, Sections 1 and 2. I think both Senator Fischer and Don Blankenau laid out the issues very well for the committee. I think what we're trying to do is...or what those sections are trying to do and I think the language in those sections also are the issues raised there, also apply equally to LB1041 and LB975 so I'll just make my comments here and then I won't come back up on those bills so to shorten up the afternoon. But I think the issue of what is raised, is how do we balance the need to allow continued growth and new uses but protect existing users at the same time. And I think that's basically what Sections 1, 2, are trying to get at and for those of us that have been involved in the Water Policy Task Force and these discussions over the years when we created and passed LB962, we knew this was going to be an issue or we knew that the need for offsets was going to be there. I don't think we ever sat down, though, and hashed out how this was all going to work. I think we all had some assumptions of how it might work but no one basically checked with each other to see if all had the same assumptions, and so I think at this point we're realizing that we may not always carry the same assumption on this. As far as Farm Bureau goes, as we've talked about this, our policy statement differs on the water that's created whether it comes from a surface water source through a lease of a surface water use or the retirement of a surface water use. In that instance, if we're trying to provide offsets or we're trying to provide water for compact compliance or some other need, our members would say, we want to try and stay within the surface water system. That is, we're willing to protect the consumptive use portion of that but historically the return flows and everything have been available for diversion and then you look at carriage losses, we want to keep that in place and keep the surface water system in place when you're looking at dealing within that. They distinguished between looking at a new use that might be created through the retirement of a groundwater use or the acquisition of a groundwater right or even groundwater regulation that might lead to increased streamflows. In that sense, our members believe that full extent of that water should be protected to offset the new use or for compact compliance purposes, so there's a little bit of distinguishing there. So that kind of where our members are at on this issue. I know this issue has touched off a lot of feelings about it and it's my understanding that there's a group that's meeting as part of the NWRA that they've set up that has representation from all sides on this, trying to hash out this issue and I think that's good. My understanding is they've had one meeting and they're going to continue discussing. And it's an issue we've got to resolve because if we can't figure out a way to allow those new uses to come into play while at the same time protecting the existing that we can, I think the integrated management planning process that we've laid out in LB962 and the Platte River program and some of the requirements that we have to meet under that could start to unravel. So this is an important issue and I thank Senator Fischer, I think, for raising this to our level. Let me just touch real quick on a couple of other sections. Section 3, the one dealing with

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Endangered Species Act. Farm Bureau has for a long time had a policy in place about as we implement the Endangered Species Act, trying to look at the economic side of things versus the species benefits. And I think the creation of the "God squad" is an important step in that way because if there are no reasonable and prudent alternatives, and we're looking at species protection versus a project that could lead some economic benefit, at least there's an out to try to weigh those two together which I don't think is there today and so we're very supportive of that. We've also in regards to section 4 have had a long-standing policy on instream flows of trying to get NRDs involved in the process and we're very supportive of that element of the bill as well. I just think it makes sense, particularly in this day and age when we're looking at integrated management that we try to involve all the parties that have a regulatory role to play in the decision of moving forward on those instream flows. And I think somebody said earlier, to the extent that we can get those groups on the same page prior to the application being made at DNR, I just think that helps out. So in the interest of time, I will stop there and just pledge our willingness to work with the committee and everybody on this issue and try to reach a step where we can move forward. Thank you. [LB924]

SENATOR HUDKINS: Thank you, Are there questions for Mr. Rempe? Seeing none, thank you, Jay, for being here. [LB924]

RON BISHOP: Senator Hudkins and members of the committee, my name is Ron Bishop, B-i-s-h-o-p, and I'm here today in support of LB924 on behalf of our Central Platte Natural Resource District. We're particularly interested and supportive of the senator's efforts as...especially as it regards sections 1 and 2. We have a situation in our natural resource district where part of the district is overappropriated, part of it is fully appropriated. We have a need to offset municipal uses within our district as Kearney and Grand Island as well as several other growing communities. We have to provide by law the offsets for any new depletions caused by growth in those towns, whether the growth is just people, whether the growth is manufacturing or any other kind of industry or commercial uses, not only within the towns but in the country as well. And so it's important that we be able to acquire water rights, and we're in a process of doing that now, and having those water rights protected as we move them down to the point where the depletion takes place and where we need to offset new uses in the river. As was indicated a little earlier, on section 2, there has been some concerns raised by some of our surface water folks. That concern deals with seniority and priority. For example, if Senator Christensen had a water right and downstream Senator Carlson had another surface water right and we were to go in and acquire from Senator Christensen his right that was junior in time to Senator Carlson's and move it downstream, the bill indicates that it might be protected from Senator Carlson's use even though Senator Carlson had a senior right and could have made a call on Senator Christensen's water right, could have stopped him from using it so that he could have the water. So there's a question as to how that should properly be handled. As was indicated, the Nebraska Water Resources Association has a group that is working on

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that trying to work out some language that addresses everybody's concern and I happen to be one of the people sitting on the committee and so I would anticipate that we'd be back to the committee and the senator very shortly with some suggestions. But other than that little wording conflict, we are in support of LB924 and hope that you'd move it forward. [LB924]

SENATOR HUDKINS: Thank you. Are there questions? Seeing none, thank you very much. Next testifier, please. How many more still to testify in support? Two, okay, three. Move your way to the front, please. [LB924]

TOM DOWNEY: (Exhibit 2) Good afternoon, Senator and members of the committee. My name is Tom Downey, D-o-w-n-e-y, president of Downey Drilling in Lexington, Nebraska. I'm here today representing the Nebraska Well Drillers Association. Our organization was established more than 80 years ago and represents the members of the professional water well drilling industry here in Nebraska. We provide them with training, educational programs, professional development activities and programs designed to assist them in their daily business activities. We also provide extensive public education and information programs to assist our customers in better understanding groundwater and their water wells. We are frequently expected by our customers to provide them with understanding about programs related to groundwater and are expected by those customers to share our groundwater expertise and perspectives with water policy decision makers. Many of our members now serve on natural resource district boards and on basin water policy planning groups. We are here today to support LB924. While I'm not going to get into specific sections of the bill, our association policies always urge local control of groundwater policy, the use of sound science in determining groundwater management decisions, and the development of laws and policies which appropriately recognize the connections between groundwater and surface water. We believe that the concept of LB924 is intended to provide critical tools to the state's natural resource districts and to the Department of Natural Resources to fulfill their assigned responsibilities where integrated management of water resources has been recognized and directed. While there may be some details which must be resolved to assure that the tenets of LB962, upon which these programs are founded, are respected, we believe that natural resource districts must have reasonable assurances that any water resources which are retired from use to provide the means to allow for new developments in a river basin can be protected to that new use. We stand ready to work with other water resources policy interests to provide essential tools and to assure that the basic principles of water resources policy for both groundwater and surface water are protected. Thank you. If there's any questions? [LB924]

SENATOR HUDKINS: Thank you. Are there questions? Seeing none, thank you for your testimony and your time. [LB924]

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TOM DOWNEY: Thank you. [LB924]

DENNIS SCHUETH: Good afternoon, Senator Hudkins and other committee members. I'm Dennis Schueth, general manager of the Upper Elkhorn Natural Resource District out of O'Neill, Nebraska. Last name is spelled S-c-h-u-e-t-h and I'm not going into all my testimony because I think the first two points have been very well outlined by the other presenters and we support those items. And one of the issues of working the third point that Senator Fischer kind of laid out for us, was working with the Game and Parks on instream flows and the NRDs do a lot of work with the Game and Parks. We consider them a partner on a lot of issues and we work very closely. One of the items, right when I became manager of the NRD, one of the issues that came up was an instream flow water right on the lower reaches of the Platte River system. And that instream flow had a dramatic impact on the lower Platte reaches of the Platte River system and the Elkhorn River is a tributary of that and they received an instream flow for that. And due to conflicts of interest on either side or not knowing what the one person was doing or the other person was doing, we spent a lot of time and effort and money on both sides arguing our cases. And I think at that time if, if maybe if the parties would have got together a little better sooner and knowing what they were doing, over a million some dollars in legal advice probably would have never had to be spent. Currently right now, that instream flow right on the lower reaches of the Platte River system is the dictating issue that would be labeling the basin, the Elkhorn River Basin or the Lower Platte River Basin as fully appropriated. So we support Senator Fischer's attempt to get the two organizations to work closer together on instream flow and like I said, we work very closely with the Game and Parks but this is one aspect that I think we could all work a little closer together on. The fourth point that Senator Fischer laid out was the accounting of surface water rights before a basin is labeled a...a preliminary report is labeled. In my neck of the woods where I grew up, my mother, my mom pumps out of a creek and if you go back to DNR's Web site and look at the surface water rights that are appropriated in that area, I can look at that specific area and locate five surface water rights that are no longer being used and have not been used for more than 20 years but they're still on DNR's Web site because of the inadequacy of DNR going out and inspecting those sites. And it's...when you start having to do that type of investigation, one, you need budget and you need staff. So the timeliness of going out there and looking at those sites needs to be done probably on a more timely basis because the preliminary determinations are based on those surface water appropriations also. And so I would agree with Senator Fischer what she has there. Then one of the points on number 5 of that was the state and federal laws. We received a preliminary determination that the Lower Platte River Basin was not labeled fully appropriated and so there's a lot of people in our district or the Lower Platte River Basin that includes the Loup River Basin, they made a lot of economic decisions to start looking at additional land purchases and stuff like that. Well, because of the uncertainty of what the law actually said, and the review of some people wanting to have a hearing on if the lower Platte River Basin should have been labeled fully appropriated, this was the first year

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that that was ever done. The two other years, previous years, that type of a hearing was never held before and I think that hearing was held this year partially was because of the uncertainty of state or federal laws that involved Endangered Species Act or the connectivity of what that really meant. I think if those words would be removed, I think that would help the clarity of what the report would actually do and the criteria that would label a basin as fully appropriated. So I'll end it with that and if anybody has any questions, I can sure try to answer those questions for you. [LB924]

SENATOR HUDKINS: Thank you. Senator Wallman. [LB924]

SENATOR WALLMAN: Thank you, Chairman Hudkins. Yeah, I have friends who chose not to irrigate in the Blue River Basin and I don't think it's fully appropriated yet. But his property values went up anyway on account of that. So now, if it's fully appropriated, he can't dig a well, right? [LB924]

DENNIS SCHUETH: Yes. Without some type of an offset and that goes along with the points in 1 and 2. [LB924]

SENATOR WALLMAN: He's the same age I am so he might want to sell it to farm to a person that wants to irrigate so...and also streamflows. You have grandfather clauses in there, don't you? They pump directly out of the Blue River also. [LB924]

DENNIS SCHUETH: Grandfather clauses meaning... [LB924]

SENATOR WALLMAN: Yeah, the first on... [LB924]

DENNIS SCHUETH: First in time, first in right, yes. [LB924]

SENATOR WALLMAN: Do you think we have to revisit that clause? [LB924]

DENNIS SCHUETH: I think if you were to revisit that you would probably, in my opinion, upset the apple cart a lot because for the surface water I think that was what the people understood when they applied for the surface water rights. They knew that they were only going to be allowed to pump out of that river if there was available water. They knew that when they received the application and so I feel that they should understand that and if the water is there, they have that ability to do that and so that's just...I don't know if it really needs to be revisited. [LB924]

SENATOR WALLMAN: Or you're not checking it good enough. [LB924]

DENNIS SCHUETH: We're what? [LB924]

SENATOR WALLMAN: You're not checking it good enough. [LB924]

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DENNIS SCHUETH: The NRDs? [LB924]

SENATOR WALLMAN: Yeah. [LB924]

DENNIS SCHUETH: The NRDs don't have anything to do with the surface water there. [LB924]

SENATOR WALLMAN: Well, whoever does. I mean they're pumping out of the Nemaha, they're pumping out of the Blue and so that's going to affect us with Kansas too. So that's what we do in here, upset the apple cart. (laughter) [LB924]

DENNIS SCHUETH: And the thing with that is, if everybody just fully understood that your surface water right only gives you the opportunity to use it if the water was there and if it is not there...yep. [LB924]

SENATOR WALLMAN: I understand that. [LB924]

SENATOR HUDKINS: Senator Christensen. [LB924]

SENATOR CHRISTENSEN: Thank you, Senator Hudkins. Question. Is there...I know you mentioned staff and things to check things, is there not enough satellite imagery to determine if these are being used? If they're not being used for extensive time, isn't that able to be picked up that way? [LB924]

DENNIS SCHUETH: The Central Platte yesterday...I know that this committee had an outstanding presentation by Ron Bishop. Their district is in the process of doing flyovers with infrared and everything like that. That is expensive and for the Upper Elkhorn NRD to do that specifically and do that on a yearly basis, no. Is the technology out there? Yes, and it's just like what you mentioned for budgetary issues, it's awfully tough to do that. [LB924]

SENATOR CHRISTENSEN: How about ASCS flies or uses satellite imagery yearly for crops? [LB924]

DENNIS SCHUETH: Yeah. In that situation, depending on when they fly, those aerial photos, depending on the month that they fly it, I know there was a ...early 2000 there was times when nobody irrigated until August, and so depending on when the NRCS or FSA flies those aerial photos, you may not have been able to tell if they actually irrigated from the surface water. [LB924]

SENATOR CHRISTENSEN: What would you say is the cost of flying versus staff because you might have seen the fiscal note here which I struggle with but... [LB924]

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DENNIS SCHUETH: As far as flying? [LB924]

SENATOR CHRISTENSEN: Yeah. [LB924]

DENNIS SCHUETH: For our district I would not know. Staffing needs for DNR, you know, they have some suboffices located out there and they may have to look at new office space. They're definitely going to have to look at additional staff, they're going to have to look at additional vehicles because right now they don't have that. And I don't know what their expense is associated on a per staff, full-time staff person is either so... [LB924]

SENATOR CHRISTENSEN: But I'm wondering if a guy couldn't fly or have imagery ever so often cheaper than what they're proposing here. [LB924]

DENNIS SCHUETH: It, yeah, I'm not for sure, Senator. [LB924]

SENATOR CHRISTENSEN: Thank you. [LB924]

SENATOR HUDKINS: More questions? Don't think so, thank you. [LB924]

DENNIS SCHUETH: Thank you. [LB924]

DEAN JOCHEM: (Exhibit 3) I might point out that's one of my...your mother was one of my former students so kind of happy to see her. My name is Dean Jochem, spelled J-o-c-h-e-m. Everybody always looks under Y for my name. I'm not going to read this to you because you are very capable of reading better than I, but I would hope that you will look at this when you have a little more time. There are certain portions of this that I will highlight for you. Senator Fischer, thank you very much for this bill. It's something that we really need and I hope that we can get that done. My manager explained quite well the problems that we have had coordinating on the instream flow process with the Game and Parks and being called a partner does not necessarily mean that you are involved in the decision making process. We have gotten a lot of information from them. We appreciate that but we would also like to have some input. I think there's an important reason for that. On page 3 at the bottom, I say that it's imperative that NRDs be involved in the instream flow process in conjunction with Game and Parks as LB924 dictates. This is verified by the fact Game and Parks has only considered the interest of recreation, fish and wildlife in their determinations thus far. Natural resource districts realize that our purpose is to consider all uses of natural resources so therefore, in addition to the aforementioned uses, it is apparent there is a need for natural resource districts to provide consideration for production agriculture and the economic impact that decisions on instream flow could have on Nebraska's number one industry. And I know the Governor, and I know all of you, use that term quite often. It is our number one

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industry and so I think it needs some number one consideration and this is one place that we can be help. I am concerned also because we have been told one bit of information I picked up that we have about 15,000 miles. I don't know if that is accurate, of streams in Nebraska that need instream flows placed on them. Can you see how important that becomes that we have some voice from the NRD? One thing that I'm very proud of and I hope that you are proud of that also, you are elected officials. You are responsible to the people. If you don't do your job the way that the majority of the people wish, you will be replaced. I am a public official that is elected by my constituents. I worked hard to get this job. By the way, I didn't mention that I am a member of the board of directors at the middle Niobrara NRD and also a member of the NARD board of directors. I am very proud of that. I worked hard to get this position and if I don't do my job, I'm going to lose it. That's not necessarily true of some of our agencies that are working on things that are brought up in this bill so I hope you consider that fact, how important it is that you would have NRDs involved wherever possible. That's one thing I like about this bill. There's a lot of places that NRDs are brought into the decision making process that we have not really had an opportunity to be involved in. One of those is in section...well, comment rather on sections 1 and 2. I always thought that we were in charge of groundwater. Isn't that what we're supposed to be in charge of? Okay. And the DNR is in charge of surface water. But when the magic words, you're fully appropriated comes down, we suddenly find that we are only in charge of trying to determine what we're going to do at that point. We have lost control of groundwater to the Department of Natural Resources. I would like to make the comment here, LB924 gives the 23 NRDs and their elected officials the opportunity to enter into helping solve the problems involved in the control of water in the state of Nebraska. If the Department of Natural Resources can control groundwater, NRDs should be able to have something to say about surface water as it relates to groundwater. So I think in this case we would like to have the input that this bill might give us the opportunity to have. I also really think it's a great idea on the endangered species that you're going...if this passes, you will involve NRDs in that committee that helps makes those decisions. Because once again, I think we need to have someone there that does consider production agriculture every time they make a decision and I don't want to sound like I'm opposed to wildlife or anything. If any of you would happen to believe that I would invite you to come to my ranch. I'm a retired ag teacher of 38 years. I believe very strongly in conservation and in agriculture. Back when I started teaching it was the number one industry in the United States. I think it still is. Thank you. [LB924]

SENATOR HUDKINS: Thank you. Questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. I just want to thank you, Dean, personally, for coming down here today and I know your commitment not just to agriculture but to conservation efforts, and in our area of the state, Dean is recognized as a conservationist and has been so for many, many years, so thank you. [LB924]

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DEAN JOCHEM: If I could say one thing in that line. Back when the World-Herald sponsored the conservation award, we won that about five times in a row so you know that we have promoted that. Thank you very much. [LB924]

SENATOR FISCHER: Yes. Thank you. [LB924]

SENATOR HUDKINS: Thank you. Is this the last person in support? We would like to have the opposition testimony work their way to the front then. [LB924]

JASPER FANNING: (Exhibit 4) Thank you, Senator Hudkins, Senator Fischer, and other members of the committee. I will be brief and to me that means short in duration. I won't read my written remarks to you. I think several things have been brought out to this point in the proponent testimony. [LB924]

SENATOR HUDKINS: Could you give us your name, please? [LB924]

JASPER FANNING: I'm sorry. Jasper Fanning, general manager of the Upper Republican Natural Resources District. That J-a-s-p-e-r F-a-n-n-i-n-g. Thank you. Some of these things that have been brought out...actually my background in economics gives me a little bit of insight too. In our natural resources district in the Upper Republican in Perkins, Chase, and Dundy Counties, when they put restrictions on beginning back in 1980, and when they essentially put on a quasi moratorium through well spacing, created a market for water in our area. And likewise, once other areas of the state were declared as fully were overappropriated, we have created a market for water. New uses must be offset. We can't have any additional increases in uses. And Senator Dubas asked the questions about preference and how that works in. Well, preference is more applicable when there's a shortage of water and there isn't enough water for everyone. But with these fully and overappropriated designations, once we get the overappropriated back to fully appropriated, there's a set quantity of water that can be used in terms of streamflow depletion. And so we're not talking about where there isn't enough water, we're talking about reducing the use to create enough water for the new use. And all of this is handled through a market. A willing buyer, willing seller type of arrangement. Any industrial user that comes in and wants to increase use is going to be purchasing water from an existing user. And I think this bill does a couple of things that facilitate that. The offsetting mechanism that it creates, that framework allows a system whereby new users can come up with offsets either by the NRD or accounted by the NRD through the open market, and purchase water rights from other individuals, either surface or ground, to offset that new use. The other important component of the bill other than the offset framework itself is the way that it attempts to streamline and improve the administration of this integrated management and accounting of offsets. In terms of using the stream to conduct that offset water, there is current law. I believe it's 46-252 for a conductance permit. And that could be used, but as Mr. Blankenau recognized, it can take a very, very long time for that permit to be processed. And in

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today's business environment, when a industrial user comes to town they need to know an answer fairly quickly, and I'm glad to have the music in the background but...(laughter) those are the two key things that I wanted to get across was that the market that has been created through these designations is an excellent way of handling most of these things. It's going to take care of itself. We simply have to have law that allows the accounting and tracking of these offsets and I think this bill provides that. And with that I'll answer any questions anyone might have. [LB924]

SENATOR HUDKINS: Are there questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Thank you, Dr. Fanning for being here today. In your letter that you handed us you talk about, and we heard this earlier, about the new uses of water in both time and location. We've heard about amount, time, location with offsets. Could you explain that a little better in detail and how that works with streamflow basically, isn't it? [LB924]

JASPER FANNING: Absolutely. That applies more directly to the surface water and depletions that we have to watch especially under the compacts and with LB962 on the Platte River. Essentially, we're worried about surface water in that we're trying to protect a downstream surface water user from being harmed by any increase in consumptive use that occurs upstream of them. And so you have to provide an offset that would increase streamflow to the same extent in time, place and quantity that the new use would create in terms of new depletions. And so you would have to provide an offset in a location where it would reach the stream or would enter into the stream above the place in which the new depletions would enter the stream. [LB924]

SENATOR FISCHER: Would you have to offset a...if you're going to get this upstream and quite a ways upstream, do you have to offset that then with more water than is required by the user downstream because of loss on the way down? [LB924]

JASPER FANNING: Absolutely. You'd have to take all those things into account. [LB924]

SENATOR FISCHER: Do you have some formula you use? How do you do that? Well, I guess you don't do it. DNR does it. [LB924]

JASPER FANNING: Currently we don't do that. We don't do that but we have some experience in that through...we leased some surface water last year for compliance activities on the Republican Basin and in that accounting process they took into account the losses of water that occurred in the river from point A to point B and that amount of water we were not able to protect at point B, which was Harlan County Lake. [LB924]

SENATOR FISCHER: Has the committee received any information on that? On how

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much water, I guess, we lost in the accounting that was supposed to go to Kansas? Do you know if we've gotten anything on that or not? [LB924]

JASPER FANNING: I don't know that you receive that. I can see that you get that. In fact I have, not full information on that, but on a later bill I'll provide some information that will address that. [LB924]

SENATOR FISCHER: Okay. Thank you. [LB924]

SENATOR HUDKINS: (Exhibit 5) Other questions? Thank you, Dr. Fanning. And we have a letter of support from John Winkler who is the manager of the Papio-Missouri River Natural Resources District. Are there any others in support? Then may we have the first person in opposition, please? [LB924]

DON KRAUS: (Exhibit 6) Thank you, Senator Hudkins and members of the committee. My name is Don Kraus. I'm the general manager of the Central Nebraska Public Power and Irrigation District. Central opposes LB924 as written. LB924, in part, would give the natural resource districts the sole authority to determine the amount of streamflow produced as result of retired groundwater pumping, and require that the Nebraska Department of Natural Resources prevent surface water appropriators from making use of any such streamflow created. Such new authority would be wrong for a number of reasons. First of all... [LB924]

SENATOR HUDKINS: Mr. Kraus, could you spell your last name for us, please? [LB924]

DON KRAUS: Sorry. K-r-a-u-s. [LB924]

SENATOR HUDKINS: Thank you. [LB924]

DON KRAUS: First of all, it should be the state through the Department of Natural Resources, not the NRDs that should have the role of determining the amount of streamflow that may be in the stream as the result of any particular activity. Although water is a single resource, it has been the policy of this Legislature to divide the authorities between groundwater by the NRDs and surface water for the state. While it certainly may make sense for NRDs to use regulations or even pay groundwater users to reduce groundwater withdrawals for purposes of restoring lost streamflow, it should fall to the NRD, or to the DNR to determine the quantity and timing of any water returned to the stream. Any such process should include a hearing to allow potentially affected appropriators to participate. Secondly, it is unreasonable to prevent appropriators from making use of any such water returned to the stream. Clearly one of the more significant water problems facing Nebraska today is the ongoing conflict between the groundwater and surface water uses in areas of limited supply. One of the

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primary reasons for LB962 is that there are times and places in this state, particularly in the western part of the state and during times of drought, when pumping from wells results in water supply being taken away from downstream appropriators. Since one of the primary purposes of LB962 and integrated management plans is to restore the water supply taken away from appropriators, it would be counterproductive to then deny the use of that restored streamflow to the rightful users. It also conflicts with Section 15 of the Nebraska constitution, which provides that the right to use of streamflow is based on priority of appropriation which provides that the right of streamflow...is on prior appropriation. Since the lost streamflow would otherwise have been available to existing appropriators had the original pumping not occurred, the restored streamflow should likewise be available to those same appropriators. Thirdly, this part of LB924 is probably unnecessary for purposes of protecting new flows as there is already existing statutory and regulatory authority for doing so and we've heard reference to 46-252 previously. That section of state law has been used on several occasions by the department to approve permits to conduct and so these authorities already exist and could be used for transfers. Another part of LB924 would require that all river basins be adjudicated prior to DNR performing an annual evaluation as to whether or not a basin is overappropriated. Such a requirement seems unnecessary, as I am not aware of any case where such a requirement would have changed the outcome of the annual review. Some have suggested that this could have changed things on the Niobrara but it is our understanding that this would not have been the case. Furthermore, DNR already has the authority to conduct adjudications and if a basin is found to be fully appropriated, that adjudication could occur as part of the integrated management plan for that basin. The primary purpose of the annual review is to catch a basin at the point of being fully appropriated before it becomes overappropriated. A pre-review adjudication could result in a delay to the annual review and would be contrary to this catch-it-in-time concept. Notwithstanding these comments, I'll be participating in a task force effort to address potential changes to LB924 and hope the group can bring back a recommendation for the committee. And I'd take questions, if there are any. [LB924]

SENATOR HUDKINS: Thank you. Are there questions? Senator Christensen. [LB924]

SENATOR CHRISTENSEN: Thank you, Senator Hudkins. Thank you, Don, for coming. When you spoke of return flows, what were you looking at? Carrier losses, field runoff, recharge evaporation, what was you looking at? [LB924]

DON KRAUS: You know, it's not evaporation but return flows...let me give you an example of our project. We provide surface water to 100,000 acres in south central Nebraska and in order to do that, water's going to flow through a number of canals and seep in. That also provides recharge, but it will also provide benefits back to the river and there will be water created in the stream as result of the delivery of that water to those irrigation canals. And so that's what I would characterize as return flows. Water that would seep back from those irrigation canals, making it to a stream, and increasing

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the flow of that stream. And so there are downstream users depending upon that flow that is created, and you call it return flows, but it is seepage from canals. Downstream users that are depending upon that for their, you know, water supply, their appropriations. So I think that needs to be...and that's a part of LB962, that concept of return flows. [LB924]

SENATOR CHRISTENSEN: Would you agree that basically that is a carrier loss then because if it soaked down, that would be a loss of what was being carried so that would just be...I guess I'm referring more to my bill but that would be natural carrier loss. [LB924]

DON KRAUS: I call it, well, you can call it losses. You could call it seepage but it seeps back to the river and creates flow in the river and it is those other appropriators that rely on that flow that is lost. And so that is something that as you look at transfers, LB962 is very clear. You could only transfer the consumptive use and so you had to find a way to maintain the return flows. That was a part of LB962 and as we had the debates on LB962, a lot of people said, okay, what about third-party impacts? And by maintaining return flows, then the question of third-party impacts kind of went away. You know you could go ahead and do these transfers to other uses but you didn't have to worry about third-party impacts as long as you maintained the return flows. So those were just some of the debate that occurred. [LB924]

SENATOR CHRISTENSEN: One more question. You made comment that NRDs shouldn't have any say upon what happens with surface water. Would you also say then that DNR should have no say on groundwater being fully and overappropriated, wouldn't that be fair then? [LB924]

DON KRAUS: Well, it's an interesting question and I probably not going to give you a very good answer. What we have is, you know, and the Legislature has kind of set up two separate systems: DNR for surface water, NRDs for groundwater. As it comes...and when it comes time to say, how do we deal with these overappropriated basins or fully appropriated, you have an integrated management plan. They both have to approve. I mean that's what...that's the concept, one, my version of the concept. DNR has surface water, NRDs have groundwater. You do the integrated management plan and they both have to agree. So that's kind of where you work out the tough details is in the integrated management plan. Now is there a better way? Perhaps. I mean, some people say it's all one resource. One agency is in charge of everything but that's not the way we're headed and so to me, as I...and the reason I brought that up, as you look at streamflow, it seems like the department should be responsible for what happens in streamflow. That was the point of bringing that up. [LB924]

SENATOR CHRISTENSEN: Yeah, I understood your comment and don't know that I disagree but I also think the other side is wrong also. [LB924]

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DON KRAUS: Clearly, if the department is going to make a decision they have to have a hearing, and they ought to have any person who's affected by that decision should have a right to participate in the hearing, and you have a right of appeal. [LB924]

SENATOR CHRISTENSEN: Because, I guess, I either see that they ought to both totally be completely separate or they ought to both work together. Thank you. [LB924]

SENATOR HUDKINS: Senator Carlson. [LB924]

SENATOR CARLSON: Senator Hudkins. Don, on the first page of your report here, I don't know if that was intentional or not, but bottom statement there, this part of LB924 is wholly unnecessary, you said probably unnecessary, and that is a change in meaning. Did you mean that or did it just come out? [LB924]

DON KRAUS: Okay. I'm going to have to find it. Catch up with you, Tom. Last paragraph. This part is wholly unnecessary, I think it is unnecessary. The part that deals with transfers, yeah, because I think there's already statutory authority to do these, is conduct water. That is a, in the statutes right (inaudible)...you can get a permit to conduct and you really don't need this other language to provide for other transfers. You've also got LB962 which allows a transfer from an existing use to a...if you have an existing use of irrigation, you say, I'm going to stop that irrigation and transfer it to intentional recharge, that can be an offset for a new use. So that is in LB962 already. I don't think it's been used but I think it is...the language is there, the authorities are there. So I don't think that the transfer part of LB924 is needed because you already have something in 46-252. [LB924]

SENATOR CARLSON: Okay. Thank you. [LB924]

SENATOR HUDKINS: Senator Fischer. Wait just a minute, Mr. Kraus. [LB924]

DON KRAUS: Oh, sorry. (Laughter) [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Mr. Kraus, don't run away from me now, come on. (laughter) You mentioned LB962 quite a bit in your comments. The law has been in effect for four years now. Do you think there are some changes that need to happen to address some situations that have come up and that LB962 does not address? [LB924]

DON KRAUS: You know, if I were to be critical of LB962, I would hope it would move faster. You know, if I were to say, here we are three years after it was passed in 2004 and I would hope that we would have had some of these integrated management plans in place be moving forward with returning basins that are overappropriated back to fully,

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that would be my comment. And I know that's not where you're going. It's like...I think, really, what we need to talk about and I think your point of your bill is a good one. What about economic development? And is...do we need something for that? And I don't know about that. I think this is something our task force is going to take up and I think it's a fair question, you know. And my first reaction would be, it's a new ball game. You're playing a new ball game when you go to a fully appropriated basin. You have to start saying, okay, how do I plan ahead? If I have development, you got to line it up early. You can't say...you can't wait for a interested party to walk in the door and say, okay, let's go out and look for water now. You've got to have that in planning, you've got to do the planning and the foresight and this is a new deal so it's going to take some time to get used to that and get the things in place. But there will be and you know, processes developed where people line it up and they have those things in place. If you...many economic development organizations will say, if I want to bring a prospect to town, I'm going to have land, I'm going to have land figured out, I'm going to have areas where I can go to get land as development sites and that's just part of the game that they, they have to play that. [LB924]

SENATOR FISCHER: But in many cases, you represent an irrigation district, and you've had a lot of development in your area and do you have opportunities for offset for economic development. There are basins in this state that have not seen a lot of irrigation development and I do not believe the opportunities for economic development will even exist in those basins if they're declared fully appropriated because the offsets aren't available under LB962. [LB924]

DON KRAUS: You know, those are...I can't comment on the Niobrara and your areas up there. You know, I know there are irrigation, surface water irrigation, there is surface water irrigation going on and LB962 allows for the transfer of those irrigation uses to another use. I mean, you can only transfer consumptive use but you have to work out agreements and I can't comment on what that potential is but I know there's some, there is some. [LB924]

SENATOR FISCHER: Okay. Also following up on Senator Carlson's question on that paragraph on, where you say it's wholly unnecessary, the part's wholly unnecessary, because it already exists in current law. Again you say it already exists in LB962. Do you have a problem with any specific language in LB924 that deals with that? Do you have a problem with specifying it in statute in LB924? Just because it exists some place else, what's the problem with putting it here? [LB924]

DON KRAUS: I think there's some merit in the discussion in LB924 on offsets. Having a process for certification, if you will, of offsets. I'm not suggesting that doesn't have merit. My suggestion is that we should the department doing it through a hearing process. Now as far as transporting water through a stream, I mean that...I'm still trying to understand why that's needed. What is different over what you have now that you need

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that? I've got to understand that, I guess. I don't see a reason for that yet. [LB924]

SENATOR FISCHER: When you talk about the task force that's meeting, is that the Water Policy Task Force? [LB924]

DON KRAUS: No, No. It's the task force that was mentioned earlier, a smaller group that's going to try to work through issues. [LB924]

SENATOR FISCHER: Okay. Right. Okay. And I appreciate that you're willing to look at it. Thank you. [LB924]

SENATOR HUDKINS: Next person in opposition, please? [LB924]

TOM SCHWARZ: (Exhibit 7) My name is Tom Schwarz, S-c-h-w-a-r-z, and I'm a farmer from Bertrand, Nebraska. I'm here to oppose LB924. While I understand the need for legislation that will allow us to move groundwater into the surface water system and vice versa, I don't believe that this bill has all the necessary components to accomplish that goal without harming the property rights of those affected by such actions. I would like to give you some background that I feel will demonstrate why I am concerned. I am a member of the state Water Policy Task Force and was very involved in the development of LB962. In fact, I was the last member of the task force to agree to send the bill to the Legislature. My concern was that the money necessary to properly implement the bill would not be forthcoming from the state. That has unfortunately proven to be true. In hindsight, I should have blocked the movement of the bill. The task force made several mistakes in the development of LB962. Early on, we had to make some choices. First, do we have the political will to set a policy that can determine, in a conflict between a surface water user and a groundwater user, whose right is better? The answer in short was no. Surface water users felt that the prior appropriation doctrine should rule in such a case and groundwater users felt that correlative rights should be used to divide the water. In the end, a compromise that really didn't answer the question was forwarded to the Legislature. The next issue was how to accomplish our mission of settling these disputes. Do we regulate our way out or buy our way out? The task force decided on buying our way out, obviously ignoring the political realities of that course of action. To make matters worse, the task force far underestimated the cost of following this course of action. So we now have a policy that requires a large annual contribution from the state to work and inadequate funding to accomplish our water policy goals. If the Legislature feels that adequate funding, which I would estimate at \$10 million to \$20 million per year, is not going to be available, then we need to go back and rework LB962, using regulation to achieve our water policy goals. Please keep in mind, fixing our water problems is going to cost \$10 million to \$20 million per year either way. The question is do only the irrigators pay, or the state as a whole? Our current system under LB962 is not working. Our water problems are obviously getting worse. The Republican is approaching critical mass and the explosion there will decimate agriculture in that

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valley. On the Platte, we have been conveniently ignoring our obligations under the program to offset new depletions since 1997. At some point the U.S. Fish and Wildlife Service will demand our compliance on our contract with them. Problems on the Niobrara are also now brewing and will probably continue to get worse. In order to have water policy that works, we need to take one step at a time. We need to answer questions like: Do we continue with two separate systems of regulation? Do we continue to have two regulators for water in Nebraska? We need a policy that defines whose right is better in a conflict. We need to have mathematical models in each river valley that are calibrated to show that we can actually depend on them. All these things and more are needed to be done if we are to start moving water between the correlative rights system and the prior appropriation system. We do need tools like this and should develop them but let's not get the cart in front of the horse again. [LB924]

SENATOR HUDKINS: Thank you. Are there questions? Senator Carlson. [LB924]

SENATOR CARLSON: Senator Hudkins. Tom, in the last paragraph of your statement, I'm going to read it and leave out a word, middle of the paragraph there. We need to have models in each river valley that are calibrated to show that we can actually depend on them. Mathematical gives the idea that there is such a thing and that it's totally accurate. Will there ever be a model that we can entirely depend on? Is that even possible? And I'm asking this because in the meantime, time is going by. [LB924]

TOM SCHWARZ: Yeah, that's correct. I think it is. I had high hopes for the COHYST model. I felt that by this point in time we would have a model that would be dead-on and obviously I was a little in error in that estimation, I guess. We've had...there's been problems with calibrating the model. I'm not an expert in modeling. I mean, my college hydrology was measured in weeks not years so I'm certainly not an expert in this arena. But I do know that models can be used and models can be abused too. Even a perfect model can be used improperly and I've seen some examples of that within the state here in the last year. [LB924]

SENATOR CARLSON: Okay. Thank you. [LB924]

SENATOR HUDKINS: Senator Wallman. [LB924]

SENATOR WALLMAN: Thank you, Chairman Hudkins. Thank you, Tom, for being here. And I agree, we have too many organizations trying to control basically the same thing. So I have some relatives in the valley, the Republican. They were pretty upset with LB701 and they wouldn't of had any problems with irrigation fees but the bonding company, I guess, didn't go for that, did they? [LB924]

TOM SCHWARZ: No, that's correct. [LB924]

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SENATOR WALLMAN: And so, I wouldn't have any trouble with the state picked up the bonding fees, but I guess that's illegal, so thank you for testifying. [LB924]

SENATOR HUDKINS: Other questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Hi, Tom. How are you? [LB924]

TOM SCHWARZ: Pretty good, thank you. [LB924]

SENATOR FISCHER: I have a question of...you're against the bill because you feel that the possibility is out there that property rights could be harmed? [LB924]

TOM SCHWARZ: Correct. [LB924]

SENATOR FISCHER: If the different groups that our previous testifier alluded to worked that out, would you then be in favor of the bill? [LB924]

TOM SCHWARZ: Yes, that could very well be the case. [LB924]

SENATOR FISCHER: Okay. Thank you very much. [LB924]

SENATOR HUDKINS: Senator Dubas. [LB924]

SENATOR DUBAS: Thank you, Senator Hudkins. Thank you Mr. Schwarz for being with us today. You reference in your testimony, you feel the task force far underestimated the cost of following course of action. What did you underestimate, where? [LB924]

TOM SCHWARZ: I was...I discussed this with Roger Patterson, who at that time was the head of the Department of Water Resources, and I was very vocal with him in my concerns that the number he was throwing around was far too low. It run between \$2 million and \$3 million per year. I tried to show some...I did some work for, at that time, Congressman Tom Osborne, on water issues and we'd done some fairly extensive work regarding the vegetation arena that Senator Carlson's worked on and had come up with some, I felt fairly accurate estimates of what it would cost to control vegetation, just that segment of this whole problem, because that's only one small component of it. And I was very certain that that \$2 million to \$3 million range was not even going to be any more than enough just for the vegetation part of the problem, if we were to address that. And as you looked at the over development in the Platte and Republican to back that train up, it's going to cost money. It's going to be a major fee...and there's not going to be painful, not even with money. But if you look at what we are, we're out of compliance in Republican, the amount of water and what that water is likely to cost, and we can come up with some guesses. In my opinion, we could tell at that time we were far

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underestimating the cost per year to put us back in compliance with the Republican and then on the Platte. [LB924]

SENATOR DUBAS: Thank you. [LB924]

SENATOR HUDKINS: Other questions? Okay. Mr. Schwarz, in the Republican Basin, those farmers were told that they were going to get money for letting their water rights go for a while and the bonding company is not forthcoming with that money. What's going to happen to those farmers? [LB924]

TOM SCHWARZ: This is a really sad, sad situation that we face there. I happen to be a commercial hay grinder and processor. I deliver hay to feedlots and cow-calf operators across our area and I, at a recent meeting, I had a call from a customer in the Republican valley who needed to sell his hay. He said, you know, can you move this hay for me? He said I was counting on that money and he said I've got notes due at the bank. I've got to get it moved. Can you help me out which I was able to do but I mean, that really put a point on this for me. This is causing real harm to real people. I understand the concerns of the people who filed the lawsuit and I'm not going to say that their concerns aren't valid. They have some valid points that they're bringing up but I do hate to see the pain that this is causing in the basin. You know, that's just, that's just tough and I don't know what more to say about it. [LB924]

SENATOR HUDKINS: And it could go on for some time? [LB924]

TOM SCHWARZ: Oh, very easily. This could draw out for years. [LB924]

SENATOR HUDKINS: Thank you. Other questions? Thank you for being here today. Dr. Bleed. [LB924]

ANN BLEED: Thank you very much, Senator Hudkins and committee staff. My name is Ann Bleed, that's capital A-n-n, capital B-l-e-e-d, and I will be testifying verbally on LB924, but I also have written testimony which I will give you now for LB975 and LB1041. Before I get into my formal testimony, to Senator Christensen, I do have some figures for you. You have been asking for them, if I may. Of the water that was purchased by the natural resources districts in the Republican River Basin, the total amount of water that was actually not diverted, and that's not necessarily purchased, there is a difference, but the total amount of water that was not diverted by the canals was 40,730 acre feet. Because the canals did not divert and consume that water, we got 22,400 acre foot of consumptive use that we would otherwise have had, so that was 22,400 acre feet of credit, if you will, to Nebraska that would not have been there if we hadn't purchased that water. And then again, from that purchase, 20,900 acre feet of water actually provided wet drops of water to Kansas at Harlan. [LB924]

SENATOR CHRISTENSEN: Can I have you repeat them? 40,730... [LB924]

ANN BLEED: Okay. Forty thousand seven hundred and thirty acre feet of water were not diverted as a result of the purchase. Twenty-two thousand four hundred acre feet of consumptive use was therefore given up by those districts, which meant that our consumptive use numbers for the codelpack (phonetic) we're counting were that much less. So we got 22,400 acre feet of credit if you will, and of the water that was not diverted, Kansas actually got 20,863 acre feet. [LB924]

SENATOR CHRISTENSEN: Thank you. [LB924]

ANN BLEED: (Exhibits 8 and 9) And now on to my more formal testimony. First I want to thank Senator Fischer for bringing this bill to the Legislature. I do believe it is raising issues that should be addressed, although I do also agree with Don Kraus that existing law does allow these offsets to occur and it does allow the department to protect the offsets. Whether or not we could do that in a more expeditious fashion, is a very good question that I think does need to be addressed. And although I am opposing the bill as written, I would be very willing to work with anybody who's willing to work with me on trying to come up with reasonable language to allow a more expeditious process. Having said that, I do have some concerns about the bill as written. The first one goes to section 1 where it states that the natural resources districts may use existing groundwater controls to offset depletions to streamflow caused by new uses. They...current bill on LB926, integrated management law, does allow NRDs to offset, or to use controls to augment streamflow. The primary purpose of that under LB926 was to either get a basin back to a fully appropriated status or to comply with interstate compacts agreements or settlements. As I read this bill, this would extend that authority one more step to say that NRDs could restrict existing groundwater users in order to allow a new groundwater or surface water use. I find this troubling unless there's some clear way...clear understanding of under what conditions restricting existing groundwater users would make sense for new uses and there may be some and I think the bill would benefit from some guidance on that point. I also...my second concern is that I think there does need to be some very important due processes involved if we are going to impose regulation on existing groundwater users so that a new use, whether it be a new surface water use or groundwater use, could occur. Second, in Sections 1 and 2, it says that the natural resources districts, if they do acquire groundwater uses to offset new uses, shall inform the Department of Natural Resources of how much water is getting to the stream in timing or in location. I think we should add the word timing to that as well because that's important but as I understand it, the NRDs inform DNR of that and then DNR shall protect whatever water the NRD says gets to the stream. And since our beginning of the history of the department going back to 1895, we've had the responsibility of making sure that our actions, and in this case it would be protecting streamflow, do not adversely affect a third party. And since 1895 there's been a fairly efficient, I believe, due process to make sure that if we do make, take an action to, in

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this case, protect more water than perhaps should be protected so that a third party, whether it's an individual pumper downstream or an irrigation district or municipality whoever, a third party has a fairly efficient due process to object to our decision if they feel they have been harmed. As I am reading this bill, not only would the role of the department, in determining how much water should be protected be removed from the department in this instance where we're dealing with groundwater offset, but also the ability of a third party to protest the amount of water that was being protected is not provided in the legislation. That's not to say you couldn't go to the courts through a tort claim or that kind of thing to complain about a potential injury but I think it does do away with what I...has been an official due process for the department in their decisions. So if the Legislature does decide to take this role from the department, then I would at least hope you would put in some kind of due process for a third party to make sure that they're not unduly injured by a decision of the NRD. The bill also says that the decision should be based on the best available science. I have a major concern with that because that is very different than the phrase that is, in fact, in the integrated management law in 46-713 which says the best available scientific data and information. There's a big difference. If I were asked to explain what the best available science would be, I would say, well, you probably should do radioisotopic studies to determine what drops of water, paint would have gone to that well, actually get into the stream and I don't think that's what is intended. So I would suggest that should be changed. The Section 5 of the bill requires that before a preliminary determination that a basin is fully or appropriated is made, that there should be an adjudication within at least the last three years. I want to make it very clear. I would love to be able to adjudicate every basin in the state every three years and we are...it is a high priority for our department. I think that some of our staff in both the Loup Basin and the Republican Basin would have been a little bit concerned with the statement that we have not made that a high priority because we have spent a lot of time making sure that our water rights have been properly adjudicated in the Republican Basin and we've been working very hard in the Loup and elsewhere. The thing that I think is important to remember is that a surface water right is a property right. It does take time to go in and tell Senator Carlson if he has...I guess, Senator Hudkins, you have a surface water right. If we go in and tell Senator Hudkins that we're going to cancel her right, we are potentially taking away a property right and there's a due process written into the law to make sure that does not happen when it should not happen and that therefore, it does take time and money. There may be some things we can do in the future using remote censuring, etcetera, to increase the efficiency of the beneficial determination of whether, in fact, the right has been used but we would still have to have hearings and allow the due process for the irrigator to object if there was a attempt for us, by us to cancel the water right. What I would suggest if you are going to move forward with some kind of a requirement that the basin has to be adjudicated, that you change the wording from, it has to be adjudicated within three, and I would suggest maybe five years since the use or lose it concept is five years, not three. But I would also suggest that you instead of saying before we can make a preliminary determination, that you change that to a final

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determination. And the reason I say that is, if we had to wait...if we had to issue an evaluation which we have to do every year and I'll just take the Loup Basin as an example, we issued an preliminary evaluation or an evaluation on our annual report that the Loup Basin is, in fact, fully appropriated. But then there was no preliminary determination, at that point there would be no temporary stays on new issuance of new surface permits or the construction of new wells or expansion of irrigated acres. The task force worked extremely hard to avoid the concern that once a basin was considered to be fully appropriated, there would be a proliferation of new uses to try to beat the deadline on saying that there couldn't be new uses. And that is why the task force put in immediate, or almost immediate, temporary stays on new uses until a final determination was made. But I would suggest that you might want to say that we could go ahead with the preliminary determination, put on the temporary stays, and then before a final determination is made, require the adjudication. And this would prevent the rush to drill wells simply to get in before the deadline. I do want to point out, however, that although I do understand your point that people may start using water rights that they hadn't used in years simply to make sure that they still had a water right, that already occurs. Once we indicate that we're going to start adjudicating a basin, you see a lot of flurry of activity, and that is a concern. However, the actual number of water rights does not make any difference at all in our determination of whether a basin is fully appropriated. Those rights have got to be used for us to make sure to determine it's fully appropriated. And with that, again I would like to emphasize that the department would be very willing to work with anybody who is interested in trying to revise the language on the bill. I think the concept is a good one and I do agree that there are some economic concerns about a speedy decisions that may be able to be accommodated in the bill. But the current bill, as I said, gives us problems. If you have any questions, I'd be glad to try and answer them. [LB924]

SENATOR HUDKINS: Senator Christensen. [LB924]

SENATOR CHRISTENSEN: Thank you, Chairman Hudkins. Ann, thank you. Are you going to come back and testify on my bill? [LB924]

ANN BLEED: I have written testimony. I will be here if you have questions. [LB924]

SENATOR CHRISTENSEN: Okay. In your...on your surface you was talking about people having not have used them for a number of years possibly losing them in five years things. Do you require annual reports or meter readings or anything now? [LB924]

ANN BLEED: In the Republican Basin we do. We do not throughout the rest of the state. [LB924]

SENATOR CHRISTENSEN: Should we not be having at least a report filled out annually that they're saying that they are using them or not using them? That shouldn't

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take a lot of effort, I wouldn't think, because we know who they are, where they're at. We mail them out and get them back in and.. [LB924]

ANN BLEED: I wouldn't have a major problem with that, Senator. I don't think that that really solves the problem of whether or not we should cancel a water right and in fact it might create problems because somebody may be sending in an annual report that they used it, when in fact they haven't. [LB924]

SENATOR CHRISTENSEN: Right. That could happen. [LB924]

ANN BLEED: And that does happen and when we do a beneficial use report before we cancel the water right, we do go out and check to see if there is evidence that they have been using that water right. And if we see that there's no diversion works, that's in fact functioning or we have seen no evidence that the field has been irrigated, then we give...we always give the irrigator due process to show why our investigation is wrong but we do have a fairly thorough investigation before we cancel to say, we don't think you've been using your water right. [LB924]

SENATOR CHRISTENSEN: Because I think I agree. There's probably a lot of rights that aren't being used. [LB924]

ANN BLEED: There are a lot of rights that aren't being used and we are working in the Niobrara Basin right now to adjudicate those rights and as I say, we have done a lot of work with the irrigation districts. You might want to talk to Ron Wulf about the work we've been doing to make sure their water rights are in proper order. Ron might get mad at me for saying that but he's been working very hard. The point is, before you take away somebody's water right, you do need to follow a due process and we have tried very hard to do that for the last 100 years and I would hate to see us stop. [LB924]

SENATOR CHRISTENSEN: Another question. Here in your second paragraph here at the bottom it says, this bill, this type of negotiation could not be done and could drive up the price of water beyond the capacity... [LB924]

ANN BLEED: Okay. That's on LB975, I believe. [LB924]

SENATOR CHRISTENSEN: Isn't that the one we're on? Nope? Sorry. Never mind, grabbed the wrong one. [LB924]

SENATOR HUDKINS: Questions. Senator Wallman. [LB924]

SENATOR WALLMAN: Thank you, Chairman Hudkins. Thank you, Ann, for being here. In my area I think all the NRD board members are probably irrigators. Is that the way it is across the state? [LB924]

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ANN BLEED: I wouldn't say all of them. The majority of NRD folks are irrigators. I would say in many places the majority of the NRD members are groundwater irrigators. [LB924]

SENATOR WALLMAN: Because I know some of the stuff they do would have never pass for a dryland farmer. They wouldn't let that happen but I appreciate your being here. [LB924]

SENATOR HUDKINS: Other questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. I have a number of questions, Ann, so I'll do short questions so hopefully you'll do short answers. I asked Dr. Fanning about the location and time deal for...with the new uses on streamflow. How is that going to be accomplished without my bill? [LB924]

ANN BLEED: Well, we can do that already. [LB924]

SENATOR FISCHER: How? [LB924]

ANN BLEED: If an irrigation district or let's say a natural resources district comes forward with an offset and says we want to...or we're going to provide this amount of water to the stream, then the process would be that they could get a conduct water permit and that is a normal permit process from our department. We would work with the applicant, in this case, perhaps the natural resources district, to determine what we believe is the amount of water being added to the stream and then we would also determine what kind of carriage losses from point A to point B we need to assess and then we would protect that water in terms of the timing as well as the location of where it comes in and the offset. It is not necessarily the most efficient process and that's why I'm supportive of the concept but we can already do it. [LB924]

SENATOR FISCHER: Do you think you have an effective way right now for the NRDs to handle those offsets? [LB924]

ANN BLEED: I think it's effective. As efficient as it could be, perhaps not and that's why I think it would be very appropriate to explore this further. It is also a part of the law that's not very clearly spelled out and I think there could be some additions to more clarify. [LB924]

SENATOR FISCHER: But those offsets that the NRDs have to make, that's required by your department, correct? By DNR? [LB924]

ANN BLEED: No. The offsets are required under LB962 if there's a new use. It's a

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requirement on both our department and the natural resources district by the Legislature. [LB924]

SENATOR FISCHER: Who do the NRDs report those offsets to? [LB924]

ANN BLEED: The concept is that the NRDs and DNR will work cooperatively to make sure that the hydrologically connected surface water and groundwaters in the basin are managed to protect existing users, both existing surface water users and existing groundwater users. [LB924]

SENATOR FISCHER: Okay. That leads into my next question. Mike Murphy from the Middle Niobrara Natural Resource District testified earlier and had some charts and information from the USGS on streamflow in the Niobrara at different gauging stations. Does your department use information that comes from the natural resource districts? Basically I'm asking you, do you believe the information that the natural resource districts provide you with? [LB924]

ANN BLEED: Yes. We usually do but that's not to say we don't do our own review if it's a matter of protecting a third party interest because we feel that our responsibility, if we're going to protect surface water from point A to point B, is to make sure that that third party interest is not being harmed. [LB924]

SENATOR FISCHER: Okay. When you talk about best science, best available science, and you quoted statute 46-13... [LB924]

ANN BLEED: It's 46-713. [LB924]

SENATOR FISCHER: Oh, I always say the dash, I'm sorry. [LB924]

ANN BLEED: Dash 713. [LB924]

SENATOR FISCHER: Yeah, dash 713. And you quoted part of that but you left out the methodologies. You said the best scientific data and information. The statute says best scientific data, information and methodologies. [LB924]

ANN BLEED: I think it has the word available in there. [LB924]

SENATOR FISCHER: Readily available to ensure that the conclusions and results contained in the report are reliable. [LB924]

ANN BLEED: Right. The readily available is fairly important. [LB924]

SENATOR FISCHER: Okay. Does DNR use...well, first, what kind of techniques do you

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use in what you would say would be the, is the best available science? [LB924]

ANN BLEED: Where there's a groundwater model that has been properly developed and calibrated, I think that would probably be the best available science and that's what we are...we're using the COHYST model on the Platte. We used a model developed by the upper Big Blue NRD to determine the 1050 area of the upper Big Blue. We are cooperating with the Upper Elkhorn and the Loups on the L model to hopefully get a better understanding of that system and finally, I just went over our budget today, we are hoping to budget \$200,000 next year to developing a model on the Niobrara, and if that model showed that our current estimate of the 1050 line is erroneous and it should be changed, we would change it. [LB924]

SENATOR FISCHER: It sounds like you just use modeling. Is that a true statement on my part? [LB924]

ANN BLEED: No, where there is not a groundwater model, we have used what is commonly referred to as a Jenkins method. It's a much more simplistic method. It has been used for years in other states, although it has been superseded by groundwater numerical modeling. It's another type of analytic model. I did... [LB924]

SENATOR FISCHER: But it's a model. I don't know that much about this obviously. [LB924]

ANN BLEED: Yeah. It's, it is a mathematical model. It's different than the computerized numerical modeling. [LB924]

SENATOR FISCHER: Okay. I had somebody mention to me that...as I said, I really don't know that much about this but what about dyes? What's dyes? What does that do? Do you use that? [LB924]

ANN BLEED: Well, probably the best available or the best scientific methodology to determine how much water is coming into a stream from a well that was or was not being pumped, is either do a pump test which is extremely expensive and fairly localized in it's analysis or you can do dye studies or radioisotopic studies. And we have done some of those on the Republican Basin. I would hate to have the law construed to mean that we had to do something like that before we could do an offset. That's my only concern. [LB924]

SENATOR FISCHER: Okay. That covers section 1 and 2. On Section 5 you mentioned the Loup and the Elkhorn Basins which those happen to be in my legislative district too. I think I have just about everything, don't I? (Laughter) [LB924]

ANN BLEED: I don't think you have the Republican. (laughter) We'll give it to you.

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[LB924]

SENATOR FISCHER: No, I don't have the Republican. No, I'll let Senator Christensen and Senator Carlson keep the Republican Basin. I'm happy with everything else that I have. [LB924]

ANN BLEED: You do cover a large number of NRDs, I'll give you that. [LB924]

SENATOR FISCHER: There's concern from constituents that I have in those basins that they're next on the list to be declared fully appropriated. Have you gone through and determined what water rights are being used there and which ones aren't? [LB924]

ANN BLEED: Yes. We are in the process of...well, we are not at the moment adjudicating but...Senator, before we actually use a water right in the determination, whether it's the calling right or the junior right that we're analyzing, in our evaluation we always make a determination that that water right is in fact calling for water and is, in fact, has a viable right to call for water. So we did that on the Niobrara Basin. We determined...we did investigate the Spencer hydro plant and we determined that if we were to do an adjudication of that plant, we probably or we would not have cancelled the right, at least based on the information we had. We also, when we looked at the junior irrigation right that was affected, we determined that that, in fact, was a viable right that was being used. Now if a right is not being used and is not calling for water, then it doesn't matter in our evaluation. [LB924]

SENATOR FISCHER: Have you ever stopped somebody from using a neglected water right after you declare a basin to be either fully or overly appropriated? [LB924]

ANN BLEED: No, and that we have not done and that is why... [LB924]

SENATOR FISCHER: Can you do that? Legally? [LB924]

ANN BLEED: I don't think we can legally do that. If they have a valid water right they do have the right to use that right. [LB924]

SENATOR FISCHER: Even if it's been neglected? You said lose it or lose it concept, five years. [LB924]

ANN BLEED: It is, but we do have to follow the due process and the adjudication and if in the process of...and this does happen, if we say we're going to adjudicate the Upper Niobrara White portion of the Niobrara Basin, which we have done and we are doing, there probably are some irrigators out there who haven't used their right who say, oh, oh, they're going to readjudicate, and so they go out and put in their pump and use it. [LB924]

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SENATOR FISCHER: Have you done any comprehensive adjudications in the Republican or the North Platte Rivers? [LB924]

ANN BLEED: Senator Christensen is saying, yes. (Laughter) [LB924]

SENATOR CHRISTENSEN: I went through one. (Laughter) [LB924]

SENATOR FISCHER: Sorry, my (inaudible) (Laughter) [LB924]

ANN BLEED: We have just in the last few years have adjudicated all the rights in the Republican Basin. We're still finishing up with the Bostwick Irrigation District. That's been held up by dealing with the bureau. At one point in time, before things got very hectic for our department, our goal was to adjudicate once every 20 years in every basin of the state. I would love to be able to do something like that in the future. But I don't think there's a year gone by that we haven't had staff working on adjudication of water rights somewhere in the state. [LB924]

SENATOR FISCHER: Have you done it...you did it in the Republican, have you done it on the Platte? I think of those two because they're some of the first that I can recall, you know, being declared fully or overly appropriated, so have you done that? [LB924]

ANN BLEED: Yeah, we have done it in the Platte. I don't remember the last adjudication we did on the Platte. It's probably been about 10 or 15 years ago. [LB924]

SENATOR FISCHER: Have you cancelled any acres to do that? [LB924]

ANN BLEED: Oh, we cancelled a lot of acres in the Republican. (Laughter) [LB924]

SENATOR FISCHER: In the Platte, have you cancelled acres too? [LB924]

ANN BLEED: Yes, in the Platte as well. And we are now cancelling acres in the Niobrara. [LB924]

SENATOR FISCHER: Thank you very much. [LB924]

SENATOR HUDKINS: Other...Senator Christensen. [LB924]

SENATOR CHRISTENSEN: Thank you. In light of the Hinderlider case, which I'll summarize for everybody is, basically says if you're in a compact or state deal you don't have any water until you...for your surface or ground people until you're in compliance. Where does that come in with third party rights and surface right? They don't even have a right until we're in compliance, correct? [LB924]

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ANN BLEED: No, I would not agree with your interpretation of the Hinderlider case, (laugh) Senator, in all due respect. What the Hinderlider case, as far as I understand it, said is that if the state of Nebraska signs on to an interstate compact or decree, they not only have the responsibility, but they have the authority under state law to restrict uses in order to comply with the compact that they signed on to. I think in the case of the Republican, what that could mean is that even though...well, let me take the case of the Platte River or not the Platte, but the Blue River where we have a Blue River compact. As you know, natural resources districts are required, are the ones who are in charge of groundwater. However, because of the compact which also requires the restrictions of groundwater pumping under certain situations, because of the compact, it is usually been stated that the state would have the authority to come in and restrict groundwater uses, if necessary, to comply with the compact. In the case of the Republican, I believe that we could for compact reasons restrict both surface water and groundwater uses if it be necessary to comply with the compact. I hope we don't have to do that but it could be done. [LB924]

SENATOR CHRISTENSEN: But I guess, you know, I was just...I agree with your analogy that would have the right to shut them off, so that's something people got to remember. Thank you. [LB924]

SENATOR HUDKINS: Other questions? Thank you, Doctor Bleed. [LB924]

ANN BLEED: Thank you very much. [LB924]

SENATOR HUDKINS: Next person in opposition. Welcome, Mr. Batie. [LB924]

DON BATIE: Senator Hudkins and members of Natural Resource Committee, my name is Don Batie, B-a-t-i-e. I am a farmer from rural Lexington in the Dawson County in the Platte Basin. I'm here today testifying for Nebraska Water Users. This is an organization that represents both surface and groundwater users and we believe in a balancing of the two interests. On our farm we irrigate with both surface and groundwater. We've used surface water since the 1890's. Our canal's the third oldest in the state of Nebraska. We've used our surface water since then. Our groundwater we've used since the mid-1940's when we put our first irrigation well in so we've had a long history of both systems. I am speaking in mild opposition to Sections 1 and 2 only. Hopefully, the compromise that was discussed earlier, that'll come to fruition and we can move to support. First of all, I would like to thank you for trying to understand Nebraska water law. As you can tell, it's very complex. I've been dealing with water regulations in Nebraska and locally for over 18 years and I find out the more I know, the more I don't know. I do agree with Senator Fischer that we do need to have some ability to offset in the full and overappropriated basins. And thank you for this. I do appreciate that. This would create a water banking type of ability and change is needed to be made to the

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statute so that we can move forward. My problems with the bill, Sections 1 and 2, is the ways it's written, part of it is because we're combining both the prior appropriations and the correlative rights system and I think previous people have talked to that so won't move on to that. It's important to remember that in the surface water irrigators like myself in Nebraska, we're kind of like the bottom feeders in an ocean. We operate on the leftovers from others above us. The water we divert out of the Platte River has been estimated to have been used by six or seven other people above us. They divert the water from the river. They use it for irrigation or power. Part of it is consumed. The rest is return flowed back to the river to be caught by the next reservoir and used and used and used. And without return flows to the river, Lake McConaughy would be a dustbowl, even drier than it is today. That is one of my concerns with the bill as that it does not...I'm concerned about that we're only protecting the consumptive rights or the consumptive uses of water, not the total uses of water. I also have concerns, and this was raised earlier by Ann Bleed, about the timing. The bill talks about...that they would talk about the quantity of water and the location of the return water. The timing is very critical and I don't mean timing as in what year. I mean timing as in what day that water will show up. When the ditch irrigation canal we have takes water out of the Platte River, they have to know on a daily basis whether the water that's in the river can be utilized or not, whether they can convert it in the canal. And it is extraordinarily difficult, if not impossible, off of a model to tell me when I shut an irrigation well off, ten miles off of the river, 50 miles upstream, what day that water is going to show up in my diversion point in the river. That is part of the problem with the science that we're involved with here. Finally, the last point I think I need to, I'd like to make, Ann Bleed mentioned this, is that I'm a little concern about the fox guarding the hen house. I feel that anytime we have an NRD, for example in the bill, deciding how much water should be credited to them...for you in the stream, I have a concern that they're the ones doing the making of the total decision. I think there needs to be an independent analysis of this. Probably needs to be some hearings done on this as well to allow all parties to participate. Anyhow, if those concerns would be fixed, I am sure that we would move into the support side and be glad to go forward. And I'd like to answer any questions you might have. [LB924]

SENATOR HUDKINS: Thank you, Don. Any questions? Senator Christen...or Carlson. (Laughter) [LB924]

SENATOR CHRISTENSEN: It must be the chair. (Laughter) [LB924]

SENATOR HUDKINS: It's the chair. [LB924]

SENATOR CARLSON: Senator Hudkins. Don, you mentioned six or seven diversions before you use it, and that would be from the state line to you? [LB924]

DON BATIE: No. On the Platte River you've got to remember it starts in the state of Colorado, moves into Wyoming. Comes from Wyoming in back into Nebraska at

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Scottsbluff and there are a number of reservoirs upstream at McConaughy. McConaughy is actually not the largest and so we lose...that water has to be, the water you go skiing on out in Colorado and Wyoming is what I'll be irrigating with six years from now. [LB924]

SENATOR CARLSON: So your count starts at Colorado? [LB924]

DON BATIE: Yes. [LB924]

SENATOR CARLSON: Okay. Thank you. [LB924]

DON BATIE: In Nebraska, it would probably be three or four users in Nebraska. [LB924]

SENATOR HUDKINS: Senator Christensen. (Laughter) [LB924]

SENATOR CHRISTENSEN: I just think it's the chair causing the problem. (Laughter) [LB924]

SENATOR HUDKINS: It must be, yeah. (Laughter) [LB924]

SENATOR CHRISTENSEN: Don, thank you for coming. Would you agree with Don Kraus's analogy of return flows because I can see we have a huge difference in what I would call return flows, carrier flows, because to me when you start in Wyoming, you got water carrying down this canal that may go through this dam and then through another reservoir, kicked out through the bottom of that one, and kicked through another one. To me that's carrier water that's not even...it's not consumed water. It's just used as a carrier. It's never lost. It's not been used. I think we've got a huge definition problem here between Don, what I'm hearing from you also, Don, and myself, which could probably clarify a lot from what my bill says, what this bill says, because, yeah, it may go through many projects but... [LB924]

DON BATIE: There's many return flows. The carriage loss that you talk about, in most cases is the carriage loss as it's traveling through the river or through a canal. As a easy case in point, my irrigation canal is owned by Nebraska Public Power District and the water is stored in Lake McConaughy. We get 125,000 acre foot of storage in Lake McConaughy up at Ogallala, above Ogallala. The water is not measured until it reaches the confluence of the North and South Platte Rivers. That is where the measuring point is taken. That's where the water is diverted by NPPD. At that point the 125,000 acres drops to 102,000 acre feet. There is a 23,000 acre foot loss just between Lake McConaughy and the confluence of the North and South Platte Rivers. That would be a carriage loss or carry loss as used in your bill. There is also carriage loss in irrigation canal systems. The irrigation canal we have is an old canal that was dug in 1896, horses and mules pulling sleds. It's not in most efficient...I'm sure we have a

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tremendous losses at the bottom. We estimated about 40 percent of what we divert is probably lost in carriage loss. And as the waters are turned back to the river, they also provide irrigation water for the groundwater wells. However, that is the carriage losses I think...that's what I would define carriage losses. There's also return flows surface water. When we apply water, we're all gravity. Our surface water's all applied gravity, but not through pivots. And so we have water that runs out the end of our field called tailwater. That tailwater goes on, can by law be captured and reused. It just has to go back into the surface water streams. And it goes through the streams back into the river. That is also return flow. The same point when you're using gravity irrigation, some the water is depercolated below the root zone of the plants and that water goes down into the groundwater table which is available then for pump irrigation and in our area, it always was down and then was sideways laterally over a period of time back to the river. Again, that's more return flows. Now, so there's multiple return flows that I'm talking about. The carriage losses you have is maybe a larger component of it but there's also other components. And so, if I only just talking carriage loss does not include the others and I think we'd be remiss if we didn't try to protect all return flows. Does that answer your question? [LB924]

SENATOR CHRISTENSEN: Well, yeah, I'm agreeing with your definition but, you know, I realize on the Platte, up in your area there is still quite a little gravity and there is some return flow. But when you look at Republican, there's not a lot of gravity left no more. It's just not. We've got too short of allocations of surface water and ground's getting that way and if you don't use a pivot, you aren't going to be there or a surge valve or the reuse pit, and there is virtually no return flows anymore and so that's why I don't think the loss is as high as is being assessed in a number of cases. I realize there's areas that there is. Up in your area I realize there's a fair amount of gravity yet. [LB924]

DON BATIE: Our area's with a fair amount of gravity because of a number of factors. The moving to pivots away from gravity in the Panhandle is part, in my opinion, a large part of the reason McConaughy is drying up. It's there, they've become too efficient. Conservation is not always a good thing. [LB924]

SENATOR CHRISTENSEN: I agree a hundred percent. [LB924]

DON BATIE: So that is something you have to watch out for. [LB924]

SENATOR CHRISTENSEN: Thank you very much. [LB924]

SENATOR HUDKINS: Other questions? Thank you, Don. Nice to see you. [LB924]

DON BATIE: Thank you. [LB924]

SENATOR HUDKINS: How many more individuals still wish to speak in opposition?

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Okay, four, five, six. You know, I hate to do this to you, but I'm going to start limiting you to five minutes. We have heard four people in opposition and with our questions, of course, that's extra. But I'm going to give you five minutes to present your case. [LB924]

MELVIN THORNTON: (Exhibits 10 and 11) Thank you. It's late in the afternoon and I have to keep reminding myself this is democracy in action. (laughter) My name is Melvin Thornton, T-h-o-r-n-t-o-n. I'm representing Friends of the Niobrara and the Nebraska League of Conservation Voters. I had prepared a three minute testimony which is the single page you're probably getting and then I've added to that two and a half pages from Duane Hovorka, who has spent...who couldn't be here today and has spent years working on the Platte River recovery program. [LB924]

SENATOR HUDKINS: We will let you do your testimony if it is written. We can all read that. Thank you very much. But we will make it part of the record. [LB924]

MELVIN THORNTON: Yes. Thank you. That was what I was asking. The proposed LB924 seems to disable large portions of current Nebraska law without replacing it in yet a provable, workable alternative. Let me briefly give just three examples quoting chapter and verse. First, concerning the offsets allowing for new water rights, and this was, I am pleased to say, was brought up also by Ron Bishop and Denny Schueth. Page 3, lines 2 to 7, here are the protecting of new offset water from diversion even from senior water rights gives priority to any new surface water appropriation which is granted under page 2, lines 21 through 24. This approach is completely against the more than century old first in time, first in right principle. Now, gutting this principal I think is explicitly indicated on page 4, lines 9 through 14. I just feel, maybe we would want to do that as a state to get rid of that principle but I don't think this is the way to do that. Second, LB924 seems to make it impossible for an exemption committee to deny any request for an exemption. Here Don Blankenau mentioned that the exemption committees can offer an exemption but page 7, lines 2 to 4, state the exemption committee shall grant the exemption if, lists three things, the first one, granting the exemption does not result in the extinction of the species. Now to a logician I think what this means is, that if just one Sandhill crane chooses to land on the Platte in Wyoming and not near Kearney, then in Nebraska we have not...don't have extinction of the species and there's no problem. So this seems to say that if then the other two mild conditions are met, litigating actions are possible and there's an economic benefit, then the exemption must be granted. Seems pretty strong. Third, page 8, lines 8 through 13, remove the total responsibility for instream flow decisions from the Department of Natural Resources. The Game and Parks Commission should not have the power to veto an instream flow request say from a Platte River NRD somewhere, or anywhere else. Likewise, I think a majority of NRD board members, and that would be either three local residents or up to eleven local residents depending on the size of the board, these folks should not have the power to veto or to prevent the Game and Parks Commission from even requesting an instream flow appropriation, even after the commission has

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shown that the request is in the public interest of the entire state of Nebraska and the request has been supported by scientific studies. Let me close now with these three things, just by thanking you for your consideration and urging you that you carefully read this much more detailed features of LB924 that was distributed to you. [LB924]

SENATOR HUDKINS: All right. Thank you, Mr. Thornton. Are there questions? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. I don't believe we've met Mr. Thornton. I see your address is Sparks. [LB924]

MELVIN THORNTON: We are trying to get...we're driving back there tonight. It's actually...we're a mile north of the Niobrara, just north of Sunnybrook. [LB924]

SENATOR FISCHER: Okay. We're neighbors then, so welcome, welcome. I have a question on the third point you made. I don't believe that this bill takes the responsibility for the instream flow appropriations decisions from the Department of Natural Resources. They still will grant the appropriations. What it does, to explain it to you right now, either Game and Parks or a natural resource district can apply for an instream flow. And I believe in having people work together at the local level and try and work out differences and come to agreement and so I'm changing that both of the entities involved have to request it from DNR, just to explain to you what my thinking was on that. [LB924]

MELVIN THORNTON: Right. Now I interpret that as still having the NRDs can still have a veto power because if you cannot get the NRDs to agree that this is a good idea, then as I read what you've written in the bill, it is not possible for the commission to even make application for a streamflow. They are required to have permission from the appropriate NRDs and I've taught voting schemes for a long time at the University and that is a veto power. [LB924]

SENATOR FISCHER: As it would be for Game and Parks. [LB924]

MELVIN THORNTON: As it would be for Game and Parks and I think they're both not the proper thing to do. [LB924]

SENATOR FISCHER: My intention here is NRDs are locally elected people and there is a tremendous impact on a local political subdivision when an instream flow is put into place so I just wanted to clarify that. Thank you. [LB924]

SENATOR HUDKINS: Thank you, Mr. Thornton, for coming today. Next person in opposition. [LB924]

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JACQUELINE CANTERBURY: Thank you very much. I don't have a written testimony. I kind of decided to do this at the last (laugh) minute so hope you will bear with me. My name is Dr. Jacqueline Canterbury, C-a-n-t-e-r-b-u-r-y. [LB924]

SENATOR HUDKINS: And you'd better spell your first name too. [LB924]

JACQUELINE CANTERBURY: Yes. J-a-c-q-u-e-l-i-n-e. [LB924]

SENATOR HUDKINS: Thank you. [LB924]

JACQUELINE CANTERBURY: And I'll pass my green paper. Thank you very much for allowing me to do this. I haven't done this in a long time so hope you bear with me, I'll be short. Senator Fischer, I own land on the Niobrara, three miles of riverfront so half the time I spend on the Niobrara and I'd spend 100 percent if I could. So I'm here actually on behalf of the river and during this conversation today, I'd just like to talk from my heart rather than a piece of paper and say that I love the river and I've not hear anybody talk about the river and so I speak for it. And I've been there for over a decade and I'm actually trying to get something going in ecotourism. That's my goal and so for me, what this bill does, is it number one, it overturns existing water right laws which I feel are very loose. Number two, it really weakens nongame wildlife programs which I also feel, if I had my way, I would like to see them strengthened. I think that it would gut Nebraska's instream flow laws and I'm really in support of Game and Parks working on those laws. And I also think that the provisions in LB962, while I don't know a lot about it, it seems like that the integrated management provisions would allow people to work together, people like me perhaps as a landowner and put my vested interest in the Niobrara. And, you know, what I've seen today I think is, and if I'm wrong I apologize, but what I feel it's almost like a bill for irrigators and I'm not an irrigator. I'm a little landowner that has 500 acres on the Niobrara that I love and I don't want to offend irrigators but at the same time this seems like it's coming, it seems like everybody that was for it were all irrigators. And I also heard somebody say that all the NRD board members are irrigators. If I'm wrong, I apologize but I'm not an irrigator, I don't want to be an irrigator and I don't want to irrigate corn in the Sandhills. Okay. So I am opposed to this but I very... I thank you for giving you my time and if there any questions. [LB924]

SENATOR WALLMAN: Thank you, Dr. Canterbury. Are there questions. [LB924]

JACQUELINE CANTERBURY: Any questions? Yes, Senator Wallman. [LB924]

SENATOR HUDKINS: Senator Wallman. [LB924]

SENATOR WALLMAN: Thank you for testifying. Enjoy having...I'm a farmer also and I chose not to irrigate but I love that Niobrara, I've canoed it, and tubed it, but I'm probably getting too old, so thank you. [LB924]

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JACQUELINE CANTERBURY: No, I don't think so. I don't think so. Thank you very much. [LB924]

SENATOR HUDKINS: Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Hudkins. Thank you for coming forward. I appreciated...I think you heard me say earlier, I love the Niobrara River. That's my home and if you notice the people for it may be irrigators with NRDs, but the people against it are also irrigators too. So it's not everybody's for the bills is an irrigator. [LB924]

JACQUELINE CANTERBURY: Exactly. And I just want to add one more thing is that when I started my small operation about ten years ago, it was all small family farms and a very large irrigator moved in. I'm actually south of Nenzel and his name doesn't need to be mentioned but he's become very famous in the area and as a result, the last two summers there have really been low flows in that river. I mean, I've observed and I'm a scientist so you know, while I can't say, I can't quote a numerical value, I can say that it's really changed since that's happened so I'm very sensitive to the fact that I think that, and I really, I don't know that much about what Game and Parks does, but I know that they're charged with managing fish and wildlife and that's my...we all have our concerns, and that's mine. So I would like to see them allowed money and respect for continuing to do the good work that they do. [LB924]

SENATOR FISCHER: What's your Ph.D. in? [LB924]

JACQUELINE CANTERBURY: It's actually in biology. (laugh) [LB924]

SENATOR FISCHER: Okay. Great. Thank you very much. [LB924]

JACQUELINE CANTERBURY: Thank you very much. [LB924]

SENATOR HUDKINS: Thank you for coming. Next person, please. [LB924]

KIRK NELSON: Senator Hudkins and other senators in the committee, my name is Kirk Nelson, spelled K-i-r-k N-e-l-s-o-n. I work for the Nebraska Game and Parks Commission. The Nebraska Game and Parks Commission is opposed to the bill as it is written. We have met with the senator and we are ready to work with her. Our concerns are that the two sections that I am going to address today are sections 3 and sections 4. Section 3 deals with the Nongame and Endangered Species Conservation Act. The Game and Parks Commission reviews about 600 applications from different state agencies annually. Less than 10 percent of those involve any kind of comments on our part. In other words, 90 percent of them, out the door. No impacts, no concerns. The 10 percent that we do deal with, we handle in a very informal manner and that's, I think, I

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guess, what I would like to stress today our concerns with the bill as written it's going to formalize the process for us that now we can meet with the applicant, we can meet with the state agency and we can work things out and we do that. That's just the way we do business. There is no need in denying a permit if there's some way of working this thing out. The informal process allows us to do that. If we're not careful and we get ourselves into a formal process, then we will have to develop a biological assessment, or the applicant will have to develop a biological assessment, we'll have to render a biological opinion and there will be a lot more staff time and it will be more cumbersome to work with. We understand your concerns that if things change at some point in time and we get a different administration, and you know, when people don't see eye-to-eye or we get somebody that maybe wants to be heavy handed over at Game and Parks, yeah, there could be some issues. That might be the time to revisit something like this, Senator. I think if we had some concerns that we weren't doing a good job, then that might be the time to bring that kind of thing up. So at this point, with the Nongame and Endangered Species Act as it is, we'd just as soon be allowed to operate in the mode that we are now. And if you feel there's some things that we're not doing, then let's work with them. The other part of the bill that concerns us, the instream flows. Since 1984 there have been three instream flow rights granted in Nebraska, two for Nebraska Game and Parks and one for the Central Platte NRD. That's almost a 25-year period when we had three instream flow rights. It's not a big issue. They are extremely cumbersome to put into action. They're very expensive to document. The hearings are, in our opinion, well conducted through the Department of Natural Resources. All of the various parties get their opportunity to bring forth their testimony and their expert witnesses and then there's what we would like to consider, an impartial ruling by a very informed person, that being the director of the Department of Natural Resources. So our concern is that if we are mandated to negotiate or to work with the NRDs that are going to be affected by the area, it's going to make the process more cumbersome, more expensive than it is. We're probably not going to do it just because we can't hardly bring it off now. Some of the comments that I've heard today from the Niobrara folks that initially we were...seemed to be interested in having their comments and their participation and then somehow we dropped off, I guess I'm here to apologize. We didn't ever intend for that to happen. We attended the meeting that you called last May along with all of them. We've had several since then. We just had a meeting a week ago where we brought in our expert witnesses that have been working on the recreational values for us, the recreational studies. The NRDs were all invited to that meeting and I think were in attendance. They're going to see everything that we develop, it's all public information. That's how we do business. We did business like that on the Lower Platte just recently when we were getting ready to put forth a biological opinion on the Lower Platte. All the information that we develop is open. So our concerns are that if our situation becomes anymore cumbersome than it is, then it will be difficult for us to conduct business. Our mission is fish, wildlife, recreation. NRDs have different missions. Therefore, it will be a concern to us, Senator, if we are mandated to negotiate or to interact with NRDs in a very formal fashion and then have to come forward with a

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ruling together or a common instream flow application. Those are my comments.  
[LB924]

SENATOR KOPPLIN: Are there questions for Mr. Nelson? Senator Fischer. [LB924]

SENATOR FISCHER: Thank you, Senator Kopplin. Thank you, Kirk, for being here and I do appreciate that you came to my office and we had a conversation on this bill. As I said in my office and you alluded to it here, with the endangered species part of this act, you already do what is laid out in this bill, would you agree with that? [LB924]

KIRK NELSON: Yes. [LB924]

SENATOR FISCHER: And my comments to you at the time were, I'm only going to be here maybe four more years and I don't know how long you're going to be around with Game and Parks. And we're working together fairly well some of the time, but my problem is what happens when you and I are gone? We work well together on this. So if you're already doing it, I don't see why you have such a huge problem with it being put into statute and you know I'm not a fan of state mandates. I just want it in statute because to formalize a process that you are already doing. So why do you have such a huge problem with that? [LB924]

KIRK NELSON: I can understand your concerns, Senator, because we deal with it as you do every day. When you go to meetings there's a lot of fear when we walk in the room because we represent government. And to have it put forth is probably a good thing if it was broke. I guess my comment would be, if it wasn't functioning at this point, then make it function. But it is functioning and I think flexibility is important, especially as our costs go up. We're going to have less and less staff if smaller government and lower taxes are what our constituents want. And so if we formalize a process that is more cumbersome, and that's my opinion that this would be more cumbersome, we would have to come forward with more paperwork and more written situations that require more staff time where not maybe we can do some things with phone calls and on a less rigid manner. [LB924]

SENATOR FISCHER: But wouldn't that be determined in how your department writes the rules and regs for this law if that were passed? Couldn't you write it in there that to allow your own agency flexibility? [LB924]

KIRK NELSON: We could try. I think there's a legal aspect to this that gets tricky for all of us. [LB924]

SENATOR FISCHER: Okay. [LB924]

KIRK NELSON: In other words, if folks get upset that we didn't rule right or an

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applicant...and I didn't address the commission that you wish to set up. That might be one out for something along those lines but otherwise, everybody wants to have their way and sometimes when it doesn't work out, if we've not followed a technicality and they're able to catch us on something, then we'd be forced to be much more concise, much more detailed in our process. [LB924]

SENATOR FISCHER: I would think the public would be more secure then, that they'd have a opportunity to catch...anyway moving on to federal Endangered Species Act. That applies in Nebraska, correct? [LB924]

KIRK NELSON: Yes. [LB924]

SENATOR FISCHER: What is our Nongame Threatened and Endangered Species Act? Why do we have that if the federal one supersedes it anyway? [LB924]

KIRK NELSON: Because there are actions that are not triggered by the federal action. [LB924]

SENATOR FISCHER: Like what? [LB924]

KIRK NELSON: Well, any of the Department of Natural Resources water right applications are state actions. We deal with the Department of Environmental Quality on a number of water quality issues, sewage type issues for livestock, etcetera. So those wouldn't necessarily trigger federal action even though if they had a direct impact. I mean, if there was going to be a taking from a endangered species, yeah, they'd be there on that one. But if there couldn't be proved a direct impact, then you wouldn't have any coverage by the feds. [LB924]

SENATOR FISCHER: Okay. On to the instream flows. At the meeting in July or August that was held at the Holiday Express in Valentine, Game and Parks started giving a presentation, a slide presentation on where they were in their process on the instream flow study. They named the three NRDs in the Niobrara Basin as partners and the rumbling started immediately in the room when those, from those NRDs. Because here they're looking up on a slide presentation seeing that they're partners with Game and Parks, with the U.S. Fish and Wildlife Service, with the U.S. National Park Service, with the Niobrara Council, and it lists those three NRDs who had not been contacted at all and they're listed on a public presentation. So you can understand why my NRDs were a little miffed at that. They asked to be included in studies. They haven't been included. You say it's a public hearing. It's public information. They can access it. Anybody can access it but if you're supposed to be included in the discussions, I don't think that means you can access it and read the report. I see, though, on your draft that I've been given a copy for the flows and recreation on the Niobrara national scenic river in Nebraska, it was prepared for the Game and Parks in cooperation with the National

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Park Service, the Nebraska Environmental Trust. I assume they're on it because of their funding for this project and it was prepared by consultants from Oregon and Alaska. It's a draft. I appreciate that my NRDs aren't on that now because they haven't been included. That's the reason for this bill dealing with instream flow appropriations because I think it's really important that you get the parties together and I think it's important that the Nebraska Game and Parks works with Nebraska NRDs before they begin to partner with U. S. Fish and Wildlife, the U.S. National Park Service. That's a reason that that's in the bill. You said you have two instream flow rights now; where are those? [LB924]

KIRK NELSON: Long Pine Creek and the Central Platte. [LB924]

SENATOR FISCHER: Okay. And when was the last...when did you get those? What years? [LB924]

KIRK NELSON: I'm going to take a guess that Long Pine Creek was in 1988, 1989, and we applied for the Central Platte water right in 1993 and it was granted in 1998. [LB924]

SENATOR FISCHER: Do you plan since the Niobrara's been declared fully appropriated, do you plan to move along with the study on this, the instream flow for the Niobrara, even though it's fully appropriated and you won't be granted an instream flow appropriation? [LB924]

KIRK NELSON: We've had discussions with DNR on that very issue. Good point. We were concerned that we'd be wasting our time also. We were given the example that say, someone forfeits their water right and all of a sudden the river becomes not fully appropriated anymore and therefore, there would be the options for people to acquire water rights. We need to be in line, so to speak, so we probably will proceed but it's not final yet. I mean our board of commissioners, our director, I mean, they may take a look at the studies and look at the cost and say exactly what you just said, there's no need to right now, why don't we put this on the shelf. I don't anticipate that. I would assume that staff will make the recommendation but it's not final until our board approves the application. [LB924]

SENATOR FISCHER: Are you asking for input on this draft? Public input? [LB924]

KIRK NELSON: Certainly, Senator. [LB924]

SENATOR FISCHER: How are you publicizing that you are asking for public input? [LB924]

KIRK NELSON: Well, at our meetings when the NRDs and all the other partners, even though it may be a loosely used term... [LB924]

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SENATOR FISCHER: Oh, don't say that. [LB924]

KIRK NELSON: ...the other participants in the meeting,... [LB924]

SENATOR FISCHER: There you go. Okay. [LB924]

KIRK NELSON: ...that would be the time and it's an ongoing study. We don't anticipate finalizing this instream flow application for a couple of years yet. So there's a lot of time for input. [LB924]

SENATOR FISCHER: That's good because I've just glanced through that study and I think a lot of it for being a study by two Ph.D.'s, it's pretty darn subjective in my opinion but I don't have a Ph.D. so what do I know. [LB924]

KIRK NELSON: Well, Senator, any of your constituents, whether they are NRDs or Ph.D.'s, whoever it may be, if they've got some better information we...we would welcome it. [LB924]

SENATOR FISCHER: Do you, how much money have you spent on the instream flow appropriation study? [LB924]

KIRK NELSON: We have three studies going right now. This is one of them, the recreational part of it. The other part of it is a biological study. The third one is a hydrologic study. We'll be getting reports on both of those two. We're anticipating spending up to \$600,000 on those three studies so average it out, \$200,000 a study. I don't know if that's how it works out or not, but that's how... [LB924]

SENATOR FISCHER: Did you get most of the funding from the Nebraska Environmental Trust? [LB924]

KIRK NELSON: That's correct. [LB924]

SENATOR FISCHER: Okay. Do you see staff recommending to the Game and Parks Commission any other instream flow appropriations that you would suggest for other rivers and streams in this state? [LB924]

KIRK NELSON: We have a list of streams that have been evaluated and given different priorities and we've had that list for 15 years and we haven't applied for an instream flow right in the last ten. So yeah, I mean, I could say, yes. We've got a list and there's a number of rivers... [LB924]

SENATOR FISCHER: Was the Niobrara number one on your list? [LB924]

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KIRK NELSON: That's right. Yes. That's why we're... [LB924]

SENATOR FISCHER: What's number two? [LB924]

KIRK NELSON: I'd have to look at it. [LB924]

SENATOR FISCHER: Is that a public list? [LB924]

KIRK NELSON: Yeah. I gave it at a presentation last year at Nebraska Water Law Conference and passed it out as part of the proceedings in that conference. So... [LB924]

SENATOR FISCHER: I do appreciate your being here today. Thank you. [LB924]

SENATOR HUDKINS: Senator Carlson. [LB924]

SENATOR CARLSON: Senator Hudkins. Kirk, you've been worked over pretty good so my question is going to be easy. [LB924]

SENATOR FISCHER: Oh now, Senator Carlson, come on. [LB924]

SENATOR CARLSON: But Senator Fischer brought up that meeting in Chadron. Valentine, excuse me, Valentine, yes. And the three NRDs listed on there and hadn't been a part of that and I sit here and listen to that and I don't think you personally probably had a thing to do with that. How could that happen and why? [LB924]

KIRK NELSON: I'm just going to guess that we thought, whether we called...I can't recall whether that was our meeting or not. I know at your meeting we thought everybody is going to be there so we don't need to call anybody and you know, make the invite. The senator called the meeting and she had it and the NRDs and us were there and so I think that's how that thing happened. We thought this is the senator's meeting, she's going to bring us all together so we're all together. But so we didn't specifically invite any NRDs. We've noted that. They've written us a letter. Our commissioners have made sure that those NRDs are now included on all of our correspondence. I think they were before anyway but, you know, we're doubling the effort. [LB924]

SENATOR CARLSON: Okay. Thank you. [LB924]

SENATOR HUDKINS: Other questions? Thank you. [LB924]

TOM KNUTSON: (Exhibit 12) Senator Hudkins and members of the committee, my

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name is Tom Knutson and I'm president of the Nebraska State Irrigation Association.  
[LB924]

SENATOR HUDKINS: Could you spell your last name, please? [LB924]

TOM KNUTSON: K-n-u-t-s-o-n. [LB924]

SENATOR HUDKINS: Thank you. [LB924]

TOM KNUTSON: I come before you for the association, opposed to LB924 as well as LB975 and LB1041 as they're presently proposed. The Nebraska State Irrigation Association is a statewide organization. It's been in existence over 100 years, represents interests of Nebraska's surface water irrigation projects which includes about 45 irrigation districts and number of reservoirs across the state over one million acres. We are a member of the Nebraska Water Coalition which was mentioned earlier in testimony today that wants to work on trying to come to some conclusion in regard to verbiage, if you will, it will make this bill successful. And we continue and will work with those on that coalition to work on those proposals. We generally believe that the existing laws do provide adequate administrative protection, making these measures unneeded. Furthermore, we believe in their present forms, the measures have an effect of shifting administrative of critical surface water laws from the Department of Natural Resources to the natural resource districts and may in fact result in unconstitutional takings of vested surface water rights now protected by the state for our member surface water irrigation districts. We pledge to work closely with the introducers, the Natural Resources Committee and the other members of the water coalition to resolve these issues. But as I said earlier, we do oppose the proposals because of the concerns and the impacts it might have in its present form. I might add that professionally I am general manager for the Loup Basin Reclamation District, Farwell Irrigation District and Sargent Irrigation District out of Farwell, Nebraska. We went through approximately eight to nine years working to buy our irrigation project from the Bureau of Reclamation or the Department of Interior and we got that done and accomplished in the fall of 2002. We purchased the reservoir and we got over 65,000 acres that we serve with our canal system from the reservoir. We spent millions of dollars and we still got millions of dollars that we got to spend in regard to the bond for buying the project. We're very concerned about changing any water law that could impact our surface water rights. And I think I might at least say that Dennis Strauch has sent some written testimony to you as a committee, and I really ask that you please review his comments because he was on the task force for LB962 and he's got some excellent concerns and comments in his written testimony, so I'd hope you'd take a look at that. [LB924]

SENATOR FISCHER: And we do have a copy of that. Thank you. [LB924]

TOM KNUTSON: Okay. Very good. Again, we're willing to work on trying to improve the

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language in all these bills and we will stand available to help. I might say that, one thing I know Senator Fischer said she wants to see a lot of local involvement in all this water activity across the state. Something that has bothered me for some time in regard to LB962 is the fact that irrigation districts were never left at the table in regard to the integrated management plans, and we've got a lot of them in the state. And I certainly think that that's something that should be taken into consideration as we move forward with these serious water issues. And I thank you again for your time and I'm willing to take any questions you might have. [LB924]

SENATOR HUDKINS: Thank you for being here. Senator Christensen. [LB924]

SENATOR CHRISTENSEN: Thank you. You made a comment you're happy with the way things are now. I appreciate you being willing to work on the bills. I know I realize mine's going to take some work and that's...but three different bills come up on the same subject. So there must be a problem and so I just glad you're willing to work, look forward to working on it but for you to make a statement you like it the way it is, I don't think it can stay the way it is. There's too many people concerned so I'm just saying, let's see if we can't get people to the table and work something out. [LB924]

TOM KNUTSON: Very good. Happy to do so. [LB924]

SENATOR CHRISTENSEN: Thank you. [LB924]

SENATOR HUDKINS: Thank you for testifying today. [LB924]

TOM KNUTSON: You bet. [LB924]

BRUCE KENNEDY: Madam Chairman, members of the committee, my name is Bruce Kennedy, and that's K-e-n-n-e-d-y. I am president of the Nebraska Wildlife Federation and I am speaking for the Nebraska Wildlife Federation in opposition to this bill. The Nebraska Wildlife Federation believes in healthy streams and rivers. One of the ways that we can secure these healthy streams and rivers is to ask our Game and Parks Commission to secure parts of those streams and rivers for fish, wildlife and recreation. They are the agency that we feel is best to do that. We also have another state agency, our Department of Natural Resources, that is sort of the one that kind of collects all of that and then decides if that is in the public interest. And so we trust in them to do that. As far as the NRDs are concerned, we definitely believe that these should be in the planning process but we do not believe that they should have the veto power on that process even before it...basically before it even gets started. That is my testimony. I know you're going to appreciate that because the hour is late. I'm willing to take questions. [LB924]

SENATOR HUDKINS: Are there questions? Senator Christensen. [LB924]

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SENATOR CHRISTENSEN: Thank you. You know, I think maybe we need to sit back and look what do we want our streams to look like because I think it's such a multifaceted issue. You know, I shared with a gentlemen in here while I was out, the magnitude of what trees have done to areas that hold water and what irrigation wells have done to streams and it's such a complex issue, I'm not sure we're attacking it right yet. But I'm wondering if we don't need to look because vegetation is out of control, there's a number of things out of control that we need to look at and maybe this state needs to decide or the Water Task Force or something. What do we want our streams to look like because if we keep all the vegetation, we keep all the sandbars and we keep all this garbage, we're not going to have stream flow. And it's been proven that we could shut all the wells off and take a long time to put a lot of water back there. So it is multifaceted. Conservation's been a huge thing. So, you know, the questions might be, what do we want our streams to look like and then work from there. [LB924]

BRUCE KENNEDY: Absolutely. Any other questions? [LB924]

SENATOR HUDKINS: More questions? Thank you. [LB924]

BRUCE KENNEDY: (Exhibit 13) Thank you. I'm also carrying the testimony of Wachiska Audubon Society. The fellow had to leave to go to work but I have their written testimony and I'll give it to your...I can submit it that way? [LB924]

SENATOR HUDKINS: Thank you. Yes. You may. That will be made part of the record. [LB924]

BRUCE KENNEDY: Thank you, Senator Hudkins. [LB924]

SENATOR HUDKINS: Mr. Winston, welcome. [LB924]

KEN WINSTON: Good afternoon. My name is Ken Winston, last name spelled W-i-n-s-t-o-n. I'm appearing on behalf of the Nebraska Chapter of the Sierra Club in opposition to LB924. Basically, our concern is with regard to instream flow rights and about changes to the Endangered Species Act and basically I'm just going to have a one sentence statement. We believe that instreams flows are beneficial to downstream agriculture, domestic uses, fish and wildlife, and tourism. We're concerned about provisions that would prevent instream flow rights from being granted. [LB924]

SENATOR HUDKINS: Short and sweet. Thank you. Questions? Thank you very much for being here. [LB924]

KEN WINSTON: Thank you. [LB924]

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SENATOR HUDKINS: Other opposition? [LB924]

HARRY MUHLBACH: My name is Harry Muhlbach and I'm testing as neutral, I'm not opposing... [LB924]

SENATOR HUDKINS: Okay. Wait just a minute. Are there any other testifiers in opposition? There's one more. Can we have you change places just for a minute? [LB924]

KEN REITAN: Chair and members of the committee, I'm Ken Reitan. That's spelled R-e-i-t-a-n and I live at 2310 South Canterbury Lane here in Lincoln and I'm here to certainly oppose LB924 and I'm only going to mention a couple sections of the bill, I guess, probably. That section of the bill dealing with exemptions to the Endangered Species Act does not say under requirement I. granting the exemption does not result in the likely extinction of the species in the future as they should, but it says does not result in the extinction of the species. That means that if only a few members of a species are left after the actions associated with the grant of exemption, then the exemption must be granted assuming some mitigation can be done and that economic gain for the state can be shown. Presumably, easy to do. This requirement talks...that is requirement I., talks about the immediate effect on extinction. What happens to long-lived species? And regarding the part of the bill relating to instream flows, the bill, as other people have said, gives veto power to NRDs who don't like the idea of water being left in the river for wildlife or recreation. After all, NRDs are in general not very interested in wildlife and recreation. They have small budgets for those things. Either they're interested in irrigation or flood control. Those are the big parts of their budgets. Some NRDs, it's well known fact, they're captives of irrigation interests. And LB962 was presumably passed because NRDs refused to control water use and probably didn't, maybe even didn't have the legal ability to do so. NRDs are basically political bodies and should not be given this kind of power to decide whether or not a river goes dry and whether or not wildlife in the river will survive. If you think this is in the public interest and not just certain special interests, then perhaps we need to include a provision giving the Game and Parks Commission veto power over the well permitting programs of the NRDs. Finally, let me ask you what would have happened to the Norden dam project and the scenic river designation of the Niobrara River if locals had been given this much power over the Niobrara River. [LB924]

SENATOR HUDKINS: Thank you. Are there questions? Senator Christensen. [LB924]

SENATOR CHRISTENSEN: You shared sharp concerns. I guess I'm going to share one too. Do you care anything about the economic viability of your number one industry? [LB924]

KEN REITAN: Recreation is a big industry. [LB924]

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SENATOR CHRISTENSEN: Not even close. [LB924]

KEN REITAN: Well, on the Niobrara it is. It's a pretty big industry up there. (Laugh)  
[LB924]

SENATOR FISCHER: No. [LB924]

SENATOR HUDKINS: Thank you for being here today. Appreciate it. [LB924]

KEN REITAN: Thank you. [LB924]

SENATOR HUDKINS: Next person in opposition. [LB924]

DON ADAMS: Senator Hudkins, members of the committee, my name is Don Adams, A-d-a-m-s, executive director of Nebraskans First Groundwater Irrigators Coalition. This will be very short. I wasn't going to testify in opposition to this bill. Senator Fischer the concern that we have is that if you keep these provisions on Game and Parks in here it could muck up your bill from what I've heard. All the...it could get out there, open up a can of worms on the floor and it could get away from you. It's a good bill. I don't think those provisions are necessary. I really don't. I guess the rules and regs, Don Blankenau said they're handled, the concerns as it is now. But that provision in the bill and if it gets out with the Omaha and Lincoln dominated floor, it could open up a huge can of worms, maybe foul up an otherwise good bill. Thank you. [LB924]

SENATOR HUDKINS: Other questions? Thank you for being here. Are there any others in opposition? All right, Mr. Muhlbach, please come forward. [LB924]

HARRY MUHLBACH: I want to testify in neutral. [LB924]

SENATOR HUDKINS: Why don't you give your name again. [LB924]

HARRY MUHLBACH: Yeah. My name is Harry Muhlbach and I'm from Lincoln, Nebraska. [LB924]

SENATOR HUDKINS: And spell it. [LB924]

HARRY MUHLBACH: M-u-h-l-b-a-c-h. [LB924]

SENATOR HUDKINS: (Exhibits 14, 15 and 16) Could I interrupt you just for a minute. I'm sorry. I want to read into the record that we do have letters in opposition from Dennis Strauch who is with the Pathfinder Irrigation District and also from Mike Delka with the Bostwick Irrigation District and also from Rick Preston with the Gering-Fort Laramie

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Irrigation District. I'm very sorry to interrupt you. Go ahead. [LB924]

HARRY MUHLBACH: That's fine. The more I listened to this bill, it's a bill that's been long overdue. I'm neutral right now. I would support it if there was made some amendments. It really brought some people to the forefront that should have been here a long time ago and part of it was the Game and Parks. They will trump a small NRD anytime they have a chance. They're out of control. I'm going to back to the NRDs though a little bit. There are big NRDs and there are little NRDs. We have, I call suburban NRDs. Lincoln is a suburban NRD. Omaha is a suburban NRD. I mean that's not the name of the NRD. Now those people would probably vote for these Game and Parks, the Sierra Club, and these people that want to have recreation. I don't have a problem with them voting for them, but the people that live out there and do the living on the land are being stepped on without having a say. This bill, I don't know how you can keep the bigger NRDs from stepping on the little NRDs. The little NRDs need more power to protect their economics of the community. Little communities are being destroyed. The Republican valley is one where the towns, it may be ghost towns. The instream flows...what would happen with, if we create an instream flow surplus? I don't know. Do we have provisions to reverse that if we create an instream surplus. I guess that's my testimony. [LB924]

SENATOR HUDKINS: All right. Thank you. Are there questions? Seeing none, thank you for being here today. Mr. Orton, nice to see you. [LB924]

LEE ORTON: Thank you. Thank you, Senator Hudkins, members of the committee, my name is Lee Orton, O-r-t-o-n. I'm here today to introduce myself as the group that keeps getting discussed all day, the water coalition. You've heard a good many of the people who've testified here today say that this group is trying to work on these three bills to try to make some modifications and changes to make it compatible for everybody's needs and that's what we're here to do. I admire the senators who introduced these bills, Senator Fischer, Senator Christensen, and Senator Wightman. I think you have indeed raised issues that need to be addressed and it's pretty obvious from the testimony you've heard today that there are a lot of questions. I think you've heard some excellent discussion on both sides of each of the issues that you've taken up thus far, and I think you'll here some discussion about those same kinds of issues when the other two bills come up. To save me coming back up and to save you taking a lot of time, the water coalition is working on all three of these bills. We think it's important to try to bundle them together because there are similarities of issues. We have a...the water coalition is a group formed originally by the Nebraska State Irrigation Association and the Nebraska Water Resources Association. We used to have another member, the Nebraska Water Users Group, who have not participated for several years because of economic reasons. We have talked about water policy issues every year for probably a decade or more, trying to work on compromises and alternatives that are important to everybody's needs. We talked about these three bills at extended length during our legislative

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committee meeting about ten days or so ago. And from that we formed a working group of eight people that represent people on all of the sides of these issues to try to sit down together and talk about trying to find some solutions. And we want to work with the senators who introduced the bills, and we want to work with the Department of Natural Resources, and we'll work among ourselves as well, and we hope to be able to bring back to you some precise amendment recommendations that will deal with the issues you've heard about today. That's all I have to say today is that we're here in a neutral position now because we want to find a solution to these problems as well. And we want to thank you very much for taking the time to listen to all of this stuff today. Thank you. I'll answer questions, if you have any? [LB924]

SENATOR HUDKINS: Thank you, Lee. Are there questions? Seeing none, thank you for being here all day with us. [LB924]

LEE ORTON: Thank you very much. [LB924]

SENATOR HUDKINS: Is there other neutral testimony? Senator Fischer, do you wish to close? [LB924]

SENATOR FISCHER: No. [LB924]

SENATOR HUDKINS: She waives closing. That will close the hearing on LB924 and we'll open the hearing on LB975. Senator Wightman. [LB924]

SENATOR WIGHTMAN: Thank you, Chairwoman Hudkins, members of the committee. Good afternoon or good evening, whichever the case may be. I'm John Wightman, J-o-h-n W-i-g-h-t-m-a-n, represent District #36 and have brought LB975 on behalf of the Republican River Natural Resource District. All three of them are interested, the Upper, Middle and the Lower. LB975 represents one approach by water users and regulators in the Republican River Basin to clarify the effect of LB701 as it pertains to restricting groundwater usage in natural resources districts where the funds from river flow enhancement bonds or hopefully will be, are used to purchase or lease water rights. You've already heard an overview of the issues and the last speaker, Mr. Orton, primarily, and before I was here, I think Mr. Don Blankenau, I want to tell you that if you're looking for expertise you're probably not going to find it here and as a result, I'll make my statement very short. I think there's a lot more people with a lot more expertise than I have and you'll hear from them later and have already heard from many of them today. I do want to say that I appreciate the willingness of all of the affected parties to work together to arrive at a mutually agreeable solution. We hope it will be a solution when it's finished and that your committee can present to the body...that they can present to the body in a unified fashion. Water issues in Nebraska are paramount in importance, as you know, and over the past year I'm sure that you are even more aware of it. And it's of particular interest to my district which is in the Central Platte district, so

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we are very interested in what is happening in addition to my interest in this bill. We have to fashion a coherent, reasonable and logical water policy in order to manage current and future use of our surface and groundwater supplies. I know that there are going to be...I know Mr. Jones, and I think at least one of the other managers of the Republican River Basin will be here or the NRDs from the Republican River Basin will be here to testify and your time would probably be much better used questioning them than me. So I will answer any questions that you have having said that. (Laughter) [LB975]

SENATOR HUDKINS: Senator Carlson, excuse me. [LB975]

SENATOR CARLSON: Senator Hudkins. Senator Wightman, you said good evening and on appropriations you'd just be getting started now. [LB975]

SENATOR WIGHTMAN: Some days. (Laughter) [LB975]

SENATOR CARLSON: Thank you for being here. [LB975]

SENATOR HUDKINS: Will you be here to close? [LB975]

SENATOR WIGHTMAN: I'll play that by ear. [LB975]

SENATOR HUDKINS: Thank you. [LB975]

SENATOR WIGHTMAN: Thank you. [LB975]

SENATOR HUDKINS: First person in support, please. Go ahead. [LB975]

DAN SMITH: (Exhibit 17) All right. Thank you, Senator Hudkins, members of the committee. My name is Dan Smith. I'm the manager of the Middle Republican Natural Resources District here to offer testimony in support of LB975, also representing the Nebraska Association of Resources District. I too was on the Water Policy Task Force. I think there's been about a half dozen or maybe eight of us through here today and I'm firmly convinced now that that's not only the most misunderstood piece of legislation in Nebraska's history, but probably the most misrepresented piece of legislation in Nebraska history. I never considered it a finished product. I always thought it was a work in progress and that's why we're here. That's why we were here last year with LB701 and the Republican River Basin NRDs are grateful to this committee and this Legislature for that piece of legislation. We're trying to make it work. We had some concerns as that bill was being put together. They weren't important enough to address last year but we're trying to come forward with them this year. I've sent around and I know the committee, I know the Legislature is used to looking at pieces of legislation not knowing how the...or knowing, understanding that the parts that are in front of you in a

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draft bill actually belong in another set of legislative statutes. I sent around 2-3226. That's the section that deals with river-flow enhancement bonds and that's what we're looking at here. The current law causes a little bit of a problem with future bonds in that if the NRDs want to go out and buy either groundwater or surface water but particularly if we buy surface water from an irrigation district, then that current law requires that we not allow those people that have comingled wells, surface water and groundwater irrigation to pump. And it was never, I think...I don't think it was ever the intent that it work that way but that's the way it does. Where that causes a problem is very evident in the Frenchman Cambridge Irrigation District purchase that we made last year. Now that provision didn't apply to that first bond. It's for anything only after April 1, 2008. But we didn't...if you were an irrigation district with one ditch, one canal, one source of water and that were all your customers at work, but the way LB701 is drafted now and in the future, if we wanted to buy water from one of the canals on the Frenchman Cambridge Irrigation District, we'd have to ask that district or all comingled acres on several other canals that maybe not be affected by the purchase, not to pump. And that was never the intent I think of what we put together. Senator Wightman in drafting this bill then struck out that section that said the district shall restrict the use of groundwater from water wells and plugged in, added to that legislation, four different situations. A one year lease of groundwater, a multi-year lease of groundwater by the districts or groundwater or surface water, a one year lease by the department or a multi-year lease by the department and then put in a variance provision. This greatly improves what we have to work with in the current LB701 structure and those references in the NRD statutes. I would like to see a little change in this. We do have a variance procedure in there that allows us to look at one situation. I'd like to see that variance procedure expanded to some more open language, a variance authority for the NRD to include but not limited to the provision that's here. Why do we need a variance? Once again, we may not buy all of the water from a particular district or even from a particular canal. Several of the irrigation districts have worked with us in the past, are still working with us, have been fairly generous in pricing their water simply because they know...they have some existing groundwater wells that they can use in their district and it is a benefit to purchase that surface water and allow them to continue to pump their groundwater wells because of the timing of those impacts. It's good for us. It's a good thing to use and it's a good tool; we appreciate it. This helps make that provisions in LB701 a much better process. We had some limited conversations with the Department of Natural Resources, that might indicate that if we can work with Senator Wightman and the committee, that we might come together on some provisions that would take a lot of these restrictions out. We can make a lot of things work in those districts out there. LB701 currently only applies to the Republican River Basin. It may apply to other basins in the future, but right now it only applies to us. It's a good tool. We're making it work. This helps and I'd appreciate the committee bringing this bill forward. LB70, or excuse me, LB975 and LB1041 that we'll hear next are both fixes to LB701 from last year. LB701 was a fix, if you will, to LB962. It's a natural progression. Senator Fischer's bill on LB924, I wish it would have been in place when we started our process in putting

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together an integrated management plan. There is some confusion over how you put together an offset. It's not defined in LB962. The statements with regard to transfers, yeah, that's there. That's not the issue. We know we can move that water down the river. What we need to be able to do is figure how we account for it. All these things come together and are respective, once again, fixes to what could have been a good piece of legislation. [LB975]

SENATOR HUDKINS: All right. Any questions? Senator Carlson. [LB975]

SENATOR CARLSON: Senator Hudkins. Dan, just help me understand this a little bit better with an example. So if the allocation in the basin is eleven inches and the surface water district, the NRD purchases five inches, and pays \$250 an acre for those five inches. So we got an allocation of eleven, purchased five, and pay for it, that leaves six? [LB975]

DAN SMITH: Yes. [LB975]

SENATOR CARLSON: Then on comingled acres, how much can that landowner use from his well? [LB975]

DAN SMITH: I got to ask you to expand that question a little bit. The five inches that you talk about of purchase would be from a surface water district? [LB975]

SENATOR CARLSON: Yes. [LB975]

DAN SMITH: Okay. The current structure of LB701 would say after April 1 of this year, if we buy five inches from that irrigation district, that if you have a comingled well and we refer to a comingled well as a person that has both a groundwater well that applies to surface water irrigated acres under a district, that you could not pump your well. Your allocation associated with the district's allocation, we would have to restrict you from using that well. What Senator Wightman's amendments would do would set up that situation, where if we have an eleven inch allocation and we buy five inches, if that all they were going to deliver to the customers, if we buy five inches from an irrigation district, then a groundwater user could still pump up to six inches on his acres. Now in all probability, he would stack those inches on part of his acres but he could continue to use that infrastructure that he's developed. We're starting to see a number of situations out in the basin where, you know, we've gone without surface water for a number of years and a lot of our producers don't have the capability to use their surface water anymore. They've put in pivots, they've become more efficient. They have their wells. If they were going to take their surface water and put it through their pivot they'd have to have a filter system. They'd have to, in many cases, have to have a booster pump. Talk about a, you know, significant amount of new purchases that they'd have to do to make that water work. The groundwater system is more efficient in many cases and the

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producers, in most cases, want to use that. With the amendments we can still let that producer use that water. Now, the exception, I guess, would be if you had a district that was capable of delivering eleven inches in your example and that's what the district's groundwater allocation was. If that customer sold all of that eleven inches of that irrigation district, sold us all of that eleven inches, that would zero out on his allocation unless we had a little expanded authority in the variance side to come up with a situation. Now, where we look at that as being a benefit to the district is pricing. If you've got a district that wants to work with you, hold the price down, knowing that in general a lot of their customers can't make effective use of that water anymore. It's good for the system. It helps in the accounting, in the basin accounting. It makes it...it's good for the district because we can keep a slightly higher allocation rather than fighting down to keep ourselves continually in balance or ahead of compact accounting if we get another dry year. We're looking at these leases, these purchases, primarily as a dry year response so that we don't have to make significant cuts in allocations. [LB975]

SENATOR KOPPLIN: Are there questions? Senator Carlson. [LB975]

SENATOR CARLSON: I'd like to follow a little further. If...who pays the occupation tax? [LB975]

DAN SMITH: There were some slight variations on the theme between the three districts but irrigated, the occupation tax applied to irrigated acres. In my district we have certified acres so we knew who or where the groundwater irrigated acres were so that part was relatively easy. We worked with NACO, the county officials association. They went out and grabbed, if you will, the data from our assessors. We plugged in our information and sent that back and then the treasurer sent out the occupation tax statement. Along with the assessor's information relating to groundwater irrigated acres were a number of acres that were surface water irrigated. And in my district we applied the occupation tax to surface water irrigated acres also. Many times these acres over here were incorrect, but we had no knowledge of what the correct number would be because it was purely an assessor number. We did provide an exception, if you will, for somebody that had enrolled in the CREP program, and in CREP only. That's the ten to fifteen year retirement program. There were some EQIP acres out there that were a permanent retirement. We pulled those off but somebody that just went into EQIP for a three-year, for the three-year incentive program, we left those acres on. Now, and I think it may have been the same, a lot of those were the same up and down the basin but we had slight variations. [LB975]

SENATOR CARLSON: Okay. And I'm trying to get at how this policy provides water savings. But we go back to the occupation tax is paid by groundwater and surface water irrigators, and you have a well on your property and surface water access as well. I'm your neighbor and I don't have the well. I've got the surface water and let's say that we've got surface water available this year so we're going to sell five inches and I get

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my \$250 an acre and you get \$250 an acre plus you can still put...you can still pump the other five. [LB975]

DAN SMITH: Yes sir. [LB975]

SENATOR CARLSON: And I'm helping pay for that. (Laughter) [LB975]

DAN SMITH: On the occupation tax? Yes, if we were using the tax to make that purchase, yes. [LB975]

SENATOR CARLSON: And I'm not particularly driving at anything, but is that a good deal for me? [LB975]

DAN SMITH: Well, and I don't know how to answer that, sir. I don't know how to answer that. [LB975]

SENATOR CARLSON: Okay. But I struggle with how are we saving water doing that? [LB975]

DAN SMITH: See and I'm not sure we can... [LB975]

SENATOR CARLSON: We've got surface water available. [LB975]

DAN SMITH: Yeah. I'm not sure if saving water is the issue here. What we're looking at is groundwater allocations to make this system balance, planning on a drought year that have to be lower than what we would use under normal situations. Because if we only look at allocations to make the system work, then we've got to drive that allocation down to build up some spare water here which we would waste across the border for a number of years until we hit that...hopefully for a number of years until we hit that drought year and then we would have this wasted water, if you will, to catch up for our overuse in a drought year. If we can keep our allocations and in my district, our 12 inch allocation is pretty darn close to sustainable. If we can keep our allocation there, and live on the edge if you will, I would like to see Nebraska overuse each year by about five or ten acre foot. That way we'd never (laugh) waste any water across the border. But if we're going to overuse a little bit, that's where we need to keep it, is where we've got that slight overuse and if we can adjust with either groundwater buyout or surface water buyout, then we can make those changes. As time goes on I'm confident that we're going to look at groundwater buyouts to gradually, orderly work those numbers down rather than making a severe cut and doing away with groundwater acres in a wide sweep which I think would probably bring us on numerous challenges as far as takings go. But we've got that capability to try and balance the system, sir. I think what we're trying not to do, not to save water per se. [LB975]

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SENATOR CARLSON: I'm glad to hear you use the term sustainable because you and I both know we have got to get there irregardless of compliance, and we need to get there in the best way we can. I've taken enough time. Thank you, Dan. [LB975]

DAN SMITH: Thank you, sir. [LB975]

SENATOR KOPPLIN: Other questions? Senator Christensen. [LB975]

SENATOR CHRISTENSEN: Thank you, Senator Kopplin. Dan, what amendment did you say needed to be here because it's in here. I thought first you said you wanted that for... [LB975]

DAN SMITH: What I would like to see, LB975 as it stands helps the districts. If we could expand that section on variance to say that a variance to restrictions on groundwater uses under this subsection may be granted for but not limited to, the rest of the language there, it'd work. We could actually do away with a lot of this and make the system work but if we need controls in place, this works reasonably well. If the law needs a structure, is more comfortable with a structure, we can make this change work. [LB975]

SENATOR CHRISTENSEN: Because I first thought you said you needed that to allow people to pump what they don't sell out of their allocation because that's written there. [LB975]

DAN SMITH: Oh, no, no, no, no, no. Where we really need an expanded variance authority, Mark, as you know what Riverside's done with, it's a small irrigation company out our way...they've made us a relatively reasonable price on their waters, natural flow, not a great deal of water. But they can do that because about 90 percent of those acres and its not very many acres, 600 acres, are covered with wells. And it's a lot more efficient for them to pump their wells than it is to deliver, kick that surface water through the system, take the losses, that sort of thing. [LB975]

SENATOR CHRISTENSEN: So you want a variance so you could allow them to pump and... [LB975]

DAN SMITH: Right now this would force us to still put a restriction on them. Now they don't get much water so it isn't much of one. But...and it could also force them to drive up the price a little bit because they can't irrigate or couldn't irrigate so. [LB975]

SENATOR CHRISTENSEN: Isn't that a major concern in any of this? Because if you want to buy my district out again, Frenchman Cambridge, that price is going way up if I can't pump. [LB975]

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DAN SMITH: Maybe, maybe not. [LB975]

SENATOR CHRISTENSEN: You just ain't going to get it then. (Laugh) [LB975]

DAN SMITH: Yep, that could be. [LB975]

SENATOR CHRISTENSEN: You know that's... [LB975]

DAN SMITH: With the authority that we have in LB701 and the ability, hopefully we'll get that, but the ability to use that bonding, I think we can help hold those prices down a little bit. Last year, we were, you know, dealing with those districts on good faith and hope that legislation would get past and fortunately, (laugh) fortunately, it did but... [LB975]

SENATOR CHRISTENSEN: But I can see that everybody's intent is, well, let's not let them pump and sell both but when you cut one right out and do you agree there is a surface right and a groundwater right? They are two separate rights? [LB975]

DAN SMITH: Well, you know, case law has said it's...well, it depends on how you look at that surface water right but, yeah. (laugh)Spear T had a different definition for that use in their, in their decision. [LB975]

SENATOR CHRISTENSEN: But I guess what I'm saying is, everybody's intent I understand. Save the water, don't let them pump if they're going to sell but that drives up the price or makes it harder for you to get in compliance or going to drive down allocations which if that's what everybody wants, that's fine. [LB975]

DAN SMITH: Yes. [LB975]

SENATOR CHRISTENSEN: But I want people to realize what they're doing because, you know, Riverside definitely going to jack their price up if now they can't pump as much. [LB975]

DAN SMITH: The current statutes won't let us do that. They won't be able to pump. Without this change, they will be able to change. [LB975]

SENATOR CHRISTENSEN: And I understand Frenchman Cambridge probably is a little high. I realize price of corn you could justify it but the fact is, it was as you said, buying on good faith and we end up with poor faith. (laugh) Is what it comes up to. Beyond our control but we had no way to pay it so they deserve more. [LB975]

DAN SMITH: But along with LB975 and your LB1041, you know, now we've got a structure where we can purchase water and deliver it and tell the producer what he can

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or can't do. With LB1041 we've got a way to account for the water now that we do purchase. And you know, we know the districts now know what are parameters are in this situation and it should make the whole process work easier for us. Like I said, LB962 is obviously misunderstood by a lot of people and it may be understood by me but surely not. But it may be but, you know, I've heard discussion here about, what are you going to do. You fully appropriated and now you've got to start generating all this water. Fully appropriated is status quo. Uses are in balance with demand. Nothing has to change. It just can't go forward. If a groundwater use is dumped in the river, I don't know how we could ever hurt anybody by moving a groundwater use down a river. We're putting more water in the river. That isn't there for some other user but...I'm sorry, I strayed. [LB975]

SENATOR CHRISTENSEN: Here's...Ann handed this out to us. I'd just like to read. Said in the future under this bill this type of negotiation could not be done and this could drive up the price of water because the capacity of even natural resource districts or state to make purchase result could, that we will not be able to maintain, remain in compliance with the Republican River compact. You know, I just want the committee to hear that, have it verbally on the record and I was thinking I had one more question for you but I'm sure I can get somebody behind you. [LB975]

DAN SMITH: Given the opportunity, I would not...I would like to see these restrictions go away and give us some more open hand, if you will, to do that negotiating. We don't always know the situation that's going to be out there on a given year. You know, like I say, if you had one district with one canal and quantities were always known, it would be relatively easy and we could work around it. But we've got a variety of situations that may apply. Especially when you get over to the groundwater side if we start buying groundwater it's...now, you're not dealing with an irrigation district that has water in storage. You're moving a different commodity in a different way. And it's going to take some time to figure out how to make that work. [LB975]

SENATOR CHRISTENSEN: One more question. Do you believe with the...if occupation tax is the only thing used, that that could be...that would be acceptable to the farmers in your district? [LB975]

DAN SMITH: Mark, I'll say, yes, you know that acceptable. Nobody likes a tax but it seems to be generally accepted if we had occupation tax only because that only applies to the irrigated acre and not to the other property. That it would be a more palatable system. Now, some of the producers would say, yeah, but now I'm paying it all and those people in the communities or others benefit but I don't think that attitude is going to go very far. [LB975]

SENATOR CHRISTENSEN: Because I guess I bring that point because they was talking about third beneficial use of water and we can't hurt the third beneficial use.

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[LB975]

DAN SMITH: Third party impacts? Yeah. [LB975]

SENATOR CHRISTENSEN: Well, third party. But that's no different than people on property tax. They're a second beneficiary to the economy. You know, same issue isn't it? [LB975]

DAN SMITH: Yeah. Very similar, yes. [LB975]

SENATOR CHRISTENSEN: In that comment, do you believe, because I've had people tell me, I can't do this. Do you believe it could go through the body of senators to remove the property tax and have only occupation? [LB975]

DAN SMITH: I think the issue with property tax in that bill last year is because the occupation tax for NRDs and that use had no history and it was generally accepted by the recommendations from bond counsel that we wouldn't be able to do a bond without that guaranteed income generated by the property tax. Now, we have applied the property tax through...excuse me, we have applied the occupation tax. We're collecting that now. We're all putting it in savings. We can't use it of course but we're collecting those dollars now. I think we could turn around, once again I would definitely want to talk to the bonding companies but we now have an established record of collection on a taxing vehicle on the occupation tax. And I think we could probably very easily in the future issue a bond, provided the authority comes back to us, availability comes back to us, using occupation tax only. [LB975]

SENATOR CHRISTENSEN: So you agree with me that I could get that done in the body, of the senators you visited with? [LB975]

DAN SMITH: I, well Mark, my feeling was I'm not sure I don't know why a senator would object to taking a tax off but you know, they've got to understand the system. [LB975]

SENATOR CHRISTENSEN: Yeah. Well, I just asked that. I wanted it on record because I've been told by some of my phone conferences I couldn't do that so I just wanted it on record. Thank you. [LB975]

DAN SMITH: (Laugh) Thank you, sir. [LB975]

SENATOR HUDKINS: Other questions? Thank you. [LB975]

DAN SMITH: Thank you. [LB975]

SENATOR HUDKINS: Next person in support. [LB975]

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JASPER FANNING: (Exhibit 18) For the record, my name is Jasper Fanning, J-a-s-p-e-r F-a-n-n-i-n-g, general manager of the Upper Republican NRD and I just wanted to clarify a few points that Dan made. These three bills all deal with trying to make the legislation that we already have a little bit better in terms of how we manage our integrated managed water in the state. And LB975 fixes one of the hitches that we had in LB701 last year in terms of the comingled acres as Dan described very well. And we support that because that will make things workable. However, I would even like to propose something that would be better. Remove the restriction on the comingled acres all together and the reason that I say this, if you look at the backside of that sheet. If you look at the irrigation districts from which we leased surface water last year there were distinct differences. The Frenchman Valley and Riverside irrigation districts in the western, more western parts of the basin, had a supply of water that wasn't that valuable because they get their water very early in the year and then it dries up. And most of those acres are covered by groundwater wells, a large percentage of them. And they looked at things a little bit differently than an irrigation district further east, Frenchman Cambridge, where they had relatively few comingled acres compared to Frenchman Valley and Riverside and had a much more valuable supply of water in terms of amount and timing available to them. And if you look clear over towards the right, in the second column from the right, the dollars per acre foot of reduction in consumptive use under the compact accounting, and I apologize for these numbers not matching the ends. I got these from her staff and they've apparently been updated since I got them but they are fairly close in terms of the total number of acre feet that she provided you earlier, Senator Christensen. But if you look at Frenchman Valley and Riverside the cost was around \$100 per acre foot reduction in consumptive use. If you look at Frenchman Cambridge whose water was much more valuable because of it, the quantity that they had available and the fact that they had a supply that was large enough to essentially fully irrigate a crop. And mind you, when we were negotiating these contracts, corn had reached \$4 which seems awfully cheap today. But Frenchman Cambridge was five times that amount and at that time that we were negotiating those, the people that were negotiating for those contracts such as Dan and Mike and I and the irrigation districts, I would have liked to have left my name out of that. But anyway, corn had reached \$4, things were very profitable, and if you looked at the numbers in terms of what they could produce relative to what the recent history in terms of dryland yields had been, it was a fairly competitive price. And no one sitting around those tables who were all trying to come together and make something work had the authority to either sell or buy water nor did we have the clear legislative authority to do it but we found a way to make things work last year. And that \$500 figure, I won't argue, was a fair price. You know, I'm not going to say that it was too high because when we looked at things last year, and in considering the circumstances under which that was negotiated, I think it was a fair price. And I also included what the state bought from Bostwick Irrigation District and that was about \$640 per acre foot of consumptive use reduced by that purchase. But what it...I don't want to imply that they

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paid more than we did because they purchased a supply that could be made directly available to Kansas and provide more water to Kansas than the water we leased it. And if you look at it, clear on the right column, I have the dollars per acre foot to Kansas if you figure it that way, and how that washes out but I think that's some important information. And so my point is, if we remove this restriction on comingled acres all together, based on last year's purchases, you see that we recognize out there the NRDs and the irrigation districts what the value of water is under the circumstances on each individual irrigation district or individual canal. And so there's no better mechanism other than the open market for this water to determine what the fair price is and that's going to vary from district to district in terms of what their capacities are on comingled acres and those wells that serve those acres and I think that was fully reflected in the prices that we paid last year by irrigation district. And I would argue that the best solution would be to remove that restriction altogether and allow the market for water to work that out and I think that would be, and based on what Senator Christensen says, it seems that the Director Bleed must agree with that as well. A couple of other quick points to make very quickly. We've heard a little bit about third party impacts and that is a concern. We don't want to harm third party impacts when we're trying to make this compliance work. We've also heard a little bit about compact versus fully appropriated. Under LB962, fully appropriated status does not require an NRD to regulate groundwater use to put additional water in the river to be used by another irrigator in the state of Nebraska. However, in the situation that we're in now, the regulations that we put in place for compact compliance and any other activities that we've taken to increase the flows in the river can be diverted by another Nebraska water user. And I think that that's what in being able to quantify those offsets under LB924 or what Senator Christenen's LB1041 will do, allow us to make that all work, coupled with LB975 in terms of how we regulate those comingled uses. I think that's very important to note. We only want to protect the water that we put in the river for compliance. We're not trying to take water away from a user that they would have access to had we not done that. And that's a important distinction. I want to be very clear that we're not trying to steal water from someone. We're only wanting to protect the water that we put in the river for compact compliance as is required by LB962. With that, I'll take any questions that you might have. [LB975]

SENATOR HUDKINS: Questions? Thank you. The next person in support. Is there anyone in opposition? Anyone neutral? [LB975]

DON KRAUS: (Exhibit 19) I will make this short. Thank you, Senator Hudkins and members of the committee, my name is Don Kraus, D-o-n K-r-a-u-s. I have comments I'm going to provide for you. I have, and this is neutral testimony but it's really a little bit of confusion. There's seven lines added related to the transfers that Dan talked about and Dan and I have talked about this on the telephone here last week and tried...made a little progress. There's two pages that have been added to clarify. I'm not sure that after we had got done discussing it that I totally understood. I think it helped listening to Dan today. Maybe we can...maybe I won't have any questions and then so might...all

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I'm doing is raising some concerns. Maybe there's a more efficient way to do this. There is a surface water transfer that's restricted after there's been water leased off of the land. I didn't understand that. I raised it with Dan. We still have to communicate on that. In the last section there's a reference to a variance, it may be appropriate. There is a question on what the area subject to the lease might mean and I think maybe in discussions with Dan we can clarify that. Bottom line, I'll be working with a task force to address any potential questions or change and hope that we can come up with a resolution on that. If there's questions, I'd answer but other than that, I have nothing. [LB975]

SENATOR HUDKINS: Thank you. Are there questions? Thank you for being here. Is there any further neutral testimony? Senator Wightman do you care to close? [LB975]

SENATOR WIGHTMAN: I'll waive closing. [LB975]

SENATOR HUDKINS: Closing is waived. That will close the hearing on LB975 and we'll go to LB1041. Senator Christensen. [LB975]

SENATOR CHRISTENSEN: (Exhibits 20 and 21) Good evening. We may get out here yet. I got some handouts here. Thank you, Mr., or (laugh) I didn't expect this I wrote...sorry, (laugh) Thank you, Mrs. Chairman and members of Natural Resource Committee. I'm Mark Christensen, M-a-r-k C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District and I'm here to introduce LB1041. LB1041 would require Department of Natural Resources to protect and account for the water purchased or leased by the state of the natural resources districts for river flow enhancement, sorry, enhancement purposes with the exception of normal carriage losses. The bill would require DNR to protect and account for this water from the point of diversion to the intended destination or use in the stream. Currently any purchase or lease of water for river flow enhancement has historic consumption, return flows calculated that I think are misunderstood but consequently additional diversions downstream of such water are allowed to take place beyond the original intent, purpose of delivery of such water. This reduces the amount of credit the state receives for compliance and compacts and agreements. Therefore, LB1041 seeks to create different guideline for water purchase or lease from river flow enhancement purposes it would help maximize a credit to the state towards compliance. You've heard testimony for and against two bills already similar in language. This shows the importance of the issue. Our job now is to take the best ideas and achieve a positive outcome. I look forward to listening to comments in order to best solve the current issues. I also have an amendment here that also includes water from, say, like Colorado does their pipeline, drops water in at the state, that that is...doesn't become the additional liability to the state of Nebraska trying to obtain compliance so I hand that out also and if there's any questions, I'd gladly take them. [LB1041]

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SENATOR HUDKINS: Any questions from Mark? Seeing none, thank you. First person in support. [LB1041]

DAN SMITH: Senator Hudkins, members of the committee, my name is Dan Smith, S-m-i-t-h. I'm the manager of the Middle Republican Natural Resources District here offering testimony on behalf of the district and the Nebraska Association of Resources Districts. I'll be brief. We know now, you know, that we're looking at amendments to LB701 with Senator Wightman's bill. With this bill as it applies to LB701, and not to LB962 in general, strictly to LB701. It identifies the process whereby we can start having a little more confidence in an accounting for purchased water. If we're buying that water from an irrigation district, if the bureau or getting on down below Harlan County, if the corp's involved, there are going to other parameters other than Nebraska law that have to be looked at. But this, by doing this now we have a procedure in place in the statutes that we used last year effectively but DNR now knows that if we purchase water or if they purchase water, it has to be accounted for. And that's obvious in some respects but it was one of those things that was missing, if you will. And this, this piece of legislation will help that process work more efficiently. Once again the bureau, the Corps of Reclamation, or the Bureau of Reclamation, Corps of Engineers rules and regulations come into play on a majority of those purchases we make. [LB1041]

SENATOR HUDKINS: Thank you. Are there questions? Seeing none, appreciate your being here. [LB1041]

DAN SMITH: Thank you, ma'am. [LB1041]

SENATOR HUDKINS: Next person in support. [LB1041]

JASPER FANNING: (Exhibit 22) Thank you, members of the committee, Senator Hudkins. I'm Jasper Fanning, J-a-s-p-e-r F-a-n-n-i-n-g, general manager of the Upper Republican NRD. I haven't had a lot of time to look at the specific language in the amendment that Senator Christensen provided you but I...it's an issue that I raised with him just the other day. And Colorado is looking at putting an augmentation pipeline and dumping water in just upstream of Nebraska in the Republican River. And I think that that amendment gets at the crutch of the argument. We have an upstream state that's overused it's share of the Republican River water just like Nebraska has. And both states are trying to get water to Kansas who has allegedly been shorted water under the compact. And it seems to me that if the use of that water that Colorado puts in the river would cause Nebraska to be out of compliance or further out of compliance, that we should try and protect that water. That just, that seems to make sense to me especially in the interest of, as Ann put in her letter to Kansas, keeping interstate comity between the three states. Secondly, I think that that amendment aside, that the idea that we're trying...what we're trying accomplish here in the Republican Basin is compact compliance and that's for many reasons. Mostly to protect our interests as the irrigated

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economy out there is the driving force of the entire economy. We need to do all that we can to protect that and I think that any water that's put into the river for compact compliance should be completely protected. Last year when we leased water from irrigation districts the bureau was a part of some of that. We had some natural flow rights further out west that they were not a part of but in terms of the Frenchman Cambridge lease, the bureau was part of that. And Ann had told us early on that she thought all that we could protect was the consumptive use portion, that that was all we were allowed to protect and use from Frenchman Cambridge's water. And she was relying and referencing when we were having those discussions on the transfer statutes for surface water. However, we were not also told that we were not really under the transfer statutes. That we were doing this for compact compliance and they could protect it without a permit, so to speak. And we were also given legal advice from the state that we were entitled to use and to get the entire amount of water. That the consumptive use limit was not necessarily in accordance with Nebraska law. And you know, this is all a very confusing issue and something that I think we need further discussion on in this case but when we looked at things, I felt like the bureau held us to a different standard than they would hold the Frenchman Cambridge Irrigation District. They would allow the Frenchman Cambridge Irrigation District to take their appropriation to install more efficient facilities and use all of that water for irrigation and if they could, if they had the technological capability, reduce the return flows to zero. That would be allowable. But it would not be allowable to take that appropriation and use all of it for compact compliance. And to me, that seemed that the bureau was attempting within Nebraska to hold their irrigation district using the water, would allow them more latitude than someone their irrigation district leased the water to. And that had a little bit to do with...they were trying to within their organization protect some of their downstream interests as well but that seems to me that to be a state decision as opposed to a bureau decision. But those are all things that we need to further, have further discussion on. I don't think that's something we're going to solve in this legislation. But that is one of the issues that we faced last year that's closely related to this. Thank you. [LB1041]

SENATOR HUDKINS: Are there questions? Senator Carlson. [LB1041]

SENATOR CARLSON: Senator Hudkins. Jasper, if Colorado would release water just across the state line, 55 percent of that is ours, isn't it? [LB1041]

JASPER FANNING: At the state line gauge I can't tell you exactly what our share of that is. We would get it so much... [LB1041]

SENATOR CARLSON: Well they would have kept their 11. [LB1041]

JASPER FANNING: Right. Actually they get 22 percent of that gauge plus 11 percent of the unallocated and we...and I can't tell you what Nebraska's is of the allocated on the gauge. It gets fairly complicated. But you're right, part of that water is ours but it's...there

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is part of it that I view as not. And regardless of whether it's ours or someone else's, in the accounting any water that passes that gauge that does not pass the Hardy gauge, would ultimately be counted as consumptive use by Nebraska and that's all I'm saying. Any of that water that doesn't make it to Kansas will count against us, increase our consumption of water under the compact. And in some instances, I don't...I'm not saying that we shouldn't allow that if Nebraska would not be out of compliance. I think that any time that it would cause us to be out of compliance we might want to think about not allowing that and only then. But if we would still be in compliance and could use that water, if we did not owe Kansas any water so to speak, that would be a different situation. [LB1041]

SENATOR CARLSON: Okay. Thanks. [LB1041]

SENATOR HUDKINS: Senator Christensen. [LB1041]

SENATOR CHRISTENSEN: Maybe I should read the amendment for everybody to understand because it's got that statute in it. Surface water or groundwater purchased or leased by another state for river flow enhancement purposes, if such state has a water compact or agreement with the state of Nebraska, shall be fully protected and accounted for, to the extent such water is needed for the state of Nebraska to comply with the water compact or agreement, by the Department of Natural Resources from the point of entry into the state to the intended destination use for such purchased or leased water, except for normal carriage losses. So if we don't need it for compliance, then it's normal again. [LB1041]

SENATOR HUDKINS: Other questions? Thank you very much. [LB1041]

JASPER FANNING: Thank you. [LB1041]

SENATOR HUDKINS: Is there anyone else speaking in support? [LB1041]

DON ADAMS: Good evening, night or whatever it is. I'm not sure. [LB1041]

SENATOR HUDKINS: And it's evening. (laugh) [LB1041]

DON ADAMS: Senator Hudkins, members of the committee. This bill just makes sense on its face. It's pretty simple. I do have probably concerns with what fully protected means. I think that's kind of a very open broad term. [LB1041]

SENATOR HUDKINS: Did you tell us who you were? [LB1041]

DON ADAMS: I'm sorry. Don Adams, A-d-a-m-s, executive director of Nebraskans First. I think it would be helpful to have some definitional clarity what that means, maybe

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some examples, means or methods of protection because right now that could mean a whole host of things. That I'm afraid possibly Kansas in its aggressive mood right now could glom onto and have that work against us if we don't clarify the means or methods of protecting it fully. I don't know how you can protect fully, but to the greatest extent possible and then some examples of what that would mean but we do support the bill. [LB1041]

SENATOR HUDKINS: Thank you. Are there questions? Thank you Mr. Adams. Is there further support testimony? Is there opposition testimony? [LB1041]

CLAUDE CAPPEL: (Exhibit 23) My name is Claude Cappel, C-l-a-u-d-e C-a-p-p-e-l. I'm a farmer at McCook. Senator Hudkins, members of Natural Resource Committee, I'm testifying against LB1041 as it is presently written. LB1041 says surface water or groundwater purchased or leased. My experience is basically in Republican Basin. The things I don't see in the bill is just compensation for those that are going to get shut down or off by the purchase or lease. The reality is what actually happens, is any irrigation in the alluvial area, either surface or groundwater is a consumptive use of water. Ever since surface water basically became extinct in 2002 west of Medicine Creek, the pumping in the alluvial area draws it's water out of the river and in almost all years and the river dries up. In order to get the purchased water to Kansas, the alluvial wells have to be constrained. If the 8,000 acre feet of surface water from the Frenchman Valley Irrigation District were purchased like last year and leased to the state or the NRD, this bill would either restrict or require the shutting down the irrigation wells in the alluvial area of the Frenchman River and Republican River from at least Palisade, Nebraska, to where the water flows into Kansas. The amount of water equates to about, 1.5 inches or less at the head gates of the Frenchman Valley Irrigation District. There's also been a lot of talk about pumping water to meet the Kansas requirement. This has become Colorado's short-term solution to meeting the compact. There are areas north of Cambridge Lake and there are areas northeast of Wauneta, Nebraska, that have abundant depth of water and relatively short water, short depth of water, plus in those two areas the river will be flowing for a number of years yet, which could possibly make them a logical choice. This bill would most likely in the Middle Republican and Lower Republican require the shutting down of the alluvial wells in the Medicine Creek, Frenchman and Republican valley. It would predominately affect the southern counties and would not affect the Upper Republican Natural Resource District possibly since...I heard, yeah, it would probably affect them in area from the state line through their district in the Republican now with Colorado doing what's to it. The alluvial area is the least cost and the most productive area for irrigation. The alluvial area is the area that has surface water irrigation districts with recorded appropriated water rights recorded back as far back as 1890. In the southern two counties of the Middle Republican NRD there were approximately 400 wells drilled prior to the final development of the irrigation districts under the federal project in 1962. About 100 more were added prior to 1970. Almost all the water wells drilled in 1970 until 1998 were to

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supplement the loss of surface water in the alluvial area. Almost all new wells added after 1997 were for new development because of an anticipated moratorium. It was also known that the Middle Republican could treat the wells after mid-1998 different than the previously drilled wells. The state has allowed the majority of the surface water appropriations to be taken with no compensation. The question is, why is it okay to purchase groundwater or surface water from some irrigators, which requires other irrigators to be shut off, with no just compensation? Why is it okay to compensate only surface water irrigators in an irrigation district that are in areas that still have surface water available and not require compensation for the ones in the same district or other districts whose surface water has been taken because of groundwater pumping? The statute 47-702 says declaration of intent and purpose. It says Legislature recognizes its duty to define broad policy goals concerning the utilization and management of groundwater and to ensure local implementation of these goals. Also, every landowner shall be entitled to a reasonable and beneficial use of groundwater underlying his or her land, subject to the provisions of Chapter 46, in Article 6, and the correlative rights of other landowners when the groundwater supply is insufficient for all users. The courts ruled the owner of the land is entitled to the appropriate water found underneath his land but cannot extract or appropriate them in excess of reasonable or beneficial use upon the land he owns, especially if such is injurious to others who have substantial rights to the water. If the natural underground water supply is insufficient for all, each owner is entitled to a reasonable portion. The correlative rights of other landowners when the groundwater is insufficient for all, was intended to be the controlling component in LB375 passed in 1982 to control irrigation development. The courts made it impossible to enforce it on a local level. The state has never corrected this problem. The state and the NRDs are using economics as a reason to follow the correlative rights. The question is, whose economics? It has become okay to deprive some irrigators of water, so others can pump more water than what is sustainable. As long as the aquifer is being depleted, there are wells that are going to go dry, and on average each year, less surface water will be flowing in the river. Internally within my NRD there is a battle between the north and south counties in the Republican Basin. If Legislature is going to be passed to take away the rights to irrigate, there needs to be language in it that requires just compensation to those irrigators whose rights have been taken or will be taken away. Unless you treat people fairly and equally and nondiscriminatory, there's going to be conflicts. One example, Dan was talking earlier about occupational tax. I'm in a surface water district that never got water for six years, I think. We are being charged that tax. We will get some water this year, probably not much but I don't see us ever getting water again and we are being charged that tax. This is one thing that I feel is unfair which I have talked to Dan but that's the way they set the rules. That's...I think that...answer any questions. [LB1041]

SENATOR HUDKINS: Are there questions? Senator Carlson. [LB1041]

SENATOR CARLSON: Senator Hudkins. Claude, help us understand how the alluvial

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wells would be shut off. [LB1041]

CLAUDE CAPPEL: Basically, well I guess one real good example is the water that comes across from Colorado. Basically in the summer it does not even get to Benkelman and that water, some way, it's going to become a consumptive use against Nebraska and the bill says, it shall be protected. I have land right at the Frenchman, on the Frenchman, on the Republican. The water they buy out of the Frenchman comes out in normal years. Last year was a totally different year but in normal years it comes out of the Republican and flows just past Culbertson. The valley gets wide. All the wells suck it out. It dries up before it gets to the well. It's dry all the way down to where it gets to the Cambridge canal at which was running water. This water, it says in here, will be protected and in order to protect it they're going to have to shut down the alluvial wells. You can't get water down there with either the wells running or the surface water running. You're going to have to shut down both of them. That's just a fact and that's the way the bills reads to me. [LB1041]

SENATOR CARLSON: Okay. Thank you. [LB1041]

SENATOR HUDKINS: Other questions? Thank you for being here today. Is there other opposition? Go ahead. [LB1041]

DON KRAUS: (Exhibit 24) Thank you, Senator Hudkins and members of the committee. My name is Don Kraus, that D-o-n K-r-a-u-s. I'm general manager of the Central Nebraska Public Power and Irrigation District. We oppose LB1041 as written. I'm not going to read my testimony. My comments are similar to what I've provided on LB924. Again, it's three basic concerns. As there is a reduction in groundwater use that water should be available for a surface water appropriator. Secondly, the gain to the stream flow should be accounted for by the DNR through a hearing process, and lastly, the return flows should be maintained. I do agree, you had the discussion on return flows earlier and I think there ought to be two components, carriage loss is one component, and then what is lost in the field is a second component. I think those are two valid components of return flows so I do agree with that. [LB1041]

SENATOR HUDKINS: Thank you. Are there questions? Seeing none, thank you for being here. Is there other opposition testimony? Is there neutral testimony. Senator Christensen, would you like to close? [LB1041]

SENATOR CHRISTENSEN: No. [LB1041]

SENATOR HUDKINS: That will close the hearing on LB1041 and the hearings for today. Thank you all very much for your patience. It's been a long afternoon. Oops, sorry, wait, wait, wait. We have...(See also Exhibits 25-27) [LB1041]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
February 07, 2008

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Disposition of Bills:

LB924 - Held in committee.  
LB975 - Indefinitely postponed.  
LB1041 - Held in committee.

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Chairperson

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Committee Clerk