

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Natural Resources Committee January 22, 2020

**HUGHES:** Ready? OK, very good. Welcome to the Natural Resources Committee. I am Senator Dan Hughes. I am from Venango, Nebraska, and I represent the 44th Legislative District. I serve as Chair of this committee. The committee will take up the bills in the order posted. Our hearing today is your public part of the legislative process. This is your opportunity to express your position on the proposed legislation before us today. The committee members might come and go during the hearing. This is just part of the process as we have bills to introduce in other committees. I ask that you abide by the following procedures to better facilitate today's proceedings. Please silence or turn off your cell phones. Introducers will make initial statements followed by proponents, opponents, and then neutral testimony. Closing remarks are for the introducing senator only. If you are planning to testify, please pick up a green sign-in sheet that is on the table at the back of the room. Please fill out the green sign-in sheet before you testify. Please print and it is important to complete the form in its entirety. When it is your turn to testify, give the sign-in sheet to a page or to the committee clerk. This will help us make a more accurate public record. If you do not wish to testify today, but would like to record your name as being present at the hearing, there is a separate white sheet on the tables that you can sign for that purpose. That will be part of the official record of the hearing. If you have handouts, please make sure you have 12 copies and give them to the page when you come up to testify and they will be distributed to the committee. When you come up to testify, please speak clearly into the microphone. Tell us your name and please spell your first and last name to ensure that we get an accurate record. We will be using the light system for all testi-- testifiers. You will have five minutes to make your initial remarks to the committee. When you see the yellow light come on, that means you have one minute remaining and the red light indicates that your time has ended and you need to wrap it up as quickly as possible. Questions from the committee may follow. No displays of support or opposition to a bill, vocal or otherwise, is allowed at a public hearing. The committee members will-- the committee members with us today will introduce themselves starting on my far left. Mike.

**MOSER:** That's me.

**HUGHES:** Yeah.

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**MOSER:** Yes. Mike Moser, District 22. I live in Columbus. I represent Platte County, a little bit of Colfax County and most of Stanton County.

**HALLORAN:** Good afternoon, Steve Halloran, District 33, which is Adams County and a good part of Hall County.

**QUICK:** Dan Quick, District 35, Grand Island.

**GEIST:** Suzanne Geist, District 25, and that is the southeast part of Lincoln and the eastern part of Lancaster County.

**HUGHES:** And on my far right.

**GRAGERT:** Good afternoon. Senator Tim Gragert, District 40 up in northeast Nebraska.

**ALBRECHT:** Joni Albrecht, northeast Nebraska, Wayne, Thurston and Dakota Counties.

**BOSTELMAN:** Bruce Bostelman, District 23, Saunders, Butler, and majority of Colfax County.

**HUGHES:** To my left is committee counsel, Andrew Vinton, and to my far right is our committee clerk, Mandy Mizerski. Our page for today is Kaitlin McKenna. She goes to UNL and she is history and major-- she is majoring in history and political science. If you want to get on the record, effective last session committee procedures across all committees state that written letters to be introduced on the record must be submitted to the committee clerk by 5:00 p.m. the business day before the scheduled hearing for that particular bill. You must also indicate on your testimony that you would like it to be included in the record. Written testimony for the record is received only if you are unable to be present at the hearing to testify. Your name will be read in during the hearing as having submitted a letter, and the letter itself will be included in the official records. Unless you testify in person before the committee, your name will not be included in the committee statement. So with that, we will proceed to our agenda and we have a reappointment to the Environmental Quality Council. So, Mr. Hawks, if you would come forward, please. Welcome.

**JAMES W. HAWKS:** Thank you.

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**HUGHES:** So if you would give us just a little brief background on who you are and where you're from and why you would like to be appointed, reappointed to the Environmental Equality Council.

**JAMES W. HAWKS:** All right. Thank you, Senator. My name is James W. Hawks, Jim H-a-w-k-s and I am currently the city administrator for the city of North Platte. I also serve as public works director for the city of North Platte, so am involved in a lot of different things with the community up there. Prior to that, I was the Lincoln County Highway Engineer and the County Surveyor. So I've been in North Platte for about 35 years. I have a background working in again civil engineering and municipal government. And, you know, with this last term serving on the Environmental Quality Council, I think we've made tremendous strides in some of the processes that are being used there and eliminated some of the frustration that-- that some folks had with timing of permits and different things. And I think that is, you know, attributable to a great staff, a great director. And I think it's important for western Nebraska to be represented on committees such as this, because we are a big state. And-- and like you say, so anytime I have an opportunity to serve on a committee such as this, I always take that opportunity. And like you say, I really enjoy being involved with that and being involved in some of the decisions that are being made when it comes to our natural resources and protecting those resources and our environment and making sure they're being used in the best way that we possibly can.

**HUGHES:** OK. Thank you. Are there questions for Mr. Hawks? Senator Albrecht.

**ALBRECHT:** Thank you, Chairman Hughes. Thank you for being here today. My goodness, you have lots of connections out there. I don't know how you've been working, know all those people, but my question to you is, you only meet twice a year?

**JAMES W. HAWKS:** No, we actually meet every quarter.

**ALBRECHT:** Every quarter. So you advertise and then do you have comments from the public.

**JAMES W. HAWKS:** Most often we do. There are many times when changes are proposed, or whatever, that simply streamline things or whatever. So we don't have public testimony on every change that we make or

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everything that comes in front of the Environmental Quality Council, but it's always open to public comment and input.

**ALBRECHT:** Have you ever had any issues that were contentious?

**JAMES W. HAWKS:** Not with my tenure on the board. There's been things that people were concerned about, but I think that when they saw them actually implemented or whatever, they understood that it was really a good thing for everybody involved. So, no, I haven't, but--

**ALBRECHT:** I appreciate your service thus far.

**JAMES W. HAWKS:** Thank you.

**HUGHES:** Senator Bostelman.

**BOSTELMAN:** Thank you, Chairman. Mr. Hawks, there's 17-- thanks for being here today and there's 17 members. So you have a PE in civil engineering, is that right?

**JAMES W. HAWKS:** My background is in civil engineering, yes.

**BOSTELMAN:** So on-- sorry, it's all 17 members, are there like subgroups, subcommittees that you serve on, if it is, is that where you bring your expertise? Could you speak to that?

**JAMES W. HAWKS:** Yes. Each one of the members of that represents a different business or a different area. And I was actually asked to be serve-- or to serve on there to represent municipal government. And so I sat on that board to do that. There's people from the ag sector. There's people from the manufacturing, a segment of our state. So, yeah, it's-- it's-- it's a very diverse group. Everybody kind of brings their particular skills to the table.

**BOSTELMAN:** And there's quite a bit of grants funding that comes through this-- through the board or through the environmental councils. Can you tell me a little bit as far as the scoring process, the priorities, what's-- has it changed? Does it stay pretty much the same? What-- what type of things are you really focused on?

**JAMES W. HAWKS:** Over the years the funding has seemed to have gone down, but the criteria is primarily the same. And what we like to do is leave as much flexibility for the staff of the Department of Environmental Quality to come to us and make recommendation on how those funds are allocated based on true needs. And so if I remember

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correctly, the last time we gave them, it was either 20 or 25 percent discretion in how some of those funds were put out there, but the overall scoring situation has pretty much remained the same, at least for my tenure on the board.

**BOSTELMAN:** Is there-- I guess the one final question I have. The types of projects, are they more bland soil, those type, I mean, those type of projects, preserving those type of areas or how does that apply within the, you know, within the cities municipality.

**JAMES W. HAWKS:** Well, for the cities, I know at least in our city, we've participated in the tires when people come in and bring in their tires and clean those up. We also work with them very closely on our transfer station. Keep North Platte and Lincoln County beautiful also works very closely with them and receives grant funding from the council, as do all of the other communities that vie for those funds. And so, you know, we have an opportunity to participate in that, you know, and I guess when it comes to things that would perhaps be more geared towards the private sector, I'm not as familiar with some of those. But again, I feel that the staff over there at DEQ is very fair and very professional and that they do a great job of screening those projects and presenting them to us to award those-- those limited funds.

**BOSTELMAN:** OK. Thank you. Thank you again for coming in today.

**JAMES W. HAWKS:** You bet.

**HUGHES:** Senator Gragert.

**GRAGERT:** Thank you, Chairman Hughes. Thank you for being here today. I'm just interested in the last year, two years, what has been the top priority of DEQ? And if I could just follow up and maybe you can add to it as if after the flooding of March 2019, how is DEQ-- any special?

**JAMES W. HAWKS:** Well, I think that that comes back, Senator, to what I mentioned earlier, and that is that it used to be that it took quite some time to get permits. And I know that Department of Environmental Quality is working very closely with the Department of Transportation in getting permits for bridge replacements, road replacements and other things resulting or as a result of the damage that was created by the flooding. So that's probably one thing that they're doing. But again, I think that what I've noticed is, is that time from permit

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application to the permit actually being issued has been cut tremendously, which again, time is money. And so any time that you have a delay in there because of the permitting process, it's-- it's costing somebody something. And so I know that Mr. Macy, as the director, has worked very hard in trying to streamline that and just create better business practices within DEQ that really help everybody get through these things whether it's air permits, again, landfill permits. Some of the grant funding that different communities vie for. But again, I think that they-- they-- they have an excellent staff over there. Mr. Macy does a great job of trying to make it as seamless as possible for those working with DEQ.

**GRAGERT:** Thank you.

**HUGHES:** Any additional questions? Seeing none, thank you for coming in. I understand the roads were not the best.

**JAMES W. HAWKS:** A little icy.

**HUGHES:** The farther you got to the east here, but we do appreciate you, your service to the state and you making the attempt to come today.

**JAMES W. HAWKS:** Thank you very much.

**HUGHES:** Okay. Very good. Is there anyone wishing to testify as a proponent to the appointment of Mr. Hawks to the Environmental Quality Council? Welcome.

**LASH CHAFFIN:** Thank you. Good afternoon. My name is Lash, L-a-s-h, Chaffin, C-h-a-f-f-i-n, represent the League of Nebraska Municipalities and our organization would enthusiastically support the reappointment of Mr. Hawks. Mr. Hawks has been involved in-- in city and county government as long as I can remember, and his entire family, including his father, have all been involved in public service in some capacity and their-- their-- their entire family, they're reflective. They ask questions, they're exactly what-- what-- what you expect in someone who is in a deliberative body. And I would certainly encourage the-- the appoint-- the reappointment-- to reappointment of Mr. Hawks to the Environmental Quality Council.

**HUGHES:** OK. Thank you, Mr. Chaffin. Are there any questions? Seeing none, thank you. Are there any additional proponents to the appointment of Mr. Hawks? Are there any one wishing to testify in

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opposition to the reappointment of Mr. Hawks? Anyone wishing to testify in the neutral position of the reappointment of Mr. Hawks to the Environmental Quality Council? Seeing none, that will close our reappointment hearing and we will move on to the first bill on the agenda. And I will turn the Chair over to Senator Bostelman, the Vice Chair.

**BOSTELMAN:** We'll begin this afternoon's hearing on LB858. Senator Hughes, welcome.

**HUGHES:** Good afternoon, Vice Chairman, Bostelman, and fellow members of the Natural Resources Committee. My name is Dan Hughes, D-a-n H-u-g-h-e-s. I represent District 44 and I am here today to introduce LB 858, which provides for an updating of Municipal Cooperation Financing Act. The Municipal Energy Agency of Nebraska, or MEAN was created in 1981 under the Nebraska Municipal Cooperative Financing Act, giving it the authorization to generate, transmit and district-- distribute wholesale electric power and energy. MEAN is a nearly 40-year-old political subdivision of the state of Nebraska, and like all power entities, it is facing new opportunities and challenges. This committee has subject matter just-- jurisdiction over MEAN's charter, and they are requesting some updates, improvements and housekeeping changes in their governance model. LB858 has four simple proposals. We organize, authorize, simplify, and streamline the governance of MEAN. MEAN is serving small towns in the Midwest and this bill-- bill would reorganize, update and simplify the basic governance of MEAN. LB858 changes provisions relating to the qualification, removal, terms, and votes by MEAN's board of directors. MEAN's governing body is currently very large, almost 70 individuals. This bill permits a board member to serve a longer term than the current limit of three years, permits new membership with other joint action agencies in Colorado that are likely to join MEAN and removes the prerequisite of being an elector of the community. You will notice that this bill sets forth throughout by the by-laws mesa-- may prescribe qualifications and other matters, such as MEAN's board's authority to establish the length of term, membership requirements, members voting rights and a fair and just procedure for suspending a member. LB858 authorizes another joint action agency comprised of municipalities to join MEAN, yet still governed by Nebraska law. MEAN has served electricity and other similar small agencies, and LB858 would allow that agency to sit on MEAN's board as a voting member. However, that agency must still be comprised of municipalities similar to MEAN. LB858 simplifies the law by deleting the requirement that

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construction, maintenance, or remodeling of the agency's headquarters constitutes a power project of the organization and removing the requirement for a certain type of security bond, yet it still allows for security by insurance coverage. Lastly, LB858 streamlines authority and permits MEAN to sell assets from time to time to other public agencies such as power district power plants, municipalities and electric generation plants. By these actions, the bill will allow MEAN to effectively serve its community for another-- for another forty years. This bill has very some-- this bill has very few new concepts. Almost all of them have been previously approved by the committee, by this committee in the power district statutes and public supplier statutes, but LB858 does propose several minor housekeeping retooling concepts. I do appreciate your support and I have people following me who will walk you through a section-by-section summary and can answer technical questions about how the organization operates and wants to be streamlined to be more efficient in the future. It's important that we have this conversation and advance this bill to encourage our public power groups to streamline, be competitive, and modernize for changes in the industry. I will try to answer any of the questions you may have. Thank you.

**BOSTELMAN:** Thank you, Senator Hughes. Are there any questions from the committee? Seeing none. You'll remain for closing?

**HUGHES:** I will.

**BOSTELMAN:** Thank you. I'd ask anyone who would like to testify as a proponent for this bill to step forward.

**CHRIS DIBBERN:** Good afternoon, Senator Bostelman, members of the committee, my name is Chris Dibbern, C-h-r-i-s D-i-b-b-e-r-n, and I'm a registered lobbyist and the general counsel for the Nebraska Municipal Power Pool and for MEAN, the Municipal Energy Agency of Nebraska. And if Mr. Hawks is still here-- oh, he stepped away. Jim Hawks sits on our power pool board, so he also attends from North Platte to our meetings in-- that meeting happens to be in Lincoln. MEAN is the Municipal Energy Agency of Nebraska and we are a political subdivision of the state in Nebraska. We serve 70 communities in four states. And MEAN is an agency like under the Public Records Law, under the Open Meetings Act and under, as Senator Hughes mentioned, under the jurisdiction of this committee. And we want to thank Senator Hughes. He's taken some time this summer to learn about MEAN to-- he's always known about it because of the committee's work, but to understand how small towns get together to be a buying club together.

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We also appreciate the committee's attention and interest in this. As Senator Hughes mentioned, the Municipal Cooperation Financing Act, the act that we're under, it was-- was formed in 1981. There are some solid waste agencies under the act, but we are the only power agency under the act and we are only changing the power piece of that act. So MEAN formed with a very large board of directors and committees. And today, unfortunately, they're meeting in Kearney, so we couldn't have our board members come. In fact, I said we need the quorum out there. So it-- I-- I wasn't planning to testify but I'm happy to be in front of you. So the board members meet quarterly and there are approximately 13 changes in this act. So that's a lot of changes to bring before you. But in 40 years, we have really never revisited the Municipal Cooperative Findings Act, and they're geared really at the governance of MEAN. So I just want to point out a few things. Senator Hughes did a good job kind of outlining what was in those bills. The first is that small joint action agency that-- that might want to join us. It's Arkansas River Power Authority and they serve between four and six members. Some of you might know eastern Colorado. Holy-- Holly, La Junta, Lamar, Las Animas, Springfield and Trinidad. So in eastern Colorado, they're very much like our loads and we have served them over the last decade power and now we're doing utility services. So we're not their power provider today, but they would like to come sit on our board. We've talked about what is not a power project and we have a new building, it's seven years old now at 8377 Glenn Oaks and we house about 15 employees. So we have engineers, we have environmental experts, we have attorneys, we have-- we-- whatever the small town needs to help them with their DEQ permits, to help them with transmission and power. And we--we-- there was some question about whether our new building was a power project and so we said, just to clear that up, remodeling, putting in a new roof would not be a power project. A fourth is MEAN had some accounting cleanups so we went to our accounting department and asked them what would we change in the statute? And they said, well, we don't do checks in writing anymore. We do ACHs, so we changed that. But we don't have the same fiscal year December 31st. Ours ends April 1st. So could we had it at the end of our fiscal year where we file a budget and our--our account, our audits with the public, with the public auditors. So we had some cleanup like that coming from our accounting department and our finance department. And lastly, over the years, if something had changed in the power district statutes, MEAN often asked me to mirror their sections, but not always. So now we went back and there were four examples of improved language already in law. And that's what this page is, where your committee counsel asked me to pull the

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examples out of the statute and-- and show you that they're almost word for word. Good Bill Drafter upstairs. Thanks. Thanks to our-- our Bill Drafting Office. So we had how a board could terminate a director. We've never had that issue but let's say there were some issue, and that came from the Nebraska Nonprofit Act. We had a contractors' bonds, and that came from Chapter 70-641, the agency's ability to sell assets. This is actually pretty big for me. We have the ability to buy, finance, own, run power plants and operations, but we never had any exit strategy to get rid of an asset. So in Nebraska law, power districts can sell to each other. If you had an asset that you wanted to get rid of, sell to co-ops, sell to a muni. So you can't sell it to a private industry, but you could sell to each other. So we-- we did face that once, our Kimball wind farm. We-- we actually couldn't sell it. We decommissioned it and then created a new farm with a private wind developer. That would have been a waste of money if we-- if somebody could have used the gen sets or the steel. So we decommissioned it and-- and took it down and re-- redid a new farm. So there-- those are the-- that's basically it in a nutshell. If you ever look at our statute, you'd see very few footnotes on the bottom of 30 or 40 pages because it hasn't changed in a lot of those years. So as Senator Hughes said, we'd like to exist another 40 years. But you will see me before that. Any questions?

**BOSTELMAN:** Thank you, Ms. Dibbern. Are there any questions from the committee? Senator Geist.

**GEIST:** Yes, Ms. Dibbern, thank you for being here. And I don't really have a question. So I guess that's a little disingenuous, but I did want to thank you. I know that what you've done with myself and my staff is carefully-- before we ever got together, walked through these changes. I'm assuming that's been done with all of the committee and because of that, I don't have any questions, but I just wanted to express my appreciation. I love when people are that meticulous and it helps us be prepared before we arrive, so thank you.

**CHRIS DIBBERN:** Thank you. And there's one exception. We do have a senator that we're still visiting with yet this week.

**GEIST:** OK.

**CHRIS DIBBERN:** One more work to do. Thank you all. Any other--

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**BOSTELMAN:** Other questions from committee members? Seeing none, thank you very much. Other proponents, please step forward.

**SHELLEY SAHLING-ZART:** Good afternoon, Vice Chairman Bostelman, and members of the Natural Resources Committee. For the record, my name is Shelley, S-h-e-l-l-e-y, Sahling-Zart, as in Sam, a-h-l-i-n-g, hyphen Z-a-r-t. I'm vice president and general counsel for Lincoln Electric System, the municipal utility here in Lincoln, and today I'm here testifying on behalf of the Nebraska Power Association. The Nebraska Power Association represents all of Nebraska's public power utilities, all of our consumer and electric utilities, including municipalities, public power districts, public power and irrigation districts, rural power districts and cooperatives. Happy to be here today to support LB858. On my LES side with the LES hat on, LES has been a longtime member of the Nebraska Municipal Power Pool. Our first CEO was instrumental in helping form the Municipal Power Pool as-- which led to the creation of MEAN. I actually served as a board member on the Municipal Power Pool board of directors, so I'm happy to be here. MEAN serve provides a service for small municipalities that is vitally necessary. They get the economies of scale of coming together. And there are a lot of complicated issues, as you know, working with transmission issues, market issues that none of them could do on their own. So it's really important that the power that MEAN is there to provide some of those services. MEAN does a whole lot of other services in terms of training for utilities and provides that in an economic way that that otherwise I'm not sure they would-- would get. So I think it provides a really vital service. As Chris pretty well laid out, this bill is a cleanup bill. It cleans up a number of statutes that have been tweaked over the years, probably necessary and long overdue, and with that, we would urge your support. I'd take any questions.

**BOSTELMAN:** Thank you, Ms. Sahling-Zart. Are there any questions from the committee members? Seeing none, thanks for your testimony. Other proponents? Welcome.

**LASH CHAFFIN:** Good afternoon, Senator Bostelman, members of the committee, my name is Lash, L-a-s-h, Chaffin, C-h-a-f-f-i-n, represent the League of Nebraska Municipalities, and I also would like to offer the League support for LB858. The interrelationship with the League and MEAN goes back to the inception. The predecessor of NMPP Energy, the Nebraska Municipal Power Pool was formed by a few very forward thinking people, including the director of LES at the time, Walt

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Canney, and a few others in the boardroom of the League of Nebraska Municipalities. And at the time, everybody thought it wouldn't work, and then very quickly, the Municipal Power Pool, which is sort of MEAN's predecessor, although it's sort of morphed into something else, grew to the point that the first growing pains of the Municipal Power Pool resulted in the Municipal Cooperative Financing Act, and that resulted in the formation of MEAN. And so the League has been very closely associated with MEAN going back to its inception. And it's interesting, it's been around that long. I've been to many, many, many, many MEAN meetings. And it's interesting in the world of computers and things like this, how awkward it run-- the governance of MEAN runs at this point. It's a very enthusiastic board, but the roll call alone takes 40 minutes and it just goes on and on and on, and there's-- there's-- there's certainly ways that MEAN could be streamlined into whatever century we're in now. So, and this is-- this is a great attempt to do it. And it's interesting that it has gone this far without being modified. I guess some credit needs to go to the original drafters of the Municipal Cooperative Financing Act, because I don't know that we can find a lot of laws that have gone this long and involved that many people and that much governments-- governance and required no amendments. So, but thank you, Senator Hughes, and thank you, committee.

**BOSTELMAN:** Thank you, Mr. Chaffin. Is there any questions from the committee members? I-- question and even kind of brought-- brought up the-- the-- the roll call and it was 70 different individuals or entities about, give or take, less than that, probably, but how is that? Is that all under one roof or did-- or sometimes really done--

**LASH CHAFFIN:** Yes, it's all under one roof. And I will say that-- that Ms. Dibbern does a much better job than her predecessor, but it's an enthusiastic board, though. I want to say, I'm from Indianola, Nebraska, and we've got this going on and, you know, it's just-- well, it's just great. And but-- I will-- I will say it's-- it's crisper than it used to be, but-- so much thanks to Ms. Dibbern too.

**BOSTELMAN:** Thank you. Any other questions from committee members? Thank you very much for your testimony. Would ask anyone else as a proponent for LB858 to please step forward. Is there anyone wishing to testify as an opponent? That's no fun for LB858. Anyone wish to testify in the neutral capacity? Seeing none, Senator Hughes, you're welcome to close.

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**HUGHES:** Thank you, members of the committee. The only thing I would like to add that it probably will from now ever be known as Dibbern the executive director of MEAN. Thank you. [LAUGHTER]

**BOSTELMAN:** Any last questions from the committee? Seeing none, that will end our hearing on LB858 We will now turn to LB802. Welcome, Senator Hughes. You may open when you like.

**HUGHES:** Again, good afternoon, Vice Chairman, Bostelman, and members of the Natural Resources Committee. For the record, my name is Dan Hughes, D-a-n H-u-g-h-e-s. I represent the 44th Legislative District. This bill was brought to me by the Nebraska Cattlemen Association and the Nebraska Farm Bureau. This bill is intendify-- intended to codify the common law concerning ownership of land and how it relates to groundwater rights. Nebraska courts have consistently viewed the right to use groundwater as being linked to the ownership of the overlying land and with-- and with a few statutory exceptions, that groundwater can only be used for a reasonable benefit of the overlying land. Recently, there have been efforts to divorce groundwater rights from land ownership. That would enable landowners to sell their land but retain groundwater rights or to sell groundwater rights but retain ownership of the land. Such a practice would set a dangerous precedent that could lead to groundwater rights being bought and sold as a commodity. This could have a negative impact on irrigators, the sustainability of water resources and upon the ag industry as a whole. This is why the Nebraska Cattlemen and the Nebraska Farm Bureau suggested I introduce this bill. As two of the largest agricultural organizations in the state they have a vested interest in ensuring our groundwater resources remain strong and sustainable. LB802 addresses this concern. It is not meant to change Nebraska's common law, but simply reaffirm it by providing a backstop to protect the right of landowners to utilize the groundwater under their land. It is not the intention of this bill to affect the NRDs or DNRs ability to manage groundwater under IMPs or the Groundwater Management and Protection Act. I have an amendment that I've been working on, but we still need to make a few minor changes before it is ready to show. You have an early draft in your bill summary. The amendment would ensure the bill is precise and doesn't cause unintended effects beyond reaffirming the common law. As most of you know who have introduced bills, once you introduce them you receive some input and we have received some input on these-- on this bill in particular and we are working very hard to address the issues that have been brought forth before us. So with that, I know there are people who are much more technical going to

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follow me if you have those types of questions, but this bill is a work in progress and it is certainly our intent to get it in the best shape possible before we move forward. I'll be happy to answer any questions.

**BOSTELMAN:** Thank you, Senator Hughes. Are there any questions from committee members? Senator Moser.

**MOSER:** Senator Hughes, just kind of an informational question. It says that the landowner has the reasonable use of the water under the land they own.

**HUGHES:** Yes.

**MOSER:** And, but does the state also claim that water is belonging to the state?

**HUGHES:** Well, the the state of Nebraska does own the water, so that Nebraska is different than other states where in other states water is considered-- considered part of the mineral rights, where in Nebraska, the state of Nebraska owns the water and they will issue you a permit to use that water through our NRD system.

**MOSER:** And does this bill affect mineral rights as well as water rights?

**HUGHES:** No. This is strictly water.

**MOSER:** So gas leases, oil leases, and they all are associated with the rights to the minerals. Can they be separated from the land to both?

**HUGHES:** Yes, they can.

**MOSER:** You can lease them, can you sell them?

**HUGHES:** You and you-- yes, you can sell mineral rights. We-- we own some land that we do not own the mineral rights, so when we purchased that property, the previous owner chose to retain those mineral rights. But the water under that land is available to us as the current owner as long as we meet the criteria that is set out by the state of Nebraska through the natural resources districts for the use of that water.

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**MOSER:** Would gravel, be considered a mineral? I mean, so if they own the mineral rights and somebody wants to-- to sell the gravel out from underneath your land, is that--

**HUGHES:** I-- I don't know whether gravel is considered a mineral or not. I-- I would have to get back to you on that.

**MOSER:** Well, yeah, just information. I'm just trying to associate the idea of what we're trying to do here.

**HUGHES:** No, this bill is strictly dealing with water. No other-- no other minerals or anything like that.

**MOSER:** Thank you.

**BOSTELMAN:** Other questions from committee members? Senator Halloran.

**HALLORAN:** Thank you, Vice Chairman Bostelman. So in my notes here, I've got from the notes given me by the committee it-- this ties ownership of overlying land to the right of the use of groundwater underneath for reasonable use on the land. So there are instances and it's mentioned in here, of course, about augmentation programs to satisfy, for example, and of course satisfying the Kansas compact. Clearly that water being pumped there isn't satisfying use on the land. The water's moving off the land. So, how does this bill relate to that-- that issue when the water leaves the land?

**HUGHES:** I guess I would-- I would beg to differ with you that it is a beneficial use. So whether or not it actually physically leaves the land or not, it is a beneficial use to that land.

**HALLORAN:** I'm just reading from the notes given us here that it says a reasonable use on the land

**HUGHES:** And the state of Nebraska and if my recollection is correct, that the state of Nebraska gave the authority to the natural resources districts for an augmentation project, and-- someone is coming behind me may be able to answer that better.

**HALLORAN:** Okay. Thank you.

**BOSTELMAN:** Senator Geist.

**GEIST:** Yes. Thank you for this, because it caused me to do a lot of thinking. And I'm curious if this would have an effect on the balance

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that's been struck with N-CORPE. Just being straight about that. Things there seem to be working well and I'm curious if putting this into law would put that into peril.

**HUGHES:** I do not believe that it will. This is just reaffirming what the state Supreme Court has already ruled, that you have to have a certain amount of surface acres in order to access the water below the land.

**GEIST:** OK.

**BOSTELMAN:** Is that all?

**GEIST:** Yes.

**BOSTELMAN:** Thank you. Senator Moser.

**MOSER:** So why would we need to reaffirm the Supreme Court? Wouldn't they be superior to us?

**HUGHES:** They are an equal but separate branch of government. This-- this bill came to me from the Nebraska Cattlemen and the Nebraska Farm Bureau, two of the largest agricultural groups in the state, and they have been following the issues that have been coming before this committee for the last six years. And they have some heartburn of what others are trying to do of separating the land from the water. And this is their way of trying to make sure that it is a very tight bond between the land and the water, that you do have to own a certain amount of land in order to have access to the water.

**MOSER:** And the question that Senator Geist asked, this doesn't affect the argument about for or against selling the ground above the water that we're using for the augmentation project.

**HUGHES:** Well, this-- this would reaffirm the balance that we have reached in-- in the N-CORPE for a project that you should not sell the land above the water. You need to have-- you need to have a certain amount of land in order to have access to a certain amount of water.

**MOSER:** In our discussions of the bill to allow them to sell the ground over the water that they're using to balance the flows in the Republican River, they talked about that it was possible to separate the water from the land. I mean, we're selling water, using land for different purposes and then you can't use that water to irrigate that 19,000 acres. So it would seem that this is going to kind of put a

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wrench in the works to sell that ground overtop that augmentation project.

**HUGHES:** If I might correct you, they are not selling the water from under that land. It is being used for a beneficial purpose by those-- the consortium of the four NRDs.

**MOSER:** Yeah, they have a settlement there or whatever of--

**HUGHES:** Well, it is being used to meet the compliance, the compact compliance that we have with Kansas, so it is a state purpose, a beneficial purpose. But yes, this-- this-- if this were to become law, it would be yet another barrier, if you will, to selling the land and not having it-- to being-- being able to sell the land and still pump the water. And that's the concern of the-- the Cattlemen and the Farm Bureau is not just N-CORPE, but they're looking at all of western Nebraska. You know, they think from the discussion I heard at their conventions that I did not participate in that discussion, that their concern is that we have rules and regulations in place to have access to the water, and they want to make sure that those rules and regulations are adhered to.

**MOSER:** Is there any limit to how much water you can pump out of-- say, that some city buys property out in western Nebraska to supply water to the city, is there any limit to how much water they can pump, or any minimum size of land that they would need to own in order to pump some volume of water from them?

**HUGHES:** There are two different answers to that. Yes, municipalities do have a limit on the amount of water they can pump in a-- in a NRD that has restrictions. In my NRD where I live, we've-- we've had well meters on our wells for 40 years, over 40 years. So we have-- we have been restricted on how much water we can pump.

**MOSER:** You're talking about farmers.

**HUGHES:** On our farmland.

**MOSER:** Yeah.

**HUGHES:** But cities within that jurisdiction as well, the Republican, they also have meters on their wells and they don't-- they cannot pump unlimited. They do have limits on the amount of that they can pump based on their population. And I'm not-- I'm not exactly sure, but I do know they have limits. Now, the amount of land that a city needs in

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order to pump water is different than for every other purpose that we have to utilize water.

**MOSER:** They couldn't buy 10 acres and then pump and put in a lot of wells in kind of close proximity and kind of drain the water table down.

**HUGHES:** Well, that wouldn't be in their best interests if-- I mean, if they-- we do have cities who have gone outside of their borders and then created a well field for their-- for the needs of their municipalities, but depending on what-- how much water is available underground, whether or not you can put a well here and a well here, or whether you have a well here and a well way over there, depends on how much water is available under the ground.

**MOSER:** Yeah, we had well fields in Columbus that were not in the city limits. We had some problems with the wells in the city limits with getting the right-- for not having all the minerals that some of those wells had so we went north of town.

**HUGHES:** Right.

**MOSER:** Thank you very much.

**BOSTELMAN:** Thanks, Senator Moser. Senator Albrecht.

**ALBRECHT:** Thank you, Vice Chair Bostelman. You said Cattlemen and Farm Bureau. What was the conversation with them to ask you to bring this? And I'm just going to kind of recollect what has happened when I've been here the last three years, so-- or didn't they already sell some ground to some folks, any part of that 19,000 acres?

**HUGHES:** They have sold land in order to consolidate their footprint.

**ALBRECHT:** OK.

**HUGHES:** So they in essence sold some, but they have bought some back closer.

**ALBRECHT:** And in selling that first part of it, did they try to retain the water rights?

**HUGHES:** They did retain the water rights.

**ALBRECHT:** They did.

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**HUGHES:** But they had-- but they had unirrigated acres that they could move those-- the water to those acres. They had surface acres that were not irrigated, that they kept the water rights from here and moved those water rights over to a different place that did-- that was not irrigated. So they had more than enough surface acres to cover the water they were pumping.

**ALBRECHT:** OK, and isn't it true that when anybody in and around that 19,000 acres, aren't they all kind of stipend how much water they can use based on what Kansas might need or Colorado? They have to have so much in their basins, is that right?

**HUGHES:** In that area. In the Middle Republican NRD, those wells are metered. And my understanding the-- the wells on the N-CORPE property are metered as-- they-- they are metered as well. I know and they cannot pump more than any of the local farmers can.

**ALBRECHT:** Right.

**HUGHES:** Now, the portion of the N-CORPE that is in the Twin Platte, I don't think anybody in the-- in the Twin Platte is metered at this point. I'm not exactly sure on that, but the amount of water that would be coming from the N-CORPE property into the north, into the Twin Platte NRD and ultimately into the Platte River would be metered.

**ALBRECHT:** OK. So, so what would the reasons be that Farm Bureau folks or Cattlemen folks would want this?

**HUGHES:** I-- you would have to ask them.

**ALBRECHT:** OK.

**HUGHES:** I did not participate. I just listened to the conversation. And it is more of a landowner or agricultural producer wanting to protect, you know, the resources that-- that they have. And, you know, for us in the west, water is extremely precious because we have a very limited supply. We have extremely limited rainfall at times. So that underground water that we do have is extremely valuable and we're trying to make sure that there's not a situation where someone can come in and we lose the ability to access that water.

**ALBRECHT:** Thank you.

**BOSTELMAN:** Senator Gragert.

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**GRAGERT:** Thank you, Vice Chairman Bostelman. Yeah, just a quick question on, you know, we went back. I'm going to go back to some prior testimony on-- by the NRD. I think-- I don't-- I don't think it was even the Lower Niobrara NRD, but that Sorensen vs. the Lower Niobrara NRD, which is up in my district and they have the water tower-- rural water tower where they only own a half acre of land. You know, they have their tower on it-- only. So would your bill or would this bill exempt industrial and domestic use in that case or in that--should I ask later on?

**HUGHES:** No, it-- it certainly it only exempts. And in my testimony, and I probably won't be able to find it, but it does not-- it says Nebraska courts have consecutive-- consistently waived the right to use groundwater as being linked to the ownership of the overlying land with a few statutory exceptions, and that-- that is for municipalities only. So the few statutory exceptions are for municipalities because people use comes one-- number one on the list of priorities and agriculture, then industrial, and then recreation. So the case that you're citing is, yes, for people you don't have to have a footprint in order to access the water, but everybody else does. So in the case of industrial, what happened in my district was, we had an ethanol plant that wanted to come in to the town of Madrid. The town of Madrid did not have enough population to absorb the amount of water that it was going to take to run that ethanol plant. So the ethanol plant bought some pivots within the vicinity and changed that use of water from agricultural to industrial, so they had enough water to operate the plant.

**GRAGERT:** So in going back to the N-CORPE situation then, would there be a possibility of that augmentation project being exempt? And in that they wouldn't, they could use the groundwater, but wouldn't have to have the overlying acres?

**HUGHES:** That's not the intent of this legislation.

**GRAGERT:** OK. All right. Thanks.

**BOSTELMAN:** Other questions? Senator Halloran.

**HALLORAN:** Thank you, Vice Chairman Bostelman. So I guess that raises a question why-- why wouldn't it be possible to amend the bill so that it does allow for that kind of exception? The reason I ask that is, is that I'm always concerned when we make exceptions. In the case of

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municipi-- a municipal or industrial, we do make those exceptions and those would stay in place if this passes, correct?

**HUGHES:** Municipal only, not industrial.

**HALLORAN:** OK. Either way, from municipal and I understand it's for people, but ultimately the water that's going to Kansas replenishes natural water that-- that they're short on and say they claim to have the contact and I'm not arguing they do or they don't, but why do we allow for an exception to separate the land from the water in one instance, but we can't make a similar exception in the case of a state compact, which is a beneficial-- beneficial to all of the citizens in the state. It's a state compact. Why can't we make that exception as well for, say, N-CORPE to separate the land from the water protecting the augmentation program?

**HUGHES:** You can-- you can try to do that. But the question is, does that at some point in the future jeopardize the project? And that's-- that's the difference that we have on whether or not you should sell the land, because that has not been tested in court to this point. If-- if the Legislature passes the law, you know, everything is constitutional until it's not. And once it's challenged in court, then that can change everything and that could put not only the N-CORPE project, but the Rock Creek project, plus the entire irrigated industry within that four-- or four NRD district. And that's not a with-- a risk that I'm willing to take.

**HALLORAN:** OK. Thank you.

**BOSTELMAN:** Senator Geist.

**GEIST:** Yes. And you just hit on my concern and valid or not, I'm not a constitutionalist, so I'll throw that out there but my concern is just-- and I kind of went through this with Senator Groene as well, is just opening this back up. Are we at risk opening all of this back up of it being challenged? One way or the other since it's not in statute currently, we're looking at, from what I understand, we're looking at what's been done in the past to set up where we are today. And we've struck this balance that seems to work and my concern is opening this up to litigation. Are you concerned about that with this?

**HUGHES:** I wasn't. But we've had a lot of input since I introduced this bill, and there will be some individuals behind me that are-- are going to talk about the potential of opening things up. So it is not

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my intent to make any changes that would allow the opening to take place because we do everything, like you say, everything is in balance now. We've had-- the Supreme Court has ruled. So we have a pretty solid position to stand on. But anytime you open up water legislation, there's always a risk that someone else will interpret it differently than what we did as the-- as the lawmakers. So, you know, we're trying to work through all of the concerns of the attorneys and other individuals who deal with water on a daily basis to make sure that we're not creating any-- any unintended consequences.

**GEIST:** And that's what your amendment will be about, is that correct?

**HUGHES:** Yes. Yes.

**GEIST:** OK. Thank you.

**BOSTELMAN:** Any other questions? Seeing none, thank you, Senator Hughes. I'm sure you'll stay close for closing.

**HUGHES:** I will.

**BOSTELMAN:** Thank you. Would ask anyone who would like to testify as a proponent of LB802 to please step forward. Welcome.

**CHRIS SCHLUNTZ:** Senator Bostelman, members of the committee, good afternoon. My name is Chris Schluntz, C-h-r-i-s S-c-h-l-u-n-t-z. My family and I farm and raise cattle near Republican City, which is 40 miles south of Kearney. I currently serve on the board of Nebraska Cattlemen as chairman of the Natural Resources Committee. I am also a member of Nebraska Farm Bureau. Thank you for the opportunity to speak to your committee today. I am here to testify in support of LB802. Currently under Nebraska common law, land ownership is directly linked to the ability to access the underlying groundwater. The Nebraska Supreme Court has affirmed this right, finding that groundwater is an attribute of ownership to land overlying a source of groundwater and is inseparable from land to which it is-- it applies. Additionally, in December, Nebraska Cattlemen debated and adopt policy in the Natural Resources Committee to support keeping land ownership directly linked to the ability to access underlying groundwater. LB802 simply restates the common law understanding of the law in statute, ensuring ownership of the land and the right to use groundwater remain connected. Agriculture, cattle, corn, and ethanol specifically is the economic engine of the state of Nebraska. Water is the limiting factor to raising cattle and crops. Without a guarantee that ownership of the

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land and the rights to use the groundwater are held or controlled by the same person or entity, there is potential to inhibit future generations from successfully passing their farm and ranches to future generations. Additionally, if underlying water can be separated from the land, water becomes a tradeable commodity to the highest bidder. The highest bidder mentality works against farmers and ranchers trying-- works against farmers and ranchers should they try to purchase water rights in addition to land to expand their farm or ranch though supplemental water may not always be needed. As mentioned earlier, once the access is gone, agriculture and livestock production will be severely limited along with the economic benefits of productive farms and ranches to rural communities. LB802 still affirms the regulatory authority granted under the Nebraska Groundwater Management and Protection Act for Nebraska resource districts to regulate groundwater, groundwater pumping and to comply with fully appropriated or overappropriated districts. Again, we understand and agree that groundwater can and should be transferred when allowed by statute, but in order to do so ownership of the land from which the water is pumped and is-- then should continue to be required. Nebraska Cattlemen strongly supports the existence and purpose of natural resource districts and firmly believes the NRD should maintain control of local natural resources. In closing, farms and ranches need access to water to efficiently and effectively raise cattle and crops to support their family and the economy of the state of Nebraska. Allowing even the potential of separating the ownership of access to groundwater from the land ownership puts the state's number one economic driver at undue risk, unnecessarily increasing operating cost. Senator Bostelman, members of the community-- committee, thank you for your time and I am happy to answer any questions you have regarding LB802.

**BOSTELMAN:** Thank you, Mr. Schruntz. Is that correct?

**CHRIS SCHLUNTZ:** Schluntz.

**BOSTELMAN:** Sorry.

**CHRIS SCHLUNTZ:** Schluntz.

**BOSTELMAN:** Schluntz.

**CHRIS SCHLUNTZ:** Yes.

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**BOSTELMAN:** Thank you. Members, do you have any-- committee members have any questions? Senator Gragert.

**GRAGERT:** Thank you, Vice Chairman Bostelman. I'm just wondering, would the Cattlemen and the Farm Bureau support no exemptions at all for groundwater? You know, the land use and groundwater. Right now, the bill-- the bill is proposing-- accept exemptions to the-- would-- would Farm Bureau and Cattlemen support no exemptions at all for the separating the land from the water.

**CHRIS SCHLUNTZ:** Do you mean that in the absence of, say, for municipalities and beneficial use like that.

**GRAGERT:** Like in the industrial or we talked about industrial land or was it domestic-- domestic use?

**CHRIS SCHLUNTZ:** As far as municipalities, I-- I-- that's a different situation, I believe. But as far as agricultural uses no, I don't think there should be exceptions.

**GRAGERT:** And as we go back to the compact we have with Kansas, and that's something that, you know, Senator Halloran mentioned earlier that affects the entire state, not just N-CORPE, the four NRDs. I can't remember the four NRDs, but actually, I mean, we had to pay out some pretty good money on that-- on that lawsuit, I believe in addition to what, you know, N-CORPE for-- the formation of N-CORPE. You know, as we see domestic use and water is very valuable, but it's very valuable in the entire state, I was just wondering, you know, the exemption of exempting that once again, that augmentation. I'm just looking at why not trying to set it precedence, you know, that a condition like that may be supported by Cattlemen or Farm Bureau.

**CHRIS SCHLUNTZ:** We would not be in favor of separating the land ownership from actual right to pump under those circumstances. As far as the N-CORPE project, I reside in the Lower Republican and it's the Upper and the Lower and the Middle and I forget the other one, but that water can be used to fulfill the commitments with Kansas on the Republican River Compact, or it can be used on the Platte River. And as far as once it's separated, I guess eventually, hopefully eventually that compact is settled in a different way and that project wouldn't be needed anymore. But then you would have an instance out there where you'd have that ground separated. And I guess, partly for that reason, I would not be in support of that.

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**GRAGERT:** For that specific one, but we still have groundwater separated with the domestic use. It's already separated in that exemption. I don't know how many more exemptions are in the bill. That's-- but that's OK. There is already an exemption with domestic use as I understand it,

**CHRIS SCHLUNTZ:** Correct.

**GRAGERT:** OK. Thank you.

**BOSTELMAN:** Other questions from committee members? Senator Halloran.

**HALLORAN:** Thank you, Vice Chairman Bostelman. I'm not sure, hopefully maybe you can address this or at least give me your opinion on this, but it's-- at some level, the compact and the augmentation agreement has already separated the beneficial use of the water from the land. The water is going-- is being pumped into the Republican River, right? And to augment-- or to augment that compact, so we've separated beneficial use. It's going towards, I'm repeating myself here, I understand, but it's going towards a beneficial use of satisfying the compact, but it's leaving the prescribed land that's being pumped to satisfy that compact. So the beneficial use goes beyond the use on the land. So we've already separated the beneficial use of the water from the land by agreeing to the compact and the augmentation. Want your opinion on this.

**CHRIS SCHLUNTZ:** I guess my opinion might differ some from that because beneficial use-- that the reason for the compact then and the reason for them purchasing the land for N-CORPE was so that they could, if they needed that water to fulfill the contract-- compact, they could go ahead and pump the water. But with-- without that N-CORPE project and water-short years, there was actually, as I understand it, they could shut off all alluvial wells in order, which I guess depended how you view beneficial use. I would-- I would say because of that, we are still able to irrigate.

**HALLORAN:** I guess my concern is, is that-- well, there's-- there's-- that's a fear factor, right, is that if it's separated, even though-- even if we had a statute that guaranteed the augmentation plan stay in place by state law, would there still be that fear that you would somehow not be satisfying the compact even though the augmentation plans in place by statute.

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**CHRIS SCHLUNTZ:** Could you restate that question.

**HALLORAN:** Well, right-- right now your concern is, is if-- if said land was separated or the water is separated from the land or vice versa, and somehow there's-- there's a potential risk that the irrigators in your area would get that risk of being shut down of pumping water, right, to satisfy drainage into the Republican River.

**CHRIS SCHLUNTZ:** Yeah.

**HALLORAN:** Basically, right. So what if we had a state statute that, by statute, clarified and very specifically guaranteed the augmentation program stay in place, but the land could be sold much like a municipal well. Municipal well will have an acre around the wellhead, right, and the waters piped into the city. The municipality doesn't have to tap 10,000 acres of ownership of land to pump the water from underneath to satisfy the needs of the city.

**CHRIS SCHLUNTZ:** That's correct. I guess my-- my true intent with this bill, it isn't really about N-CORPE, it's the fact that if-- if you open this up by allowing N-CORPE to separate the ownership of the ground from the ownership of the land, how many more instances are there where they can start doing that across the state and they can continue to do that and it snowballs. With this bill right here, it stops it, period. It doesn't happen with N-CORPE. It doesn't happen in the next instance either.

**HALLORAN:** Correct. That if I'm-- if I'm wrong, I'll be corrected, I'm sure, but I'm sure by statute we can very-- be very specific that it's exclusive to this project, augmentation project that the land could be separated from-- from the-- from the water, water from the land and satisfy the compact. Right. And that doesn't carte blanche open it up to anybody else to do it. That would have to take approval of the Legislature to do that for anyone else to play off that same-- that same strategy practice, separating land and the water. It'd be a very specific statute that would just guarantee the compact satisfied, augmentation programs satisfied, but the land could be separated and sold. My Cattlemen wouldn't be--

**CHRIS SCHLUNTZ:** No, I-- I-- Cattlemen would not be-- in fact, that's not our policy. That's not the intent with the policy that we have.

**HALLORAN:** Okay. Thank you.

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**BOSTELMAN:** Seeing no more questions, thank you, sir, for coming in today and testifying.

**CHRIS SCHLUNTZ:** Thank you.

**BOSTELMAN:** Next proponent. Anyone else would like to testify in support of LB802, please step forward. Welcome,

**DON BLANKENAU:** Good afternoon, Mr. Chairman, members of the committee. My name is Don Blankenau, D-o-n B-l-a-n-k-e-n-a-u. I'm an attorney in private practice in Lincoln and for over 30 years I've represented various natural resources districts in the courts of Nebraska, including the Nebraska Supreme Court. My testimony today is on behalf of the Nebraska Association of Resources Districts in support of this bill. The association itself provides support and representation to Nebraska's 23 natural resource districts or NRDs. These NRDs have been given primary groundwater management responsibility by the Legislature. The Legislature has in turn structured Nebraska's NRDs groundwater management authorities around the common law, which was of course created by the Nebraska Supreme Court through a long line of cases, at least with respect to groundwater beginning in 1933. We appreciate the work of the Nebraska Cattlemen and Farm Bureau Federation to bring this bill to the Legislature. NRD, excuse me, the NARD and its members support the concept behind LB802 because its intent is to codify the components of the common law, which would ensure the continuity of their overall management goals and objectives. Codification of the common law would also preserve the existing rules and regulations that have been adopted by the NRDs. Now, obviously, every time you change the statute, those changes can affect how the NRDs regulate and can't disrupt their goals, objectives and the rules and regulations. LB802 is at least designed to try to avoid that. Now, while we do support this bill and the concept behind it, we are aware that there are concerns and some of those concerns have been raised to you about its existing language, and we remain committed to working with all parties to address those concerns. Provided those concerns can be addressed, we would urge that this bill be supported. Thank you.

**BOSTELMAN:** Thank you, Mr. Blankenau. Are there any questions from committee members?

**DON BLANKENAU:** This is your chance to play stump the lawyer.

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**HALLORAN:** So.

**BOSTELMAN:** Senator Halloran.

**HALLORAN:** Thank you, Vice Chairman.

**MOSER:** He accepted your challenge.

**HALLORAN:** Well, I don't know that you were here at the previous hearing where we discussed-- primarily discussing a bill by Senator Groene on the N-CORPE issue separating the water from the land. But-- but his efforts, as I recall, was to try to place-- to codify, try to place in statute the augmentation agreement and to satisfy the Kansas compact. But we heard people testifying, not from you, but other people testifying that common law was sufficient which is what we're basically being governed by to this day before this proposed statute. We kept hearing time and time again, common law is sufficient, we don't need a statute. And what confuses me is now we're looking at a statute to codify N-CORPE's existence. It-- it sounds like a dichotomy to me.

**DON BLANKENAU:** Yeah. I think those are different concepts. So the Nebraska Supreme Court specifically looked at N-CORPE. In the Estermann case, for instance, it did so in a similar fashion in the Rock Creek project, which was Upper Republican NRD vs. Dundee County. Those cases essentially endorsed the concept that the amount of land you owned was correlated to how much water you could pump. So, for instance, N-CORPE can because it needs to pump occasionally, large quantities of water, needs to have a large footprint so that its impacts aren't felt too far distant. And the Supreme Court endorsed that and said that through other statutes already in existence N-CORPE could continue or Rock Creek could continue to pump that water. I believe what Senator Groene is attempting to do is to say you can eliminate the size of that footprint, sell off that property and pump large quantities of water and still satisfy the compact.

**HALLORAN:** I can stand corrected, but I think Senator Groene was saying the footprint of the-- of the well fields would remain the same. You would have the same existing wells in the N-CORPE footprint for the well fields, but it would be selling off the land which, of course, was his goal.

**DON BLANKENAU:** Yeah, and I guess I should be clear when I talk about the footprint of the well field, I'm not talking about the physical

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structures of the well field. I'm talking about the groundwater depletion and the cone of depression which was created by those wells which extend far beyond. So for instance, this bill, as it's written, exempts municipalities who have obtained a permit from DNR to pump and transfer groundwater. Their footprint can be far beyond the actual amount of land they own, but they always risk having to pay damages to wells outside of that area. So even though they have a permit to move the water, they don't have a permit to injure neighboring well owners. And so the concept of time-- behind LB802 is to say let's protect all of those other surrounding wells by demanding that you have that large footprint. Now, I think the language has created concerns that perhaps you could revise litigation against N-CORPE or other entities, including some of the programs sponsored by DNR, and that's the kind of language that we would like to revisit with the parties.

**HALLORAN:** Well, you probably satisfy my question, but I'm not sure I understand it. So, again, it gets back to my-- my question about whether or not common law is satisfactory for-- for under previous testimonies on this issue common law seemed to be okay as being able to satisfy the issue. And yet, Senator Groene was trying to codify it in statutes, and now we're looking at saying with this that common law isn't satisfactory enough and that we have to codify the statutes to protect, essentially protect N-CORPE.

**DON BLANKENAU:** Yeah, I think, at least was the way I envision this, LB802 simply says we will codify what the Nebraska Supreme Court has already said. I believe Senator Groene is trying to say we need to change the common law and put a change to how the Supreme Court would have to rule going forward. So, it's almost the complete opposite. Now the question always is, well, it's already in the common law, why do we need to codify it? And I think the simple answer is just for ease of reference. I get a call from a lawyer around Nebraska every week that says, explain this case to me, what's the common law the court's relying on. Ostensibly, it would be easier for those people to simply pull out the statute, look it up and then see what that law really means.

**HALLORAN:** I think that was centered, I'm not-- I'm just-- just a conversation here. I think that's where Senator Groene was going as well, right, where he was saying, look, let's-- let's put in statute or codify in statute what the purpose and protect the purpose of what N-CORPE does now.

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**DON BLANKENAU:** Except keep saying let's change what the Supreme Court has said, we say we don't want to accept the common law any longer.

**HALLORAN:** Right.

**DON BLANKENAU:** And I don't wanna speak for him, but that's the way I interpret it. We want to change the common law and create a new permitting system.

**HALLORAN:** We change common law all the time, though.

**DON BLANKENAU:** Sure you do.

**HALLORAN:** Every time we create it, well, not every time, but very frequently with statutes we create we're-- we're-- we're adding to the base-- base of what common law is.

**DON BLANKENAU:** Absolutely. And that's what the whole municipal groundwater transfer permit was. That was a change of the common law, which allowed for a permitting of a municipality.

**HALLORAN:** Was there any Supreme Court rulings around the municipalities being about the exception?

**DON BLANKENAU:** Yes. There are a number of them, actually.

**HALLORAN:** And I'm not asking you to draw your memory on that, but there have been Supreme Court rulings.

**DON BLANKENAU:** Yeah, there are and they all are pretty consistent, which-- they land on the proposition that if you go through the process before DNR and satisfy the statutory requirements, you'll get a permit to move a certain quantity of water from your well field to its use in the municipality. They're also consistent, I think, in noting that that doesn't insulate the city from having to pay damages to-- to neighbors should they intrude.

**HALLORAN:** I think I failed at stumping the attorney, but that's OK.

**DON BLANKENAU:** Well, maybe not.

**GRAGERT:** I got a couple of questions.

**BOSTELMAN:** Senator Gragert.

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**GRAGERT:** Thank you, Vice Chair Bostelman. You mentioned the footprint. I won't go back to the footprint and let's say this footprint, what was there, 19,000 acres in the farm back with the N-CORPE. You mentioned that, well, if they lessen the footprint, then there's a possibility of you could draw and do injury to surrounding neighbors. So that 19,000 acres, is that-- is that set in stone or are there possibilities that they could take more irrigated acres out of these drainages for satisfying Kansas in a certain year.

**DON BLANKENAU:** It-- it's not a statutory requirement so they can grow or shrink that as their needs would require. Because of the demands of the compact there are significant quantities of water that need to be pumped during certain years, certainly not every year. And for that reason, I think the thinking is, is let's be as safe as we can to ensure compact compliance and keep the size of the footprint, the physical footprint where it is until we have a better understanding of what the needs really are.

**GRAGERT:** So and then in those NRDs, are they fully appropriated or do they get to add any more irrigated acres as we go from a dry year to a wet year?

**DON BLANKENAU:** No, they're-- they're have set in stone unless-- there are opportunities for moving certified irrigated acres, one tract of land to another. But overall, the total consumptive use within those NRDs is pretty much static and will be probably for all time.

**GRAGERT:** So, I'm sorry. So then the-- what is it, consumption that the consumption use or the tax or, I don't think you call it tax, whatever you call it, the \$10 an acre to pay in lieu of taxes on this 19,000 acres. Who exactly is-- has to pay that ten thousand or that dollar an acre or ten dollars an acre.

**DON BLANKENAU:** I think there are multiple taxes, that issue there, the occupation tax which is \$10 an acre is assessed to everybody within those four natural resources districts that irrigates land and that money is used to pay for the N-CORPE project. And then I'm trying to think of the other tax here that you kind of referenced, uh--

**GRAGERT:** Occupation tax.

**DON BLANKENAU:** Yeah, occupation tax and--

**GRAGERT:** I'm sorry, I can't help you. OK, I stumped him.

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**DON BLANKENAU:** Yes. You'll recall that the-- again, this is the Upper Republican NRD case, which stood for the proposition that all of the land purchased was for a public purpose, it was therefore tax exempt. And all of that land was necessary because you needed a large physical footprint to pump those large quantities of water. So since all of that was tax exempt and the Supreme Court concluded that that was correct, what N-CORPE did, they went through Senator Hughes and I believe this committee approved it, was the in lieu of-- the voluntary in lieu of property tax payment. And what that allowed us to do is to kind of slide around the constitutional prohibition to say we will voluntarily pay this property tax to the counties so that the county had a little bit of a recoup there of the taxes that they lost when this irrigated land went out of production.

**MOSER:** OK, thanks.

**BOSTELMAN:** Senator Albrecht.

**ALBRECHT:** Thank you, Vice Chair Bostelman. Thank you for being here today. I don't mean to stump you, I just have a few questions. Since this has come to us, LB802, does it only refer to the N-CORPE? Does it--

**DON BLANKENAU:** No, this applies to every landowner in the state.

**ALBRECHT:** Or, and/or is it-- does it kind of encompass all the NRDs and what they're doing throughout our state?

**DON BLANKENAU:** It encompasses every landowner in the state, so it serves--

**ALBRECHT:** Every landowner.

**DON BLANKENAU:** Yes, so if you acquire property, you have a qualified right to access around the corner.

**ALBRECHT:** Now I'm understanding why Farm Bureau and the Cattlemen might be a part of this bill. OK. So on page 2, line 8, so these sections-- of course, I didn't open up 46-613.01 and 46-691 and 46-691. I didn't open up those statutes to see what they actually say. So is what we're doing here and-- and making certain that the groundwater stays with the land owners, it's not just about the 19,000 acres in court, it is every landowner throughout the state of Nebraska is going to be affected by this bill.

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**DON BLANKENAU:** That's correct. Except that with those exceptions, that honors the exceptions to the common law that the Legislature has already granted, maybe the municipal groundwater transfers. There's also the industrial groundwater transfers. Those are exempted in the present draft as well. I believe Senator may have misspoken on that, but so if you have a permit under those acts already, you then can continue to pump without regard to how much land you actually own.

**ALBRECHT:** OK, so if the gentleman that was here before you, he's a Cattleman. He-- I mean his ground, unless-- unless he's around that area and they tell you you can only have so much water, whether you have livestock or-- or crop ground, right, you can only have so much, right? Isn't everybody kind of--

**DON BLANKENAU:** Right.

**ALBRECHT:** --that privy of how much they can use and how much you all have to have in reserve for Kansas or Colorado?

**DON BLANKENAU:** So however much land you own, it's-- you can still be restricted on your water use by other authorities. So the NRDs can-- can and have specified that you must have certified irrigated acres on your land, for instance, and only those acres may be irrigated. Some of those certified irrigated acres receive an allocation which further restricts how much water you can use. So the common law only reflects a portion of that total management scheme.

**ALBRECHT:** OK. So what is happening today with excluding the Groene deal that everybody loves to talk about, what-- what's happening today that would cause this to have to go into effect.

**DON BLANKENAU:** I don't know that there's any urgency to it. I think it's just a convenience. You know, it's taking what is already in the law and simply saying put it in easy to find reference point. But-- but it technically doesn't change the law as it exists today, at least that's the objective anyway. And I think you'll hear from-- from objectors that perhaps it might, and that's what we want to take a look at and make sure we get right.

**ALBRECHT:** Thank you.

**BOSTELMAN:** OK. Senator Gragert.

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**GRAGERT:** Thank you, Vice Chair Bostelman. OK, so if Senator Hughes did misspeak with the industrial, why wouldn't N-CORPE augmentation project fall into an industrial type of category, if you will.

**DON BLANKENAU:** Maybe because they don't manufacture anything. It's not being used for any purpose-- put it in the stream. That's an accounting offset. So Nebraska gets charged for every molecule of surface water it consumes under the compact and it's not necessarily a delivery obligation to Kansas, it's-- it's more of a limitation on how much Nebraska can use. But that changes dramatically every year, and you never know exactly how much you have to use in a year. So having N-CORPE available allows it to pump in offset water, which directly credits Nebraska in times of need. So if you're in a situation where you think you're going to be short that year, N-CORPE can turn on the pumps, pump it into the river, and the Nebraska Supreme Court has said the simple discharge in the river to ensure compact compliance is a beneficial use.

**GRAGERT:** I go back to though-- I go back to more that you don't have to have the land over the water to be able to get-- what kind of-- if we got-- if we now got domestic and industrial, what other category were-- I'm just wanting to, you know, to where-- or I would like to see or be answered that, OK, this happened now, is it going to happen somewhere else? And this-- this doesn't set a precedence that, OK, now on the Missouri or Niobrara River Valley, we're going to do the same thing and pump it to Iowa, or whatever you know, or holding them up on the-- on the dams there. Why can't-- what kind of cap-- category for exemptions again, that this type of-- without having Farm Bureau and the landowner, you know the individual landowners without government entities coming into play that they are-- they are secure, you know, with what they want. The Cattlemen and the Farm Bureau want to make sure my water underneath my land or what I use it for is, I don't want the government messing with that. Why can't we exempt an N-CORPE type of thing and put this land back into production?

**DON BLANKENAU:** Well, in theory, you could do that. And I think the caution has been contrasted with this bill, which is just an attempt to reflect what the Supreme Court has already decided exempting an N-CORPE would create a new exemption. And you could do that. You can exempt probably any type of water use you desire as a Legislature. But in doing that, you need to be careful that you don't create other concerns. And I think that's-- that's what the opposition will tell you with this, that if you're going to reflect the common law, you

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have to be careful how you do that so that you don't create other problems.

**GRAGERT:** Yeah. I just want to go on record that I'm very protective. I want to be very protective in the Cattlemen, in the Farm Bureau situation and where they're coming from. But I just see this N-CORPE thing as an exception to the rule over 99.9 percent of the water use in Nebraska, maybe 99.8.

**DON BLANKENAU:** And, you know, there are a couple of other augmentation projects out there as well. But I should point out that we've talked about domestic agencies being exempt from transfer off the overlying land. It probably isn't. Municipalities have an exemption only if they get a permit. Industries have an exemption, only if they get a permit. And there are a lot of municipalities out there that don't have permits.

**GRAGERT:** Thank you,

**BOSTELMAN:** Senator Geist.

**GEIST:** Yeah, and I just have a brief comment, not really a question. I just wanted to clarify that my concern that I voiced to Senator Hughes was because I did quite a bit of inquiry about this subject. Not this one specifically, but over the interim and came to that concern on one bill and just in-- have overlaid and applied that to this same one. And you had mentioned that-- that there were concerns that were expressed that were brought to us and I just want to clarify that was mine, and I found out today that there were actually others that have that concern. So I just want to make sure that actually that Senator Hughes knows that that's my concern and not one that was brought to me. It is one I've heard since, today, but one that was my own. So that's why it's here.

**DON BLANKENAU:** Yeah, I appreciate that, Senator. And I've had discussions with numerous people in this room, including Professor Schutz at some length about how we might change the way in which to address those concerns. It, you know, hopefully we can get there. But it-- it does take a collaborative effort and that's why I think that it's important to be cautious as we proceed. We all think we're pretty smart when we write these things, but I'm always surprised so often we get side tracked and get surprised, so.

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**GEIST:** Thank you.

**BOSTELMAN:** Other questions from the committee? Question on NRDs. And since N-CORPE has been talked about quite a bit, my question is this, is say that you would sell off the land, but right now my understanding is that land is dry land, you can't irrigate it. So the NRD could at some point later come back and say you can irrigate that ground, yes?

**DON BLANKENAU:** That's a good question. I don't think we know the answer to that. I say that just because it depends if the NRD wants to operate an augmentation project at the same pumping levels and they sold off the land, then there's a question, would they have that right to continue pumping? And I think the Supreme Court right now would say no in court. You need to go to the Legislature and somehow address that, because the amount of water you can pump right now is dependent upon how much land you own and if you sell some off, your pumping has to be diminished as well.

**BOSTELMAN:** And I believe-- I may be mistaken, but I believe and since we're talking about Senator Groene's bill in what he's brought forth and N-CORPE in selling off the land and being able to continue to pump water. Part of the concern, I guess I would have is, is, can that NR--, you know, if that NRD would have that opportunity or they have the authority at some point later for that private land now that's been purchased, that's now-- that currently is dry land for-- for farming purposes, but the augmentation processes is using the water, if you will, to-- for the augmentation process. But if they sell that off, that at some point in time the NRD come around, come back around and say, well, you can go ahead and farm, or you can go ahead and put a well on there, you can go ahead and irrigate your ground, we don't care about the augmentation process.

**DON BLANKENAU:** Yeah, and It's conceivable, I suppose, that the hydrology can change over time and the scope of the augmentation project could be diminished significantly. At that time the NRDs may want to sell off those properties or a portion of it and authorize additional water use, but it's really fact dependent.

**BOSTELMAN:** I understand. I-- I- it's just one question comes up. That's fine in that instance that you sell off that ground with intent of keeping the water right and fuel underneath it, and ultimately, you

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know, this would-- would the statute if it be-- if-- what governs the use of that water at that point in time then if that makes--

**DON BLANKENAU:** Yeah.

**BOSTELMAN:** You know, does the NRD have the authority at some point down the line to say, you know what, no, augmentation process, you don't have rights to that water anymore. We're going to let that-- we're going to let that farmer go ahead and irrigate that ground.

**DON BLANKENAU:** Yeah, NRDs are political creations governed by elected boards and they do change course from time to time and its-- so you would revert back to the existing statutory law, which would allow NRDs to have that kind of latitude.

**BOSTELMAN:** Another question is really not-- I don't know how much it plays in the state, but I do know in my district we do have this happen. I don't know, they may be taken from the city water supply, but people who do bottled water, companies do bottled waters and ship out, do they have their own private well. How does that come into play?

**DON BLANKENAU:** That is a great question and that's one that has been something that lawyers talk about with law professors over beer, which is typically imported from somewhere else. I don't think there's any clear answer on that and I think you can argue that's a transport of water. Twenty years ago, there was an entrepreneur from Denver who talked about putting a well field in the Sandhills, having a rail line, filling up tankers of water, not to supply municipal Denver, but to market bottled Sandhills water. Of course, that got everybody talking about this very issue. No, no clear resolution on that.

**BOSTELMAN:** Thank you. Are there any other questions from committee? None? Seeing none, thank you, sir.

**DON BLANKENAU:** Thank you very much.

**BOSTELMAN:** Any other proponents for LB802 that wish to testify today? Anyone else wish to testify in support? Welcome.

**DOUG WINZ:** Thank you. Senator Bostelman, and members of the Natural Resources Committee, my name is Doug Wintz, D-o-u-g W-i-n-z, and I am also here today to-- on behalf of the Nebraska Farm Bureau Federation, as well as the Nebraska Corn Growers Association testifying in support of LB802. I am part of a multi-generation farm and ranch in Harlan

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County, Nebraska, and am also currently president of the Harlan-Furnas County Farm Bureau. We would like to thank Senator Hughes for his continued leadership on this and other issues impacting our abilities to properly manage our natural resources. As you have heard, present groundwater law is based on the principle that the groundwater belongs to the public and the water is attached to ownership of the overlying land. LB802 would codify this notion to hopefully avoid future undoing of this basic principle of law and allow the creation of a separate right for groundwater, much like mineral rights have been handled for many years. In 2002, the Nebraska Legislature created a water policy task force to evaluate the effectiveness of and make recommendations on any needed changes to the law for laws governing the integrated management of service water and hydrology connected groundwater. While a task force spent many options and hours discussing physical transfers of ground and surface water, transfers of different kinds of allocations and certified irrigated acres, the idea of separating the groundwater from the overlying land and creating a separate right was very quickly dismissed and not hardly discussed at all. In December at our Nebraska Farm Bureau Annual Convention, the members adopted our currently-- current policy, which states that we support the common law principles linking land ownership directly to the ability to assess the underlying groundwater. Farm Bureau is not in support of selling off the overlying land that would separate the ownership of the surface land from the groundwater below. Furthermore, Farm Bureau does not support any Nebraska legislation that may allow the separation of the surface land from underlying groundwater. Our policy very clearly supports what Senator Hughes is trying to achieve with LB802. All right. Thank you for this opportunity to offer my testimony today and would be happy to try and answer any questions that you might have.

**BOSTELMAN:** Thank you, Mr. Winz.

**DOUG WINZ:** Thank you.

**BOSTELMAN:** Thank you. Are there any questions from the committee members? Seeing none, thank you, sir, for coming in today. We appreciate your testimony.

**DOUG WINZ:** Thank you.

**BOSTELMAN:** Next person who would like to testify in-- as a proponent in support of LB802. Is there anyone else who would like to testify in support? I invite anyone who'd like to testify in opposition to LB802.

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Seeing none, anyone like to testify in the neutral capacity for LB802, please step forward.

**JEFF FASSETT:** Mr. Chairman, I was slow in the trip. I'm actually in the opposition.

**BOSTELMAN:** You're in opposition. OK. Welcome.

**JEFF FASSETT:** Thank you, Senator Bostelman, and members of the committee. I'm Jeff Fassett, J-e-f-f F-a-s-s-e-t-t. I am the director of the Department of Natural Resources. As you know, we are the department with jurisdiction and responsibilities over the beneficial use and management of surface waters of the state of Nebraska. I am here today to testify in opposition to LB802. The legal issues of transfers of groundwater off of overlying land by the Republican River Basin NRDs for the important N-CORPE augmentation project and others, were found, as you've heard already by the Nebraska courts to be a legitimate, legal, beneficial use of groundwater for legitimate state purpose. The streamflow augmentation project in that river basin are absolutely essential to the interstate compact compliance that are part of the formal agreement that the states have entered into and they are contained. Those agreements are contained within the integrated management plans developed jointly by my department and the natural resource districts. So we are working together to maintain compliance, and augmentation is one of a number of management objectives that the natural resource districts are employing. You'll recall during the 2019 session, the department, through my testimony, raised concerns over suggested changes to law proposed by LB606 and deferred to the Attorney General's Office and the legal views that they were expressing at that time. So we are-- been consistent in raising concerns over changing Nebraska's water laws on a number of these related issues. So let me just briefly comment about LB802 for you today. As I've said a number of times before this committee, Nebraska's water laws are a complex, interrelated system that begs for stability and legislative caution because imprecise words can create unintended consequences that will lead to litigation. It is simply the nature of the beast. And I have tried since I have had the pleasure to be director, to be consistent in why you don't see me very often suggesting changes to laws, because they have to be done precisely and carefully and involve all of the stakeholders that are potentially affected by our water laws. It is critical, as you've heard today, for our biggest industry, agriculture and certainly many others. There's always a risk, in my opinion, that when we rely and

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approach that says we simply want to restate, confirm or clarify existing law or the common law, that that leads to difficulties, and I think Mr. Blankenau discussed again the caution that comes with that. If these are issues of settled law in legal acremen, then why is the clarification necessary? And if a clarification is created in 2020, then the question becomes, well, what was it? What was the law before 2020? It just naturally creates issues that can be litigated. That has been the caution that I bring to you today. The bill and the amendments that apparently are under development, I've seen a few, but not the ones that are in progress, as Senator Hughes, our sponsors have mentioned earlier. We obviously would like to be ingol-- involved with that process. But when you're inserting new language into the Groundwater Management and Protection Act, the primary law, the primary law change that was critical to the management of water in this state, and that law was enacted after only years of broad stakeholder involvement involving everybody across this state. And to come in and sort of surgically add saying, oh, we just want to clarify something, I think is what the concern is that's been raised. Introducing potentially conflicting or contradictory or slightly different words that says that you intend to say the same thing by itself can upset, in my opinion, the delicate balance that was achieved and which has now been implemented for over 15 years. The shared authorities, the shared programs that the natural resource districts and the Department of Natural Resource do, modifying those on the run without careful consideration, in my opinion, is simply not a very good idea. We need to involve all of the different players when talking about this. You don't want to do anything, and I think you've heard testimony already, that may create an unnecessary confusion about the circumstances dealing with real estate or to make a change now that might somehow upset something that has occurred in the past, which is settled, such as the N-CORPE project or other kinds of things that have been enforced and developed under the existing set of laws that we have. So that is my caution, that it is why I'm here. I would happily join Senator Hughes and others in working carefully on the language that might be acceptable, but you-- you have heard clearly I hope my tendency is to-- to stay away. I recommended that to you with the prior piece of legislation last year, and that is my suggestion today. I very much appreciate the opportunity to share my thoughts. Certainly, I look forward to working with Chairman Hughes, this committee and the Legislature that if you want to start amending the groundwater law statutes of this state, I am recommending you not advance LB802, but instead engage my department, engage the Attorney General's Office and the other stakeholders to make sure we're doing a

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very thorough review of these issues during the interim or as best we can before bringing that issue back. We think changes sort of on the run make me very nervous, and that's really why I'm here today. I'd be happy to answer any questions.

**BOSTELMAN:** Thank you, Director Fassett. Are there any questions from committee members? Seeing none, thank you, Director Fassett.

**JEFF FASSETT:** No, thank you.

**BOSTELMAN:** Is there anyone else who would like to testify in opposition to LB802? One last time, anyone else opposition? Seeing none, anyone like to testify in a neutral capacity. Please step up.

**KAREN AMEN:** This way I can go first and get out before it freezes, I hope. Hello, Senator Bostelman and the whole committee, some of you I know personally. I'm Karen Amen, K-a-r-e-n, last name A-m-e-n, living in Lincoln and I am-- thank you. I am here testifying as myself, partly on behalf of my husband also who is a hydrogeologist, but I am also on the board of Lower Platte South NRD and I'm also a commissioner on the Nebraska Natural Resources Commission, where we have responsibility for basically prioritizing the state's water projects for funding out of the Water Sustainability Fund. I don't know whether I'm an English major or a geologist because my undergraduate degree was in literature and English and then I went to graduate school in geology. But I did not understand Nebraska's geology and hydrogeology until I married my husband, who is kind of the person at conservation and survey who defined the Ogallala Aquifer. And therefore I have traveled throughout the central and western part of the state and seen and felt the aquifer. When you can actually jump in the springs, in the Sandhills that keep you floating because of the pressure of the aquifers, water coming up. So we have talked a little bit about language and that is what I'm here to talk about, not language related to policy or the specific wording of the law, but a little two-word phrase, the source that is in the law, the way it's currently drafted. And hello, Senator Hughes, I want to emphasize again how wonderful our system of NRDs is in Nebraska for a number of reasons. A professor at the university, Ken Kastman has said that we are unique in all the world and Nebraskans should be proud of that. And one of the major features of our NRDs is that we use the best available science in order to make our decisions about how to manage our region's groundwater. And we are cutting-edge science in Nebraska for groundwater management. So there is a problem with the term the source, because here in Nebraska, the source of groundwater

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could be the rain that falls in the Sandhills and percolates down into the Ogallala formation, or it could be seepage from the irrigation canals in western Nebraska. The water that seeps out from the canals into the aquifer or the source could even be the groundwater that is pumped up and irrigated on the land and therefore it becomes surface water officially then. I think then you might agree. But then any of the surface water that was once groundwater that percolates back downwards and makes it to the water table becomes groundwater again. And here's yet one more source. It could be the quaternary alluvium, the gravels and sands that are the beds of our rivers. And those gravels and sands are often accessed for the water that's considered groundwater within them. So I've just got a tiny little issue, but it could end up being a great big thing in a court case. Excuse me. So my recommendation is to find the best wording to be geologically accurate. And you'll see in the testimony that I printed out that a really good phrase might be land overlying the geologic formations, slash, aquifer that contains the groundwater being accessed by the landowner. And my final comment is, probably 70 percent of the Nebraskans that Jim and I meet think that an aquifer is either a lake or a river underground. And I've even seen Ph.Ds in biology who think if a Texas farmer accesses the Ogallala aquifer, the level of the aquifer in Nebraska will go down. That's not true. The Republican River cuts off the Ogallala aquifer in Nebraska, and that is our water that belongs to the citizens of the state. So I think it would be really nice to put a bit of hydrogeology into your bill. Grand Finale.

**BOSTELMAN:** Thank you, Mrs. Amen.

**KAREN AMEN:** Thank you.

**BOSTELMAN:** Any questions from the committee members? Seeing none.

**KAREN AMEN:** If any of you want to jump into the blue pool and see what it's like to have sand gushing up and not letting you go down but making you float, let us know.

**BOSTELMAN:** Thank you very much for being here today. Next, if anyone else would like to testify in neutral capacity, please step up. Welcome.

**ANTHONY SCHUTZ:** Thank you. My name is Anthony Schutz, A-n-t-h-o-n-y S-c-h-u-t-z. I'm a professor at the University of Nebraska College of Law. I focus on agricultural water law and all of those sorts of subjects. So I came down here to testify just in a neutral capacity

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and really I can-- my main role is to answer questions if you have them about water law in Nebraska. I don't really have a stake in the outcome of this or anything along those lines. The main thing that I would want to mention about this particular piece of legislation is that when I read it, I completely misunderstood it, the first time I read it. In the source of my misunderstanding was the term inseparable from. To me, especially taking that term inseparable from in light of the opening of subsection 2, which says that this section does not apply to transfers of groundwater authorized on any municipal, so on and so forth. I took inseparability to refer to the actual wet water transfer of-- or I'm sorry, the wet water transfer of land-- of water off of land. In other words, I took subsection 1 to be a prohibition on a restatement of the common law, a prohibition on transferring water off of the property. That's not the intent of this bill. The intent of this bill is to limit the extent to which somebody can place legal ownership of water resources in somebody else's hands. Taken in that light, my objections to-- and they weren't really objections. My concerns with the bill changed to some extent and those changes, those-- those concerns really revolve around the different ways in which we already separate legally the right to use water from the ownership of land. We do do it with regard to these particular permits that we issue under the Industrial Groundwater Regulatory Act and those sorts of things. But we also do it with things like certified irrigated acres, certified water uses. We do it with easements in water banks. And so there are a lot of different ways in which we've already started to separate the right to use water from the ownership of the land, not the actual use of the water, not the transport of the water, but the right associated with land ownership that we're talking about here. So I've submitted comments to a number of different folks to try to flesh out what exactly those things are that we really need to exempt in this provision in order to make sure that we don't disrupt the law. So I've been working on that. Hopefully, I can help. This would to the extent N-CORPE is concerned, my reading of this isn't so much that it necessarily risks-- restates the restraints that N-CORPE is operating under, but that it really clarifies the restraints that N-CORPE is operating under. My reading of Estermann is that it's not entirely clear that N-CORPE has to hold the vast landscape that it holds in order to pump the volume of water that it wants to pump. Estermann made an exception to the common law for the transport of water off of the overlying land. It's hard for me to understand why exactly it wouldn't also exempt them from this common law restraint on the volume of pumping that comes from that off track trans-- transport prohibition. So this legislation would, I think,

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clear up that uncertainty, and it's just an uncertainty. I can't say for sure what the court would say and neither can-- can N-CORPE. But this bill would require, at the end of the day, any NRD that wants to do an augmentation project, in order to do one and pump a particular volume of water, would need to buy a piece of land that's big enough to basically justify the pumping. And that-- that could be good policy, right? It-- it provides for a certain level of assurance that you won't have conflicts among adjacent land owners, but there are also some drawbacks to that. For example, an NRD might come to own a large piece of land and there's been some objections to that in the body. So it's neither-- well, one can have an opinion on that, but I do think that that is definitely one consequence. And Don said as much at the beginning of his testimony that this would-- this would require an NRD to own a large chunk of land in order to pump the volumes that they would want to pump. So I can answer any questions you may have.

**BOSTELMAN:** Thank you. Mr. Schutz. Is there any-- are there any questions? Senator Geist.

**GEIST:** Thank you for your testimony. I went back as I said, I did some research over this over the interim and ran some testimony that you gave in the past, and you had indicated something about a process of permitting that you thought could be useful possibly in the N-CORPE. Would you mind commenting on that?

**ANTHONY SCHUTZ:** Sure. So similar to the Industrial Groundwater Management Transfers Act and the Municipal Groundwater Transfers Act and in all of those areas we've had, we had a statutorily created permit. That-- and the main thing about a permit is really the process by which it's developed. You have the NRD involved, you have the DNR involved, you try to figure out what the ramifications are. You have a hearing. Do all of those sorts of things, and then we figure out how much we want to allow you to pump. What sort of offsets we need to get, all of those sorts of things. The thing about the streamflow augmentation in its current state, to the extent it's allowed under the statutes, and Estermann did say that it is allowed under the statute, it's allowed under two provisions. One is a general provision that allows NRDs to do projects and own pipelines and that sort of stuff. And the other provision is just a-- it's a small piece of the Groundwater Management Protection Act that allows for-- for NRDs to plan for augmentation projects. It's hardly detailed. It definitely doesn't have much process associated with it. We could improve that if-- if there's a need to. The thing about creating a permit that

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creates this special water right to do streamflow augmentation is that it's statutorily created. It doesn't rely on some common law underpinnings. There's no even-- there's no real question about that. So a permit mechanism like that would give NRDs wanting to do augmentation projects a very specific right that they could go and get maybe in consultation with whoever you want to have involved in the process and get it done. I think Senator Halloran talked about that maybe at the beginning, but that didn't exist at the time N-CORPE was created, at the time those NRDs came together. They used what they had under the statutes and-- and got a favorable outcome at the Nebraska Supreme Court. And now we find ourselves sort of trying to figure out what should the parameters of these augmentation projects be? Should we require large land owning land-- large landscape purchases, land-- land purchases in order to do the projects, or is there a better way of doing that? Yeah, there's some upsides to requiring NRDs to buy all of that land. It increases the cost of those augmentation projects so high that they can only be undertaken in very limited circumstances. And maybe that's good policy. It also separates the augmentation well fields from adjacent property owners and their wells, and that could be good policy. So there's good reasons to require that sort of thing. And if you do nothing, there's a strong argument that that stays in place. If you pass this bill, it clearly is in place. And if you do a permit, then you'd be free to condition it however you want to create a pot-- process for figuring out what the appropriate conditions would be.

**GEIST:** Good. Thank you. I've been wanting to know the answer to that for several months, so I'm glad you're here. Thank you.

**BOSTELMAN:** Other questions from committee members. Seeing none-- oh, Senator Albrecht.

**ALBRECHT:** Thank you, Vice Chair Bostelman, and thanks for being here. You came a few times in front of the committee and I appreciate you being here. Just wondered if you had put your application in for legal counsel for-- to change careers.

**ANTHONY SCHUTZ:** For whom?

**ALBRECHT:** Here.

**ANTHONY SCHUTZ:** I know this guy, yeah, I know this guy.

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**ALBRECHT:** I appreciate your comments and help us kind of figure out what we need to do but that was good.

**ANTHONY SCHUTZ:** Your welcome. The ivory tower is a pretty good job, though. Yeah.

**BOSTELMAN:** Any other comments or questions from committee members?

**ANTHONY SCHUTZ:** Thank you.

**BOSTELMAN:** Seeing none, thank you very much for coming in today. Is there anyone else who would like to testify in a neutral capacity on LB802? Is there any other wishing to testify in the neutral capacity? Senator Hughes would you like to come up to close? There are three letters for the record. Proponent, Jasper Fanning from the Upper Republican NRD. As a proponent, proponent, Todd Seal, Siel, the Lower Republican NRD. An opponent, opponent is Sherry Miller, League of Women Voters in Nebraska. With that Senator Hughes, I would invite you to close on your bill.

**HUGHES:** Thank you, Vice President, or Vice Chairman Bostelman, and members of the committee. As always, water is a very, very complicated issue in the state of Nebraska. Even the simplest ideas, bringing them to a bill and the challenges that you have of not making unintended consequences is staggering. So even the best of intentions are a lot of work and we are certainly committed to addressing the concerns that have been expressed today with an amendment. So stay tuned and thank you for your time.

**BOSTELMAN:** Are there any other questions from committee members? Seeing none, that will close our hearing on LB802 and that is the end of the hearings for today. Thank you all for coming to your Natural Resource Committee.