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Judiciary Committee  
February 15, 2012

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[LB728 LB777 LB1029 LB1113 LB1134]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 15, 2012, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1113, LB728, LB777, LB1029, and LB1134. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Brenda Council; Burke Harr; Tyson Larson; and Scott Lautenbaugh. Senators absent: Amanda McGill.

SENATOR ASHFORD: Good afternoon, everyone. Welcome to the Judiciary Committee. Usually we have more senators than this. But since I'm the Chair, I can decide when we start, so we will start here fairly quickly. Let me introduce Speaker Flood, who is not on the committee. But what we're going to do today is we're going to hear five bills. Two of the bills, LB728 and LB777, Senator Mello's bill and Senator Haar's bill, we are going to take together, and what that means is that the two introducers will come up one after the other, and then the testimony will follow. The first bill that Senator Haar and I...Senator Harr is from Benson, from Omaha, and Stacey Conroy, to my right, is my legal counsel. Oliver VanDervoort is committee clerk. Colby Coash is a senator from Lincoln. Let me see, if we get lucky here, we might get one more. We have a light system, for those who aren't here on a normal basis, that we ask you to confine your testimony to 30 seconds--I'm just kidding--three minutes. And we'll have...the yellow light will go on, and when the yellow light comes on we ask you to sum up. Normally, or many times there are questions, so your testimony or discussion will usually exceed three minutes, but we ask you to get your introduction done in three minutes. The first bill is LB1113, adopt the Nebraska Uniform Power of Attorney Act, and Speaker Flood will introduce the bill.

SENATOR FLOOD: Thank you, Chairman Ashford, members of the committee. My name is Mike Flood, F-I-o-o-d. I represent District 19, which is Madison County and a portion of Stanton County. This bill would adopt the Nebraska Uniform Power of Attorney Act, which is based on the Uniform Power of Attorney Act that was drafted by the National Conference of Commissioners on Uniform State Laws and approved by that body in 2006. As for an overview of LB1113, Sections 1-23 contain all of the general provisions that pertain to the creation and use of a power of attorney. Most of these provisions are default rules that can be altered by the power of attorney, but certain mandatory provisions in these sections serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Sections 24-40 provide default definitions for the various areas of authority that can be granted to an agent. Most of these definitions come from the Uniform Statutory Form Power of Attorney Act in 1988; however, the language is updated where necessary to reflect current transactions. Section 24 identifies certain areas of authority that must be granted with express language because of the tendency of such authority to dissipate the principal's property or other principal's estate plan--or alter the principal's estate

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plan. Sections 41 and 42 contain statutory forms that are designed for use by lawyers as well as laypersons. Step-by-step prompts are given for a designation of the agent, successor agents, and the grant of authority. Section 42 contains a sample agent clarification form. Sections 43 and 45 contain miscellaneous provisions concerning the relationship of the act to other law and preexisting powers of attorney, and this bill has an operative date of January 1, 2013. Eric Fish is here today. He's the legislative counsel with the Uniform Law Commission. He's going to testify immediately after me concerning the genesis of the Uniform Act. I'm also pleased that Bill Lindsay could be here today, and he will testify about the Nebraska-specific portions of the bill and the work of the bar's studying committee since the fall of '08. I should also mention a concern that was raised by the bankers regarding the knowledge definition in the green copy. The bankers would prefer a narrower actual knowledge standard instead of the broader definition of knowledge on page 4, in lines 6-25 of the green copy. The bar association favors the definition that is in the green copy as it tracks the current definition in the Uniform Trust Code. I'm happy to work with the committee to reach a resolution on this issue; I just wanted to bring it to your attention. One last thing, I'd like to offer a letter of support from Professor John Gradwohl at the University of Nebraska College of Law, and I have made copies for the committee which will be handed out. With that, thank you for your consideration. I will waive closing. [LB1113]

SENATOR ASHFORD: Thanks, Speaker Flood. Senator Council and Senator Lathrop have joined us, both from Omaha: Steve Lathrop and Brenda Council. Does anyone have any questions of the Speaker on this or any other matter? [LB1113]

SENATOR LATHROP: Other matters, did you say? [LB1113]

SENATOR ASHFORD: Seeing none, thanks, Mike. [LB1113]

SENATOR FLOOD: Thank you. I'll waive my closing. [LB1113]

SENATOR ASHFORD: Okay. For those of you who have not been here before, we ask you to fill out the sheets with your contact information. Aly and Evan will pick those up and make them part of the record. If you wish to note your opposition or support or neutral testimony, but don't wish to actually come up and talk, you may indicate such on those sheets as well, and give them to Aly or Evan and we'll go from there. Bob? [LB1113]

BOB HALLSTROM: (Exhibit 1) Chairman Ashford, members of the Judiciary Committee, I'm somewhat of a surprise witness in support today, and I am going out of order because I have another commitment in another hearing. I do want to express support of LB1113 on behalf of the Nebraska Bankers Association. We have worked with NCCUSL at the inception stage before final adoption of the Uniform Power of Attorney Act and had a number of changes and concerns that were addressed in the

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midst of that process. We have worked closely together with the bar association on the drafting and crafting, along with Speaker Flood, of LB1113, and have had most of our concerns addressed in that regard. As Speaker Flood noted, we do have an issue and an interest in having an actual knowledge standard which has been adopted as part of the Uniform Act and adopted to my knowledge in every state--my actual knowledge, that is--in every state that has adopted the Uniform Power of Attorney Act, and we would ask the committee's indulgence in accepting that uniform provision and will pledge to work with Speaker Flood and the committee in that regard. [LB1113]

SENATOR ASHFORD: Thanks, Bob. Any questions of Bob? Seeing none. [LB1113]

BOB HALLSTROM: Thank you. [LB1113]

SENATOR ASHFORD: Thank you. Welcome back. Are you just in today from Chicago or...? [LB1113]

ERIC FISH: (Exhibits 2 and 3) Yes, Mr. Chairman. Thank you, Mr. Chairman. For the record, my name is Eric Fish and I am the interim general counsel at the Uniform Law Commission. I did just come in today from Chicago and appreciate to see snow--we haven't seen that much in Chicago--as well as the fog that kept me circling Nebraska for about 20 minutes or so. I'm here to testify in support of the Uniform Power of Attorney Act as drafted. And I know Mr. Lindsay from the State Bar Association will talk about some of the local changes that have been made to comport the rules to local law, but I wanted to give some background on why this act is important for the state and some of the issues that led to its drafting. First, this act came out in about 2002. The drafting started because they noticed that powers of attorney weren't being accepted and a lot of the agents did not know what their rules and responsibilities were. Old power of attorney laws were very vague; they allowed for a flexible form of decision making but didn't give much guidance. You'll see in the Uniform Act that the agents' duties are laid out in both the default provisions and also in the form. That helps agents know what they can do, what they can't do, and what they are expected to do under the law. In a way, this helps protect against another main issue that brought forth this act, which is protecting against elder abuse and other forms of abuse by an agent within the fiduciary relationship. The Uniform Act calls for such things as: judicial review by a third party wherein a coagent can ask for a court to review that other agent's duties; a family member who might have an interest in protecting an elder can ask questions and ask for a court review; and also the state itself, in situations where the actions may be so bad that they need to be reviewed by the courts, they can do so. A third major point that you'll see in this act is Sections 119 and 120 of the Uniform Act which allow and encourage third-party acceptance. One of the issues that became apparent during the drafting were that powers of attorney were being drafted but were not being accepted by third parties. This act creates a duty to accept these powers of attorney but does allow for, say, a bank to review a third party that might be a little sketchy or smell a little fishy--pardon the pun on

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my last name; but it was something that bankers have great interest in. But it is something that does help people using powers of attorney as a surrogate form of decision making use them, and use them cheaply and quickly. With that, Mr. Chairman, I'll take any questions from the committee. And I have also provided a written statement if that's helpful. [LB1113]

SENATOR ASHFORD: Okay. Thanks, Eric. We may have some questions later, but thank you. Bill? Bill and I have in common the fact that our ninth-grade sons play against each other in basketball, Bill's son at Roncalli and mine at Westside. But we lost, I think, but it was a home court and they didn't start playing until 9:00 at night. [LB1113]

BILL LINDSAY: (Exhibit 4) Well, my name is Bill Lindsay, L-i-n-d-s-a-y, and I think it would be wise if I ignore the comments of the Chair, so I will do so. (Laughter) I'm having passed out a list of the committee members that served on the study committee for the State Bar Association. You'll see these committee members came from various different parts of the state and throughout the state. This was very helpful to the committee members because this gives both the agricultural point of view as well as the city point of view and really did help us. There were a number of issues that came up during the study by the study committee. One of the biggest ones was whether a power of attorney should be required to be acknowledged, and there is...I believe Maine had a requirement in their statute to do so; other states did not. The initial results of the committee were split, but the majority were in favor of not requiring acknowledgment. It then went to the real estate, probate, and trust law section, and they reversed the committee on that particular point; so it shows that this has been studied. You know, the type of things...we went through and we prepared a report which has already been presented to the Legislature that was part of an interim study report and goes through and puts in committee recommendations, some of which have been changed later on. But we went through section by section at a number of different meetings generally held at the bar association headquarters here in Lincoln. It was very helpful to have the group that we had. We had different ages of attorneys who had seen different problems. One of the concerns, as Mr. Fish stated, was trying to make sure that powers of attorney get accepted. I had a firm one time tell me that if you were not doing business with them and your power of attorney was more than 18 months old, they would not accept it. There is nothing in the law that says that. The old statutes in Nebraska created a durable power of attorney jurisdiction in the county court and not much more than that. We did have a short-form power of attorney act. And I will say, as much as I like the attorney who wrote it, I will commend it to you for bedtime reading if you have a bit of insomnia. With that, unless there are any questions, that's all I have. [LB1113]

SENATOR ASHFORD: Bill, just briefly. What--and don't, not long division--but what...obviously this is a national trend and so forth. But in your experience, what are the two or three principal reasons to adopt the Uniform Act and not stay with what we

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have on the books? [LB1113]

BILL LINDSAY: Okay, well, the first--it was mentioned by Mr. Fish--which I think is extremely important is the mandatory rules and having default rules, which we do not have in the statutes now. Mandatory rules are if you're going to have a power of attorney, there are certain things that must be in it. For example, you cannot relieve the agent of liability for their actions; so that's one of the most important things to have. To have a requirement that says you can't just reject a power of attorney because of its date--but, you know, as my prior example--would be, you know, another item. And this does create a statutory form which I think will gradually become much more common in usage and, as people get used to it, I think will also facilitate the acceptance of powers of attorney. [LB1113]

SENATOR ASHFORD: Okay, thank you. Any questions of Bill? I don't see any. [LB1113]

BILL LINDSAY: Thank you. [LB1113]

SENATOR ASHFORD: Thank you, as always, for all your help on these issues. Larry, are you...? No? Any...? How many are testifying on this bill? No one else. Speaker Flood waived his testimony or he...? Is that correct? All right. That ends the hearing on this first bill. We will now go to Senator Mello and Senator Haar--Ken Haar, I guess, is that right?--and LB728, provide for the distribution of money received by the state due to a settlement or court order or judgment, and LB777, change provisions relating to distribution of certain supplemental funds. Okay. Senator Mello. [LB1113]

SENATOR HARR: Thank you for joining us.

SENATOR ASHFORD: See you later. No. (Laugh) Short and to the point.

SENATOR LATHROP: Got it. Do you wish to close?

SENATOR MELLO: Good afternoon, Chairman Ashford, members of the Judiciary Committee. My name is Heath Mello, H-e-a-t-h M-e-l-l-o, and I represent the 5th Legislative District in south Omaha. Last December, the Attorney General's Office publicly announced that it was awarding a \$100,000 grant from a fund called the Nebraska Attorney General Supplemental Environmental Project Fund to the We Support Agriculture Coalition, a recently formed organization created to oppose the efforts of animal rights groups to change livestock practices. For many Nebraskans, including myself and many of our colleagues, this was the first we had learned of this fund's mere existence. Based on the large amount of information my office, the Legislative Research Office, and the Legislative Fiscal Office has been able to gather since this issue first came to light, the Nebraska Attorney General Supplemental

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Environmental Project Fund does not appear in state statute and was created by the Attorney General's Office as a subfund of the State Settlement Trust Fund without any direct authorization or approval by the Legislature. Since 2003, a growing number of court settlements dealing with violations of environmental laws have seen roughly the following language inserted in them, quote, it is further ordered that the defendant shall pay, as a voluntary supplemental environmental project, the sum of XXX into the Attorney General's Environmental Protection Fund to be used for environmental safety, training, public awareness, and other related uses as permitted by state law at the sole discretion of the Nebraska Attorney General. Given that there is no reference to this fund in statute, this language essentially gives the Attorney General unbridled discretion to appropriate money in this fund as he or she sees fit. According to the Attorney General's Office, the fund has received nearly \$2.4 million in payments since 2003. At the same time, similar cases for environmental violations have resulted in the collection of more than \$7.2 million in fines, which pursuant to Article VII, Section 5 of our state constitution must be "appropriated exclusively to the use and support of the common schools." LB728 would provide that money received by the state from out-of-court settlement, court order, or judgment shall be by default distributed in the same manner as fines and penalties collected for violations of Nebraska law to K-12 public schools. In the event that a court order or judgment provides that funds are not to be distributed in this manner, the bill requires that court order or judgment provide a specific fund created by the Legislature to which to credit the money. LB728 also restores legislative oversight to both the State Settlement Cash Fund and the State Settlement Trust Fund. These funds were designed to hold recoveries received under the Consumer Protection Act; but current language in statute also grants the Attorney General the ability to take payments received for other purposes, such as the Supplemental Environmental Project Funds, and deposit them in subfunds of either the trust fund or the cash fund. Section 2 and 3 of the bill would strike this language, essentially requiring the Attorney General to come back to the Legislature to create separate funds for separate types of settlements. Section 2 of the bill also reverses a language change made by the Legislature last session, which in retrospect may have been a mistake. Under a bill that passed last session, LB549, language providing that the State Settlement Cash Fund is subject to legislative review and appropriation was stricken from Section 59-1608.04 and replaced with language giving the Attorney General complete discretion over the fund. Based on conversations with Senator Council and her staff, the language change was made at the request of the Attorney General's Office as part of negotiations to provide funding for the legislation from the State Settlement Cash Fund. And while myself and among 44 other senators that supported LB549, I believe that in light of the recent developments that change should be reconsidered. Yesterday my office e-mailed the committee members a copy of a report from the Public Law Research Institute at the University of California Hastings College of Law. The report summarizes the practices used in all 50 states for supplemental environmental projects and contains some best practice recommendations. One recommended best practice which at least 15 states are currently doing is to specifically authorize the use of supplemental environmental

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projects in statute, as well as establish the process to be used in awarding grants for such projects. At the end of the day, LB728 is not about one particular Attorney General, one particular grant, or one particular grant recipient. As one of the many state senators who signed on to support the efforts of We Support Ag, I hope the coalition will put the \$100,000 they received to good use. And while I may support many of the grants that may have been handed out under this program over the years, my underlying concern is that there is not an unbiased, transparent procedure in place to facilitate the awarding of these grants. The We Support Agriculture grant was reportedly approved via e-mail just 32 minutes after it was submitted. Nebraskans deserve more transparency than that when it comes to the use of taxpayer dollars, which ultimately is what these settlement dollars are. Thank you, Chairman Ashford, for your time, and I'd be happy to answer any questions the committee may have. [LB728]

SENATOR ASHFORD: Any questions of Senator Mello? Seeing none, thank you. Are you going to remain for a bit? [LB728]

SENATOR MELLO: For a while. [LB728]

SENATOR HARR: I got a...I have a question. [LB728]

SENATOR ASHFORD: Senator Harr has a question. [LB728]

SENATOR HARR: Sorry. [LB728]

SENATOR ASHFORD: No, that's all right. [LB728]

SENATOR HARR: So is your issue the way the money went out, or is it the fact that it goes to the Attorney General, or what is your specific problem with how it's currently done? [LB728]

SENATOR MELLO: (Laugh) That's...thank you, Senator Harr. I guess that's a very open-ended question which I'll try to provide a very succinct answer. The underlying issue is it deals, I guess, in threefold. First off, the question of settlements in regards to fines. As I mentioned, this Supplemental Environmental Fund received \$2.4 million in settlement funds where other environmental fines that were levied against those who violated state law resulted in \$7.2 million in fines. The question is...the underlying question is, why were ultimately those cases settled instead of being fines and that settlement dollars, that money went to settlement funds instead of went into essentially the common schools, which is laid out in the constitution? That's the underlying policy question I think of when we're dealing with what is in LB728. The second component ultimately that it deals with is how that settlement fund operates after it's been deemed that the settlement has been given to it. There is no...it's not listed in state statute anywhere. The Legislative Fiscal Office hasn't been able to find any information. The

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Legislative Research Office wasn't able to find any information statutorily of this specific fund, which the underlying issue is that fund was created as a subcategory under the State Settlement Cash Fund. And so essentially, if the Attorney General's Office can essentially create new funds with new names and be able to direct settlement dollars there, we as a Legislature and the public at large has no idea how that is being done because there's no legislative oversight over that process. But it's also good to know in the bill, the Department of Administrative Services does not oversee the Attorney General's budget issues, their fiscal issues. The Attorney General's Office, it is my understanding, is the only office or only agency in the state that doesn't utilize the Department of Administrative Services for their kind of fiscal oversight or fiscal management. So we would have never found out more about this, so to speak, through simply getting on the DAS Web site looking at budgets or looking at financial documents that are released through the Department of Administrative Services, which you would find for every other state agency if they had a cash fund, so to speak. That, I would say, are probably the two underlying issues that are existing, is constitutionally should settlement dollars be going to the common schools? Because, as my staff pointed out in the best practices document I gave the committee, the state of North Carolina recently just changed that or it was brought forward in a lawsuit that required the state of North Carolina to change that any of their settlement dollars were essentially designated as fine dollars, so that they weren't able to segregate settlement dollars away from fine dollars, similar to how we kind of have our process set up right now under at least the current process, without the adoption of LB728. They recently had to make that change so that all settlement dollars are now identified as fine dollars. And if that was the case for us, all of those dollars, in theory, would be going to our common schools. [LB728]

SENATOR HARR: So let me ask you about this \$2.4 million fund. Is the only reason we found out about it because of press releases by the Attorney General's Office, or did we find out a different way? [LB728]

SENATOR MELLO: For me at least, I found out about it by reading it in the press actually. [LB728]

SENATOR HARR: Well, I guess let me restate. Is there another way to find out about it besides press releases? [LB728]

SENATOR MELLO: We were...you'll have to ask that question, I guess, of the Attorney General's Office. At the time, there was no information available on his Web site. There was no other information generally available. We've done...further research shows that you can find out, at least...the name of the fund actually comes up through the settlement agreements on the Department of Environmental Quality Web site where all the settlements and settlement documents, legal documents in regards to violators and the state are listed on the DEQ Web site. So we specifically, because it would have...one, it would have been a lot of paper to give out and we would have had to

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black out significant amounts of information, we felt, we just wanted to inform the committee that if you want to know more about that fund or at least where it comes up and where the settlements are, that's all attributed through the DEQ Web site. [LB728]

SENATOR HARR: Okay. And this is a subfund you said? [LB728]

SENATOR MELLO: That is our determination of it. It's a subfund of the State Settlement Cash Fund. [LB728]

SENATOR HARR: And have you been able to find or learn of any other subfunds similar to this? [LB728]

SENATOR MELLO: Not that we've been able to find, no. That ultimately...once again, it's another question to the Attorney General's Office because the reality is that even before...I would say even before we removed language in a bill last year regarding legislative oversight over the State Settlement Cash Fund, there's very little documentation, because the Attorney General's Office doesn't utilize the Department of Administrative Services for their...for essentially their monthly budgetary and financial information. That's not material that's readily available to the Appropriations Committee that I sit on. That's something that we never heard about, as an Appropriations Committee, of specific funds that are listed within the Attorney General's Office that they can utilize for grant programs or any other purpose. So as far as I know...that's probably a better question you'd still have to ask the Attorney General's Office if they have other funds. We've only identified and focused right now on the Environmental Supplemental Fund. There may be others, for all we know. [LB728]

SENATOR HARR: And this is a--and I will ask--so this is a subfund of the what again? [LB728]

SENATOR MELLO: State Settlement Cash Fund. [LB728]

SENATOR HARR: Okay. Thank you very much. I appreciate it. [LB728]

SENATOR ASHFORD: Senator Council. [LB728]

SENATOR COUNCIL: Thank you. And thank you, Senator Mello. And as you know and as you stated in your opening, the language that was removed was to enable a singular year funding... [LB728]

SENATOR MELLO: Uh-huh, uh-huh. [LB728]

SENATOR COUNCIL: ...of a program. And because it was a singular year funding of the program, there was certainly no representation made that the change would remain

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a permanent change. [LB728]

SENATOR MELLO: Uh-huh. [LB728]

SENATOR COUNCIL: But my question is, prior to the change last year the Settlement Cash Fund fell within the purview of that provision which required the Legislature to be involved in disbursements, correct? [LB728]

SENATOR MELLO: Uh-huh. Correct. [LB728]

SENATOR COUNCIL: By what authority do you create a subaccount? Because I mean the issue for me is how do you create a subaccount of the Settlement Cash Fund, which prior...if LB549 had never occurred,... [LB728]

SENATOR MELLO: Uh-huh. [LB728]

SENATOR COUNCIL: ...circumvented the language of the statute? [LB728]

SENATOR MELLO: That's the underlying argument we're making, I believe, in LB728, is that there has been no statutory authority given. Even prior to removing some language last year, there's no statutory authority given to the Attorney General's Office through the State Settlement Cash Fund to create multiple subaccounts that ultimately, yes, fall in theory...they may make the argument today that that falls, they feel, constitutionally under the State Settlement Cash Fund. But the Legislature had never given them the authority to actually create other funds based out of that fund because the settlements that we have researched through the DEQ Web site never lists the State Settlement Cash Fund. It purely lists the Environmental Supplemental Fund, which you would think and assume is a separate fund. But the argument that has been made to us, and I think the Attorney General's Office has made that publicly, is that this is simply a subcategory or a subfund of a bigger fund and it falls all within the same purview. We are making the argument I think today in LB728 that the Legislature should provide more guidance, more authority, and require more transparency if the Attorney General's Office chooses to operate subfunds under the guise of the State Settlement Cash Fund. [LB728]

SENATOR COUNCIL: But, and that's the point I'm making, is that if LB549 had never been enacted, there were limitations on the Attorney General's Office with regard to the Settlement Cash Fund. [LB728]

SENATOR MELLO: Um-hum, um-hum. [LB728]

SENATOR COUNCIL: And by creating a subfund that was not administered in accordance with the statute was arguably circumventing the statute. [LB728]

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SENATOR MELLO: Um-hum. That is my interpretation, Senator Council. [LB728]

SENATOR COUNCIL: Okay, okay. [LB728]

SENATOR MELLO: And I would hope that enough other senators would share that interpretation that would necessitate some change, whether it's obviously the committee feels that there could be other changes made to LB728 to necessitate more transparency and directing the Attorney General's Office more or limiting what they can or can't do in accordance with what we as a Legislature provide them that authority to do. [LB728]

SENATOR COUNCIL: Thank you. [LB728]

SENATOR ASHFORD: Heath, do you know or someone else, how much money is in the fund now? [LB728]

SENATOR MELLO: You'll have to ask the Attorney General's Office. [LB728]

SENATOR ASHFORD: But theoretically you could...whatever dollars are there could be statutorily...if they're not fines, could be statutorily allocated... [LB728]

SENATOR MELLO: Any money that currently exists right now in that fund, the Legislature, if we pass LB728, or a version of LB728 if the language changes, I see LB728 split into two categories. One, the issue of whether or not settlement dollars go to the common schools, that's one component of the bill. [LB728]

SENATOR ASHFORD: Right. [LB728]

SENATOR MELLO: The other component of the bill is what authority does the Legislature have over the State Settlement Cash Fund, either providing direction to the Attorney General or utilizing that money for what the Legislature deems appropriate, which the Legislature...to answer your question, the Legislature with that component of the bill, we could say that money goes to fund... [LB728]

SENATOR ASHFORD: YRTC. [LB728]

SENATOR MELLO: ...that money goes to fund YRTC or it could fund to...it's up to the Legislature to determine where that money would go. [LB728]

SENATOR ASHFORD: I guess that's my question. Is it your belief and your position that the settlement dollars can...today we could pass a bill that allocates those settlement? The fines constitutionally go to the schools. [LB728]

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SENATOR MELLO: Yes. [LB728]

SENATOR ASHFORD: We could, once we determined and get all that sorted out, the additional dollars that are settlement not fines, theoretically we could appropriate that money to YRTC. Is that correct or...? [LB728]

SENATOR MELLO: Senator Ashford, that would be...I think the general premise of the question is... [LB728]

SENATOR ASHFORD: Not that you would support. I'm just asking could you theoretically? [LB728]

SENATOR MELLO: Yeah. The Legislature, right now the Legislature is the branch of government that appropriates funds. Right now, with the usage of...my interpretation of what the Attorney General's Office is doing with the State Settlement Cash Fund, they are appropriating funds that they receive that is outside of the budget, outside of any oversight from our branch of government, which we have the ability to provide guidance to the Attorney General's Office... [LB728]

SENATOR ASHFORD: Okay, okay. Or pass a law that says where it goes. [LB728]

SENATOR MELLO: That is actually in LB728. [LB728]

SENATOR ASHFORD: More than guidance, just tell them where to go. [LB728]

SENATOR MELLO: Yes. Yes. [LB728]

SENATOR ASHFORD: Okay. All right. Thanks, Heath. [LB728]

SENATOR MELLO: Thank you. [LB728]

SENATOR ASHFORD: Senator Haar. What we're doing, just to remind everybody, we're going to take both bills together if that's okay, and then the testifiers, when they come up, if they would indicate for or against either bill or neutral on either bill, that would be helpful. Senator Haar. [LB728]

SENATOR HAAR: Mr. Chairman and members of the committee, usually it's age before beauty, but in this case it will be just fine. (Laugh) [LB777]

SENATOR ASHFORD: That's for us to determine, Senator Haar. (Laughter) [LB777]

SENATOR HAAR: Well, that's true. I don't mean to be presumptive. Thank you for the

compliment. The first I learned about this situation was when a reporter called me and told me about the situation where a big check had been presented by the Attorney General; and in my usual style, I just responded to him, and I'll just read you the response and I still feel that way. Quote: Right now it leaves the appearance the Attorney General is gifting an organization; it doesn't feel right. I think it goes back to the fact that when...the feeling probably goes to the fact that, for example, when you go to get your license plates in Lancaster County there's a little sign there that says make your checks out to John Jones, county treasurer. Well, I've always just made my checks out to county treasurer and I get my license plates anyway. So you know I wouldn't imagine that the Attorney General would do anything illegal; I never wanted to say that. But I don't think it was transparent. And that's the issue that bothers me, is the whole issue of transparency and appearances. And then the other news came out that was mentioned earlier that the grant was approved 32 minutes after the application was received and then more and more information came out. And part of the information is that some organizations I feel very good about got some of the money. Some of it went to, I believe, for example, the Audubon or whatever it was; but, you know, some good organizations have gotten the monies. And so my bill has nothing to do about the grant itself but the problem is with the process, and so what I'm suggesting in my bill is very simple. You just take any money acquired this way and you put it into the Nebraska Environmental Trust Fund and it's distributed along with any other Nebraska Environmental Trust Funds. Again, I think that's about as simple as I could state it. I think what we do here, it's so important that it not only be legal but that things be transparent, that things feel right, and my first reaction to this, as a citizen and then as a state legislator, this didn't feel right. [LB777]

SENATOR ASHFORD: Thanks, Ken. [LB777]

SENATOR HAAR: Yep. [LB777]

SENATOR ASHFORD: Senator Lathrop. [LB777]

SENATOR LATHROP: I want to make a point briefly and that is when money comes into the Attorney General's Office because of some litigation they're involved in, if it's a fine it has to, by the constitution, go to the school districts, right? And we can talk about how that money ought to be spread out. Maybe that's a proper subject of legislation. [LB777]

SENATOR HAAR: Uh-huh. [LB777]

SENATOR LATHROP: If it is a settlement of a mass tort style action, and I'll use the actions that they had against a long-term disability carrier for their business practices that may have deprived citizens in Nebraska of money. They enter into a settlement but many times that settlement has to be used for a particular purpose: Nebraska will get

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\$20 million to be used for educating the public regarding long-term disability policies. The problem I have with everything going into the Environmental Trust is that it may violate the very terms of the agreement. [LB777]

SENATOR HAAR: Gotcha. [LB777]

SENATOR LATHROP: And I expect we'll hear from Cookson shortly about whether we can force the money into a fund that's not consistent with the settlement, okay? [LB777]

SENATOR HAAR: Uh-huh. Yeah. [LB777]

SENATOR LATHROP: I get the idea of having the Legislature be in charge of the settlement proceeds and where they should go. I happen to agree with that. But I don't know that we can force it into the Environmental Trust Fund or any other fund if it's inconsistent with the terms of the settlement. [LB777]

SENATOR HAAR: Okay, and taking that as a question, I'll respond to it. [LB777]

SENATOR LATHROP: Sure. [LB777]

SENATOR HAAR: No, I appreciate what you've said, and, very frankly, school, you know, wherever this money goes is not my big concern. I thought we'd just give another option for broader discussion of this as to where the money goes. I just think that it has to be a very transparent process. I believe it should be statutory, not just a process, because of the appearances of this situation. [LB777]

SENATOR ASHFORD: All right. But...and Dave Cookson is here and Senator Lathrop mentioned that. But if...it would be nice to know what the process is for determining the funds that do come in, if they are attached to a particular purpose,... [LB777]

SENATOR HAAR: Uh-huh. [LB777]

SENATOR ASHFORD: ...that we need to know can they follow that money. I mean if there's \$20 million coming in from a settlement and it must be used for X, can the Attorney General's Office tell us--and I assume they can and David can answer--can they tell us that those dollars must be used for something that's related to the environment or something else? And if there are funds that are coming in that are untethered in that way, that we would know that too, I would think probably. David could answer that. But that's really not a question, but thanks for your comments, Senator. [LB777]

SENATOR HAAR: Yeah, and I'd like to tether the funds in a way that's transparent. [LB777]

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SENATOR ASHFORD: Okay. [LB777]

SENATOR HAAR: And I think my young colleague's bill probably goes into more detail in that area. Mine is very simple: Let's just take the money and put it somewhere in a very transparent way. [LB777]

SENATOR ASHFORD: Fair enough. Thanks, Senator Haar. [LB777]

SENATOR HAAR: Yep. [LB777]

SENATOR ASHFORD: Thank you. And you're...seems like...you'll be here for a bit? [LB777]

SENATOR HAAR: You bet. [LB777]

SENATOR ASHFORD: Good. Okay. Let's go to those who wish...well, the proponents of either or both bills. Do we have those who support these bills? Good afternoon. [LB728 LB777]

JERRY HOFFMAN: Good afternoon, Chairman Ashford and the Judiciary Committee. My name is Jerry Hoffman, J-e-r-r-y H-o-f-f-m-a-n, and I'm here representing the Nebraska State Education Association, which in turn represents 28,000 teachers across the state. And we are in support of LB728 for the real first reason that Senator Mello stated, and that is to put settlement money into common schools. One of our resolutions is to ensure that schools are adequately and equitably funded across the state, and we believe that this, in a very significant way, will help to achieve that. So we thank Senator Mello for bringing it forward and also for Senator Paul Schumacher cosigning the bill. And with that, I would answer any questions that you might have. [LB728 LB777]

SENATOR ASHFORD: Seeing none, Jerry, thanks. [LB728 LB777]

JERRY HOFFMAN: Thank you. [LB728 LB777]

SENATOR ASHFORD: Any other proponents of either of the bills? How about...oh, Ken, and then... [LB728 LB777]

KEN WINSTON: Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Ken Winston, last name is spelled W-i-n-s-t-o-n. I'm appearing on behalf of the Nebraska Chapter of the Sierra Club in support of both LB728 and LB777. We are longstanding supporters of providing standards for the expenditure of public funds and transparency in government operations. We believe that such standards and transparency increase public confidence in government. We're greatly

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concerned about the process that was used in this particular situation in which there was a \$100,000 grant was made 32 minutes after receiving the application to an organization that had been in existence for less than three months, whose Web site is almost completely focused on attacking the Humane Society and whose largest contributors also make political contributions. We believe that this kind of process creates substantial concerns in public perception about the operations of government. It's been reported that other conservation organizations had applications in line for months but had received no response. We believe that there ought to be some sort of a process so that the public knows who's applying for funds and what funds are being allocated and what the fate of those applications is. We're most strongly in support of LB777 because there is an existing process for allocating funds and it's well known, the framework. It has standards and a process in place. We'd ask that the committee advance LB777. [LB728 LB777]

SENATOR ASHFORD: Thanks, Ken. Senator Coash. [LB728 LB777]

SENATOR COASH: Thank you, Chairman Ashford. Ken, do you think we should just divert all the settlement money into the school fund, as Mr. Hoffman stated, or would you like us to continue to use that money for projects only in a more transparent way? [LB728 LB777]

KEN WINSTON: Well, my preference would be something like, as I said, that would be something related to the Environmental Trust, because there is a process there. It is...people know who's made applications. People know how the funding process goes. They know there's criteria for and ranking systems for allocation of funds. And so that would make the most sense to us. If there's another system of criteria that... [LB728 LB777]

SENATOR COASH: Well, we could just say settlement money just goes into the state aid to schools, as Mr. Hoffman, and we could just...we could just change one of these and say all settlement money goes into the schools, just like the fines and everything else. We could do that too. [LB728 LB777]

KEN WINSTON: Well, I'm... [LB728 LB777]

SENATOR COASH: That would be a straightforward way to get to that transparency that these two bills are trying to... [LB728 LB777]

KEN WINSTON: Sure. And I guess my concern about that, and we're big supporters of public education as well, but we'd like to see...we think that conservation projects are often unfunded or funded at lower levels than they need to be funded. And so we'd like to see that if a settlement is specifically for an environmental purpose, that the funds go to that purpose, and the Environmental Trust seems to be one way that that could be

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accomplished. [LB728 LB777]

SENATOR COASH: Okay. Thank you, Ken. [LB728 LB777]

SENATOR ASHFORD: Thanks, Ken. [LB728 LB777]

KEN WINSTON: Thank you. [LB728 LB777]

SENATOR ASHFORD: Jack, are you next? [LB728 LB777]

JACK GOULD: Senator Ashford, members of the committee, my name is Jack Gould, that's G-o-u-l-d, and I'm here representing Common Cause Nebraska and I will be brief. All money received by government should be regarded as the people's money. Tax dollars, fine money, court settlement money, it all belongs to the people, and it is the Legislature that best represents the will of the people. When special funds are created to serve the interests of specific government entities, it is the Legislature that should have the responsibility of oversight. Giving a single individual or a specific office the power to direct public funds without legislative oversight simply opens the door to questions of impropriety. Senator Mello's bill and Senator Haar's bill put the oversight responsibility for court settlement funds in the hands of the Legislature, where it should be. [LB728 LB777]

SENATOR ASHFORD: Thank you, Jack. Any questions of Jack? Thank you. [LB728 LB777]

JACK GOULD: Let it be noted that I did meet the 30-second rule. [LB728 LB777]

SENATOR ASHFORD: You did. [LB728 LB777]

JACK GOULD: Thank you. [LB728 LB777]

SENATOR ASHFORD: I mean, very well done. Any other proponents of either of these bills or both of them? Opponents of the bills? Opponents? Dave. Do we have any neutral testifiers here today? Okay. I think you may be it, Dave. [LB728 LB777]

DAVID COOKSON: I kind of figured I would be. Mr. Chairman, members of the committee, I'm David Cookson, C-o-o-k-s-o-n, Chief Deputy Attorney General. Let me start by, and I'll try to get this all done in the five minutes but there's a lot to cover based on your... [LB728 LB777]

SENATOR ASHFORD: It's actually...it's three. [LB728 LB777]

DAVID COOKSON: Three...on your questions and some of the statements that...

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[LB728 LB777]

SENATOR ASHFORD: But you may get questions so... [LB728 LB777]

DAVID COOKSON: ...I'd like to correct for the record. These funds, every fund in which state money is spent is created by DAS. DAS has a number of administratively created funds. It's authority granted to them by the Legislature. So all of the money in any of our settlement funds is run through the state accounting system, both when it comes in and when it goes out. It can only go out to payees who are authorized under the state NIS system. All of it is done through that process. To correct on the numbers, only roughly \$1.19 million actually went into the SEP Fund. The balance of the \$2.4 million is money that went directly to a project through a court-ordered settlement fund. Thirty-seven of the 48 states have been doing SEP funds administratively, in the fashion that we have. That's from the study that Senator Mello cited. I would point out that there is no settlement that has a SEP Fund that doesn't have a corresponding fine pursuant to the DEQ statutes, which is why over \$7.5 million went to the common school fund and then an additional--additional, on top--\$2.4 million went for either direct SEPs or into the SEP Fund. As to the information on the Web site, there is information on the Web site. There is a process, there's an application process. It talks about what we're looking for. I will say that when we switched Web sites it was in the archives for two months but it was still there. As to--and I think Senator Lathrop picked up on this--as to sending the funds to other areas other than these funds or contrary to the court funds, that would be a violation of the separation of powers clause. The state has long recognized that the statutory constitutional common law authority of the Attorney General to settle cases belongs solely to the Attorney General. So to the extent we sign on to a multistate settlement and it says funds must be used for consumer education or whatever that is, that's what it has to be used for. We did, at our suggestion, go to DAS and add the language with regards to legislative approval. We were asked, with regards to Senator Council's, not by Senator Council's office directly, but were asked if they were to do this what would we receive. The only thing we could think of was to take out the legislative approval language. The fact is we've only spent out of that fund what the Legislature Appropriations Committee has appropriated for us. So with that, I think my time is up. I'm not sure that...I did want to make one point clear. We have followed the law to the letter of the law and the spirit of the law throughout this process. These, both SEPs and consumer settlement funds, preexisted this particular office. SEPs started with the Clinton administration EPA and the states picked up on it. The state of Nebraska was doing it in the '90s; we know for sure it was done in 2001. And the same with the State Settlement Funds have been there all along. We actually created the State Settlement Cash Fund, along with the legislative approval language, to make sure that it didn't get confused with the settlements that come in where we're actually recovering direct money for consumers that comes in and goes right to the consumer. And so that's why the State Settlement Cash Fund was created. Again, DAS creates the administrative subfunds and there's any number of them. [LB728 LB777]

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SENATOR ASHFORD: Thanks, Dave. Senator Lathrop, then Senator Council. [LB728 LB777]

SENATOR LATHROP: I'd like to ask you a few questions about the settlement process maybe... [LB728 LB777]

DAVID COOKSON: Sure. [LB728 LB777]

SENATOR LATHROP: ...so that everybody understands it better. [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR LATHROP: The Attorney General gets involved in certain multistate lawsuits. Is that true? [LB728 LB777]

DAVID COOKSON: Right, with regards generally to consumer and Medicaid fraud. [LB728 LB777]

SENATOR LATHROP: Okay. And are any of the proceeds from those multistate lawsuits fines, or are we just talking about settlement proceeds? [LB728 LB777]

DAVID COOKSON: Those are all settlement proceeds. [LB728 LB777]

SENATOR LATHROP: Does the Attorney General's Office receive fines as part of what it does? [LB728 LB777]

DAVID COOKSON: With regards to the environmental cases, yes. The DEQ statutes, I think it's 84-1500 or 81-1500, specifically provide for fines. Fines are required to go, as you pointed out, by the constitution to the state school fund, but those fines are not all the damage that is done. [LB728 LB777]

SENATOR LATHROP: Okay. [LB728 LB777]

DAVID COOKSON: There's a distinction in the law between fines and damages. [LB728 LB777]

SENATOR LATHROP: And that was a point I was going to try to make. Fines are the punishment and damages are the compensation to the people of the state of Nebraska that the Attorney General's Office secures in these multistate litigation and in some environmental cases. Is that true? [LB728 LB777]

DAVID COOKSON: Yeah. To put it in lawyers' terms, in the environmental cases the

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finances are sort of the hard damages--the fish kills, whatever--the formulas we have for doing that, that we come up with, with the U.S. Department of Environmental Protection. And then the subdamages or the damages are a lot like pain and suffering in a personal injury case, harder to quantify, but we know damage is done to the good enjoyment of the environment by the citizens of the state. [LB728 LB777]

SENATOR LATHROP: Okay, okay. When you receive...now we're talking about two different things. One is a claim for damages to the environment, which would be all within the state of Nebraska, true? [LB728 LB777]

DAVID COOKSON: Right. Yes. [LB728 LB777]

SENATOR LATHROP: And those come with no strings. In other words, they don't say we'll settle this claim with you but the money has got to be used for a particular purpose. [LB728 LB777]

DAVID COOKSON: Well, the fines...the way we... [LB728 LB777]

SENATOR LATHROP: I got...the fines I understand. They're going to the school district. [LB728 LB777]

DAVID COOKSON: Yeah. [LB728 LB777]

SENATOR LATHROP: But the damages in an environmental case do not come with any particular purpose. [LB728 LB777]

DAVID COOKSON: They can. They can. For example, the city of Grand Island, we had a large settlement, a joint settlement with the EPA and the city...or with Swift in Grand Island, and it was a significant amount of money in which they wanted to do a SEP. A lot of companies want to do supplemental environmental projects because they have a long history of doing it with the EPA. That money was directed by the court order to the city of Grand Island to... [LB728 LB777]

SENATOR LATHROP: Was that by stipulation? [LB728 LB777]

DAVID COOKSON: Yes. [LB728 LB777]

SENATOR LATHROP: So can you agree your way into a purpose for the damages? [LB728 LB777]

DAVID COOKSON: Yes, and that's primarily the way that EPA did it initially when they did the SEPs, and that's the way the majority of the 48 states do it. [LB728 LB777]

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SENATOR LATHROP: Okay. When you're involved in multistate litigation and you settle with a, for example, Unum. [LB728 LB777]

DAVID COOKSON: Yeah. [LB728 LB777]

SENATOR LATHROP: That was one that was a multistate. [LB728 LB777]

DAVID COOKSON: Mortgage foreclosure is a perfect example. [LB728 LB777]

SENATOR LATHROP: Okay. When you do that, do we enter into a separate agreement for settlement or are we just part of a multistate distribution... [LB728 LB777]

DAVID COOKSON: They vary. [LB728 LB777]

SENATOR LATHROP: ...of money for damages? [LB728 LB777]

DAVID COOKSON: They vary. Sometimes it's a single consent judgment in one location. Typically that's when we're involved with the some agency of the federal government. Sometimes there are consent orders in all of the settling states. [LB728 LB777]

SENATOR LATHROP: Does the Attorney General's Office put or participate in limiting the purpose to which the money can be used or as in the multi... [LB728 LB777]

DAVID COOKSON: It's usually... [LB728 LB777]

SENATOR LATHROP: ...in the multidistrict litigation, is that part of a settlement over which you have no control? [LB728 LB777]

DAVID COOKSON: We can be part of the negotiating process. Usually, in the multistates, they're run by a handful of states that act as an executive committee. Usually the premise for paying these monies is to use it back for either consumer education...for instance, in the Medicaid fraud, the federal government requires that we replenish the healthcare fund that it comes out of. [LB728 LB777]

SENATOR LATHROP: Right. Okay. [LB728 LB777]

DAVID COOKSON: So yes, generally it's part of the negotiation process with the parties. [LB728 LB777]

SENATOR LATHROP: And if it's multistate, you have little control over that. Is that what you're telling me? [LB728 LB777]

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DAVID COOKSON: Generally. [LB728 LB777]

SENATOR LATHROP: You guys don't typically end up on the executive group of the attorneys general that are making the claim. [LB728 LB777]

DAVID COOKSON: Rarely. [LB728 LB777]

SENATOR LATHROP: We're generally people that tag along. [LB728 LB777]

DAVID COOKSON: For the most... [LB728 LB777]

SENATOR LATHROP: And as a... [LB728 LB777]

DAVID COOKSON: Some. We've been involved in some, but usually those haven't involved large money damages. [LB728 LB777]

SENATOR LATHROP: Okay. And when the settlement is reached, it says you must use it for consumer education regarding... [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR LATHROP: ...the use of credit, right? [LB728 LB777]

DAVID COOKSON: It's consumer education enforcement. [LB728 LB777]

SENATOR LATHROP: That money currently will then go into a particular account. [LB728 LB777]

DAVID COOKSON: State Settlement Cash Fund. [LB728 LB777]

SENATOR LATHROP: State Settlement Cash Fund. And it is like a trust account in that I have a trust account, different clients' money is in there. This is segregated, on paper at least, for the particular purpose. [LB728 LB777]

DAVID COOKSON: Yes. [LB728 LB777]

SENATOR LATHROP: Is that true? And as the system is now set up, the Attorney General, and I'm not saying it didn't precede this particular Attorney General, but this Attorney General will then decide what is a purpose consistent with the settlement terms. [LB728 LB777]

DAVID COOKSON: Correct. [LB728 LB777]

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SENATOR LATHROP: Right? [LB728 LB777]

DAVID COOKSON: Yeah. [LB728 LB777]

SENATOR LATHROP: Do you or does the Attorney General have a problem with allowing the Legislature or the Appropriations Committee, initially, to say if the purpose for this money is to educate consumers on credit worthiness or the use of credit, if that's done by the--now it's done by the AG--do you have a problem turning that process of appropriating that money over to the Legislature? [LB728 LB777]

DAVID COOKSON: Let me explain how the current process works, because with... [LB728 LB777]

SENATOR LATHROP: I think that's the goal of Senator Mello's bill, if I understand. [LB728 LB777]

DAVID COOKSON: Notwithstanding the passage of LB549, right now, in this biennium, there is a subprogram created by DAS and the Fiscal Analyst's Office, not by us, in which we make a request for specific funding out of the State Settlement Cash Fund for consumer education purposes which the Legislature--Appropriations Committee, and ultimately the Legislature--approves as part of the budget process. So currently we're still operating under that system, so we have a fixed amount in there, much like the court has a fixed amount for what it spends, or any of the other agencies in their subprograms, as to what we can spend out of that fund for the purposes decided. [LB728 LB777]

SENATOR LATHROP: Okay. Let me ask it differently. As the process currently stands, does the Attorney General have discretion to spend or grant money from those cash funds without any participation by the Legislature? [LB728 LB777]

DAVID COOKSON: As to the consumer fund, we can only spend the amount the Legislature appropriated in this biennium. [LB728 LB777]

SENATOR LATHROP: That sounds like a qualified answer, so... [LB728 LB777]

DAVID COOKSON: It is a qualified because there's not a straightforward... [LB728 LB777]

SENATOR LATHROP: Is there any money that comes in that is settlement money that is put into the cash fund that the Attorney General spends or grants without legislative oversight or authorization? [LB728 LB777]

DAVID COOKSON: Not in the State Settlement Cash Fund. [LB728 LB777]

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SENATOR LATHROP: In any other fund? [LB728 LB777]

DAVID COOKSON: In the Supplemental Environmental Project Fund, yes. [LB728 LB777]

SENATOR LATHROP: And so if we nick somebody for polluting a stream and we fine them, the money goes into the schools; and if there is a settlement to the people of Nebraska for polluting the stream, our damages go into one of these environmental things, and you...not you, but the Attorney General's Office has discretion over how to appropriate that. [LB728 LB777]

DAVID COOKSON: Right. That's correct. [LB728 LB777]

SENATOR LATHROP: But all other settlements, you have to go through the appropriation process to spend it? [LB728 LB777]

DAVID COOKSON: Well, as it stands now, next biennium we will not because of the removal of the legislative approval language... [LB728 LB777]

SENATOR LATHROP: Okay. [LB728 LB777]

DAVID COOKSON: ...by the Legislature last year in LB549. [LB728 LB777]

SENATOR LATHROP: Okay. I'm just trying to better understand what... [LB728 LB777]

DAVID COOKSON: Yeah, and it's a little... [LB728 LB777]

SENATOR LATHROP: ...what money you guys have discretion over and what money is already... [LB728 LB777]

DAVID COOKSON: And it's a little...I need to clarify one point. There are two different settlement funds created by the Legislature. There's the Settlement Cash Fund, which is the one we've been discussing, and the State Settlement Trust Fund, and that's where...for instance, we had an action against a company selling prepaid groceries they would deliver. All of the money in that settlement went through the trust fund and then was appropriated back directly to the victims of that particular scam. [LB728 LB777]

SENATOR LATHROP: Okay. And I'm not...to the extent you're doing a class action and the money is actually going to the people that have been ripped off, I don't think anybody would have a quarrel with that, Mr. Cookson. [LB728 LB777]

DAVID COOKSON: I just wanted to make that clear, that there were two. That is one

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where the court tells us to pay it back to the folks directly. [LB728 LB777]

SENATOR LATHROP: Okay. Thank you. [LB728 LB777]

SENATOR ASHFORD: Senator Council and then Senator Harr. [LB728 LB777]

SENATOR COUNCIL: And just quickly, Mr. Cookson, we're talking about fines. In part of LB728 we're talking about fines and settlement. And there have been questions about if the Attorney General collects fines, where they go. Is there ever a case where the penalty is a fine but the Attorney General negotiates a settlement covering fines? Have you ever negotiated? Say the fine is \$1 million and the perpetrator sits down and negotiates with the Attorney General's Office for some resolution of that, short of paying \$1 million. [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR COUNCIL: Do you treat that as settlement or do you treat that as fines? [LB728 LB777]

DAVID COOKSON: Both. There is always a fine component to every environmental settlement, and it is always, to my knowledge...well, the numbers speak for themselves: \$7.5 million for fines and \$2.4 million for SEPs. But there's never a SEP without a fine, and the fine is always equal to or greater than the SEP. That's the way the process works. Now interestingly, a lot of other states do what you're suggesting, which is they have smaller fines and bigger SEPs. But we believe the constitution requires us, if there's a fine amount we negotiate, it's supposed to go, and we've always just as a practice kept the fines at an amount equal to or greater than the SEPs. [LB728 LB777]

SENATOR COUNCIL: Okay. So your practice has been if there's a settlement and a portion of the case was for fines, that the settlement segregates the fines from the... [LB728 LB777]

DAVID COOKSON: Yes. Yes. [LB728 LB777]

SENATOR COUNCIL: Okay. And the second point was, under LB549, since there were no...so this year. I mean, this is the first year that there's been no restriction. And it's your testimony that under that there has been no distribution out of the Settlement Cash Fund that did not...because it had already been subject to an appropriation? [LB728 LB777]

DAVID COOKSON: Right. We had already been appropriated an amount for the biennium... [LB728 LB777]

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SENATOR COUNCIL: Okay. [LB728 LB777]

DAVID COOKSON: ...and we did not ask the Legislature to change...the Appropriations Committee or the Legislature, to change that. Given the timing of the passage and all that, we just didn't feel it was appropriate. [LB728 LB777]

SENATOR COUNCIL: Okay. Well, I understand that you didn't ask to change the appropriation. But arguably, as a result of LB549, this year if the Attorney General wanted to distribute money out of the Settlement Cash Fund he wouldn't have to seek the authority of the Legislature. [LB728 LB777]

DAVID COOKSON: Correct. [LB728 LB777]

SENATOR COUNCIL: So you can do...you have your appropriations for this year, and arguably, you could distribute more. [LB728 LB777]

DAVID COOKSON: There is a question about whether a specific clause needed to be added to our appropriation, and since we weren't intending to do that anyway this year we didn't press the issue. [LB728 LB777]

SENATOR COUNCIL: Thank you. [LB728 LB777]

DAVID COOKSON: The appropriation process requires you either have a specific appropriation or there's language that allows you to spend up to whatever is in the fund. Like the court with its fees, in its appropriation says they can expend up to all of the funds in the account. We didn't ask for that language this year. [LB728 LB777]

SENATOR COUNCIL: Okay. So the Attorney General is operating under being bound by what was appropriated. [LB728 LB777]

DAVID COOKSON: In the biennium. Because that's what we asked the Legislature for, for the biennium. [LB728 LB777]

SENATOR COUNCIL: Okay. So in response to Senator Lathrop's question, if the provision that was removed with LB549 were reinstated, you would be back to the appropriations process with regard to the distribution of the Settlement Cash Fund. [LB728 LB777]

DAVID COOKSON: If the Legislature chooses to undo what it had done, which I know some senators have spoken rather adamantly about not undoing what you've done before in other bills, that's fine. We will go to the Appropriations Committee and ask for an appropriation. [LB728 LB777]

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SENATOR COUNCIL: Thank you. [LB728 LB777]

SENATOR ASHFORD: Just to get some...what was the appropriation this year then? [LB728 LB777]

DAVID COOKSON: It's \$300,000. [LB728 LB777]

SENATOR ASHFORD: Okay. [LB728 LB777]

DAVID COOKSON: Since the year we adopted the cash fund in '07, it's been the same amount, \$300,000. [LB728 LB777]

SENATOR ASHFORD: And that fund could be greater than that, but that's the amount that you... [LB728 LB777]

DAVID COOKSON: Yes. [LB728 LB777]

SENATOR ASHFORD: How much is in the fund now? [LB728 LB777]

DAVID COOKSON: The last time I looked, and it was probably last year during the discussion on LB549, it was roughly about \$4 million. [LB728 LB777]

SENATOR COUNCIL: Four million. And a million...just for the record, a million of it went to LB549. [LB728 LB777]

SENATOR ASHFORD: And the rest of it is restricted. [LB728 LB777]

DAVID COOKSON: We're operating under our line-item appropriation. [LB728 LB777]

SENATOR COUNCIL: And so the balance is just there. [LB728 LB777]

DAVID COOKSON: It's there. And you had asked earlier about the SEP Fund. I think there's roughly \$100,000 in the SEP Fund. [LB728 LB777]

SENATOR ASHFORD: Okay. Thanks, David. Senator Harr. [LB728 LB777]

SENATOR HARR: Thank you, Senator Ashford. And I apologize, I stepped out for a little bit. Are you here in a neutral or are you opposed? [LB728 LB777]

DAVID COOKSON: Opponent. [LB728 LB777]

SENATOR HARR: Opponent. [LB728 LB777]

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DAVID COOKSON: Yeah. [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: We're in...let me qualify that,... [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: ...as any good lawyer should. We're in the opponent capacity to the extent that the bill is asked to do something we believe is unconstitutional. To the extent we're talking about replacing the language that was taken out in LB549, we're not necessarily...we're neutral on that. [LB728 LB777]

SENATOR HARR: And I appreciate that clarification. That's was one of the questions I was going to follow up with. Earlier, Senator Mello mentioned, and I don't think anyone...at least I'm not accusing the Attorney General of a conflict of interest. Would you agree though that there could be an appearance of a conflict of interest in that you have a lawsuit in which the Attorney General is a party--well, is suing--and then part of the settlement is that this money goes into a fund in which that person controls where the money goes instead of the people? Do you... [LB728 LB777]

DAVID COOKSON: No, I don't see any particular... [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: ...conflict there. I mean this is a process. [LB728 LB777]

SENATOR HARR: But... [LB728 LB777]

DAVID COOKSON: There are 48 states that do this. [LB728 LB777]

SENATOR HARR: But you could see where it could become a slush fund for an attorney general if they were less than noble. [LB728 LB777]

DAVID COOKSON: I mean if it's not in a transparent process like this is, where every dollar is accounted for. [LB728 LB777]

SENATOR HARR: Okay. And let's talk about that. How is the...because, I'll be honest, I didn't know about this account until there was a press release. How is this--you say it's public--how is it told or how do we know about it? [LB728 LB777]

DAVID COOKSON: There are three ways. One is it goes through the state accounting process which is part of...you have adopted at various times different changes to the

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state [Spending.gov](http://Spending.gov). [LB728 LB777]

SENATOR HARR: Uh-huh. [LB728 LB777]

DAVID COOKSON: So it's in that part of the state process. It's in the DAS part of the state process, which is available. They're all public records. It's been publicized on our Web site pretty much continuously, although when we changed Web sites it got dumped into an archive for two months. [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: And then finally, we counted at least a dozen newspaper stories, either front page or top of the fold, in papers of state distribution where distributions from this fund have been discussed since going back at least to '03, and we did find one that discussed I believe the 2001 settlement where SEP funds went to the Norfolk Public Schools. [LB728 LB777]

SENATOR HARR: So if I wanted this subfund, is there an application process? [LB728 LB777]

DAVID COOKSON: Yes, it's on the Web. It's on our Web site. There are guidelines, there's an application process. And I did want to clarify one point as we talk about the application process. The discussions, it was...this report of a 32-minute e-mail keeps coming up. [LB728 LB777]

SENATOR HARR: Yes. [LB728 LB777]

DAVID COOKSON: What the reporter didn't say or that we told him and showed him was we had been in discussions with this particular group for at least two months, as we do with all of the SEP grants. We talk to the folks as they're contemplating it to see what they're doing and trying to shape it in a way we think is consistent with what the court orders are. [LB728 LB777]

SENATOR HARR: Okay. And is this a rolling deadline, meaning whenever there's an application, you consider it at that time, or is it all applications due April 15? [LB728 LB777]

DAVID COOKSON: No, it's rolling because we never know exactly how much we're going to get into the fund. It really depends on the enforcement cases we have pending. [LB728 LB777]

SENATOR HARR: And the amount you give out is...is there anything on the application? Is it based on need of the applicant or is it whatever is in the fund, or how is

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that determined? [LB728 LB777]

DAVID COOKSON: It's generally based on the merits of the application and whether or not we think there will be a sufficient environmental benefit. [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: A lot of it has been used for educational purposes, primarily with folks who have to comply with rules to make sure that in fact they don't pollute and they don't violate the rules. We'd like to be able to educate our way out of an enforcement obligation because that's to everyone's benefit. [LB728 LB777]

SENATOR HARR: Okay. And this was a subfund of the State Settlement Cash Fund, is that correct, that we've been talking about? [LB728 LB777]

DAVID COOKSON: Yeah. To be honest, DAS sets this up, so you really need to talk to them... [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: ...because we don't have the authority to set up a fund. We have to ask DAS and they set it up. And to be honest, the arcane nature of how they set up administrative funds is beyond my understanding. [LB728 LB777]

SENATOR HARR: Are you aware of any other subfunds underneath the State Settlement Cash Fund? [LB728 LB777]

DAVID COOKSON: Not under the State Settlement Cash Fund. [LB728 LB777]

SENATOR HARR: Okay. Are you aware of any other subfunds then? [LB728 LB777]

DAVID COOKSON: In other agencies I know periodically there have been administratively created funds by DAS. [LB728 LB777]

SENATOR HARR: Okay. And all the... [LB728 LB777]

SENATOR ASHFORD: I'm still a little bit unclear. Go ahead, Senator Harr. [LB728 LB777]

SENATOR HARR: Yeah. All these lawsuits...these are civil lawsuits, correct? [LB728 LB777]

DAVID COOKSON: Yeah, they're civil enforcement actions. [LB728 LB777]

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SENATOR HARR: Civil enforcement actions. So let me ask you and... [LB728 LB777]

DAVID COOKSON: With regards to the environmental. [LB728 LB777]

SENATOR HARR: With regards to the environmental. Are there any times when the Attorney General sues someone or--this is more prevalent on the federal level with white collar crime, and I don't know if this happens on the state level, so I'll ask--where you might file a penalty or a case against a certain company for violating regulations, and it's a fine but it's a criminal action, and instead you settle it with the agreement that there's a...no acceptance of responsibility but you pay a fine, damages, and agree in the future not to do X? [LB728 LB777]

DAVID COOKSON: As a general rule, we cannot mix the civil and the criminal. So if we make a decision to go criminal, we go criminal. [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: If we make a decision to go civil, we go civil. [LB728 LB777]

SENATOR HARR: And if it is criminal, have you ever had cash settlements where you agree to dismiss the charges if they do X, Y, and Z, and part of that is a cash payment to go to a fund to educate so that X doesn't occur again? [LB728 LB777]

DAVID COOKSON: With the environment, they're all brought as civil enforcements. [LB728 LB777]

SENATOR HARR: And I'm not asking about the environment, I'm asking in general... [LB728 LB777]

DAVID COOKSON: Oh. [LB728 LB777]

SENATOR HARR: ...had you ever do that. [LB728 LB777]

DAVID COOKSON: Not that I'm...I guess I'm not following you. [LB728 LB777]

SENATOR HARR: Well, let me give an example that I know of where it's occurred on a federal level. There was a certain dealership that was violating incentive kickbacks and, as a result, what was agreed upon was that the charges would be dismissed but the dealership would then going forward pay a fee...or a fine, and then also education so that other dealerships don't do what they did. Do you ever... [LB728 LB777]

DAVID COOKSON: I can't think of...again, if we make a decision to go criminal, we

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don't ever resolve that then civilly. [LB728 LB777]

SENATOR HARR: Okay. All right. [LB728 LB777]

DAVID COOKSON: Just...it gets too problematic... [LB728 LB777]

SENATOR HARR: Okay. [LB728 LB777]

DAVID COOKSON: ...from our perspective. [LB728 LB777]

SENATOR HARR: Okay. Thank you very much. I appreciate it. [LB728 LB777]

SENATOR ASHFORD: Senator Council. [LB728 LB777]

SENATOR COUNCIL: Okay. I just have one other question and it was prompted by your response to a question from Senator Harr. If this is like a rolling fund and so there's no, like, annual application deadline, how does one know how much money is available to ask for? [LB728 LB777]

DAVID COOKSON: Well, what we expect them, and as part of what we have in discussions with them, is for them to tell us what they need. The application is judged on how are they going to use the money and how much do they need. So we generally...we don't...our decision-making process is based on what we think the efficacy of what they're proposing to do is going to be and do we think they need as much money as they ask for in order to carry out what they say they're going to do. [LB728 LB777]

SENATOR COUNCIL: Okay. But I'm just saying, how do I know to even ask for \$100,000 if I don't know? How do I find out what's there? [LB728 LB777]

DAVID COOKSON: Well, we generally don't...in fact, I can't think of when we've ever told anyone what's available. We expect them to tell us what they want to do and how much they think it's going to cost. And then if we have funds available, we'll proceed. If we don't have funds available then we'll tell them we don't have funds available. But generally we don't...we keep applications so that when we do have funds available we reconsider them. [LB728 LB777]

SENATOR COUNCIL: Thank you. [LB728 LB777]

SENATOR ASHFORD: I'm still...yeah, Senator Lathrop. [LB728 LB777]

SENATOR LATHROP: I apologize for lengthening this out, but I do have a question about fines. If you go in and let's say somebody in Grand Island pollutes the Platte River

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and you bring one of these actions and you secure a fine--and I'm going to make a number up, \$100,000--first of all, where do you institute those proceedings, in Lancaster or in Hall County? [LB728 LB777]

DAVID COOKSON: We have a choice of either one. [LB728 LB777]

SENATOR LATHROP: And when you make a recovery and a \$100,000 fine, what school district does that go to? [LB728 LB777]

DAVID COOKSON: The school district in which we file the action. [LB728 LB777]

SENATOR LATHROP: Do most of those get filed in Lincoln? [LB728 LB777]

DAVID COOKSON: Generally speaking, yes, I think so. [LB728 LB777]

SENATOR LATHROP: Do you believe that that needs to be resolved, some equitable division of that... [LB728 LB777]

DAVID COOKSON: My understanding... [LB728 LB777]

SENATOR LATHROP: ...fine should be made among the school districts as long as we're at it? [LB728 LB777]

DAVID COOKSON: My understanding is it's, and Senator Ashford may know better than I, it's a factor in the TEEOSA formula that when Lancaster County gets more money from us, there's a corresponding reduction in funds they get somewhere else. [LB728 LB777]

SENATOR ASHFORD: I don't know if it's dollar for dollar,... [LB728 LB777]

SENATOR COUNCIL: It's not dollar for dollar. [LB728 LB777]

SENATOR ASHFORD: ...but I...but that is...is that a practice? [LB728 LB777]

DAVID COOKSON: Generally speaking, yes, because of the... [LB728 LB777]

SENATOR ASHFORD: It's not a statutory requirement. [LB728 LB777]

DAVID COOKSON: No. I mean we have...the venue is either the place where it occurred or because it's DEQ and they're headquartered here in Lancaster County. [LB728 LB777]

SENATOR LATHROP: If you were to give us some guidance, is there a way to sort that

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out, something that's more of an insult to the natural resources of the state, or what would we use to distinguish a fine for speeding in Lancaster County versus a fine for polluting the Platte River? [LB728 LB777]

DAVID COOKSON: I would suspect that the Treasurer's Office, who would be the one who would disburse the funds. When they come into us and it's a fine, it goes to the Treasurer's Office and goes to the common school fund, is my understanding. So once it comes to us, it goes directly to the Treasurer, under state law, and we don't...it goes with directions where it goes. We don't see it again. [LB728 LB777]

SENATOR LATHROP: Okay. Thanks. Just a little side issue, I suppose. [LB728 LB777]

DAVID COOKSON: I will tell you that I know in the past I've had conversations with representatives of LPS about not filing actions elsewhere. [LB728 LB777]

SENATOR ASHFORD: And what are those discussions like? [LB728 LB777]

SENATOR LATHROP: (Laugh) Please file them here. We might want you to file those in Omaha. (Laughter) We might need to change that statute and make Omaha the venue of choice. [LB728 LB777]

SENATOR ASHFORD: And I get... [LB728 LB777]

SENATOR HARR: Oh, here we go, rural-urban. [LB728 LB777]

SENATOR ASHFORD: And I get what you're saying, David, and I'm not...but I...and it really isn't so much you or your office. This is a longstanding practice and it happens with other agencies as well. It happens with sheriffs' offices and how they accumulate funds and how they distribute funds and so forth and so on. And just so I understand though, the constitutional underpinning for your objection to Senator Haar's bill and Senator...maybe it's Senator Mello's bill and not Senator Haar's bill or both, is does it go to the interference with the process of awarding money to particular applicants? Is that the under... [LB728 LB777]

DAVID COOKSON: It goes... [LB728 LB777]

SENATOR ASHFORD: ...is that the... [LB728 LB777]

DAVID COOKSON: ...it goes to the constitutional, statutory, and common law authority of the Attorney General to settle the legal matters of the state in the manner he deems... [LB728 LB777]

SENATOR ASHFORD: I get that part, but I'm...but the process, I understand the

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settlement part. [LB728 LB777]

DAVID COOKSON: Yeah. [LB728 LB777]

SENATOR ASHFORD: That's clearly within your... [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR ASHFORD: ...constitutional prerogative. But the distribution or process of distribution of those dollars, I'm more concerned about going forward and what the proper process is than I am... [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR ASHFORD: ...about anything that's happened in the past. So what is the constitutional underpinning of the Attorney General or any other Attorney General saying we get to decide, essentially constitutionally, whether the money goes to what Senator Haar is suggesting or Senator Mello. [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR ASHFORD: What is that? Where is it in the constitution that says it? [LB728 LB777]

DAVID COOKSON: And as you might imagine, this is an issue that comes up in almost every AG's Office at some point with their Legislature. [LB728 LB777]

SENATOR ASHFORD: Right. Right. [LB728 LB777]

DAVID COOKSON: The constitutional authority to settle also gives the AG the responsibility when a consent decree is entered to make sure that the consent decree is complied with, within terms of the funds; and when you separate that from the Attorney General and give it to another body, you've now put him on the hook for something he has no control over. As long as...which is why the consent decree is provided... [LB728 LB777]

SENATOR ASHFORD: What if it's silent though, David? What if it's silent on--and maybe that's some of the early questions--if it's silent on the distribution aspect as opposed to the... [LB728 LB777]

DAVID COOKSON: We've never had that particular question come up, but in the process of this being an issue across the country with AGs longstanding for several years, one of the provisions that courts have wanted to see is how is this money going

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to be used and who's going to have authority over it. [LB728 LB777]

SENATOR ASHFORD: Right. [LB728 LB777]

DAVID COOKSON: And so because it's the Attorney General who's on the hook to the court, the Attorney General...it is my understanding the historical perspective is the courts have asked to see specific direction as to the money, not having the money go back into a fund that is later outside the control of the officer of the court before that court. [LB728 LB777]

SENATOR ASHFORD: And that's...not all of that is in the constitution, all of what you've just said, but that's your interpretation of it. It goes beyond... [LB728 LB777]

DAVID COOKSON: Right. [LB728 LB777]

SENATOR ASHFORD: ...simply the... [LB728 LB777]

DAVID COOKSON: It's... [LB728 LB777]

SENATOR ASHFORD: You have an obligation to report back to the court, if necessary, on how the funds are allocated in a particular settlement. [LB728 LB777]

DAVID COOKSON: If someone were to challenge how the money was spent from a particular court order, we have to be able to show the court we complied with the order. [LB728 LB777]

SENATOR ASHFORD: And those... [LB728 LB777]

DAVID COOKSON: And again, it goes back to the constitutional authority of the AG to settle cases. [LB728 LB777]

SENATOR ASHFORD: Okay. All right. I appreciate your candor, David. I believe that's all I have. I don't know if anyone else has any other questions. I don't see any. Thank you. Senator Mello or Senator Haar, do either of you wish to close? Are there any other...? I'm sorry, are there any other testifiers? I thought I asked that but I may not have. Any other testifiers on this bill? Thank you. [LB728 LB777]

SENATOR MELLO: Senator Ashford, members of the committee, a couple points of clarification I guess in regards to some of the dialogue, at least from my interpretation. I guess the Attorney General's constitutional opposition to LB728 is, in my perspective, that LB728 takes away their authority to give out grants. Instead, it gives the authority that settlement funds go to public schools or, if there's a specific...as Senator Lathrop's questioning was, if it's a multistate settlement, it goes to a specific fund, where right

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now, in the terms of others, this is a fund that has very little oversight beyond their ability. They are the ones who get to give it out at their sole discretion. And I look at this and... [LB728 LB777]

SENATOR ASHFORD: There is court oversight though. I mean it's not their sole... [LB728 LB777]

SENATOR MELLO: Well, the court...I will show you...no, the consent decree I have here, I can give copies to the committee if they want, from February 24, 2011, lays out, and most of the funds that go into the Supplemental Environmental Fund, as Senator Lathrop's questioning was, are not multistate settlements. These are civil fines or settlements with people who have violated Nebraska environmental law. What it shows, this consent decree from last year was with a party from Raymond, Nebraska, where they were fined \$15,000; as well, it says, it further be ordered the defendants pay, as a voluntary supplemental environmental project, the sum of \$15,000 into the Attorney General's Environmental Protection Fund to be used for environmental safety, training, and public awareness or other related uses as permitted by state law, at the sole discretion of the Nebraska Attorney General. That's the underlying intent and issue of LB728. It's not whether or not funds should be going, quote, unquote, to different groups, whether or not past practices have worked. Moving forward we want more transparency over the State Settlement Cash Fund, which is laid out crystal-clear in LB728, and the underlying policy issue, and it was raised, in regards to whether or not the fines or the settlement should be going to fines in general...or the common school fund. Senator Lathrop and Senator Harr asked a question in regards to where cases are being filed. That is an underlying issue that my office worked with the Education Committee's legal counsel, which originally had this bill prior to the Judiciary Committee actually getting it referenced to, of that is a concern and issue that has consistently been raised, is the Attorney General has the ability and discretion to determine where these settlement funds or these decree consents would go and where the fine dollars ultimately go, whether it's... [LB728 LB777]

SENATOR ASHFORD: Can we statutorily require that the fines go to the jurisdiction where the cause of action accrued? [LB728 LB777]

SENATOR MELLO: Senator Ashford, I believe, in the conversations we've had with the Education Committee legal counsel, that is an underlying issue that has been, I guess, bandied around this Legislature for years, well before most of us have been here, in the sense of that is a constitutional change in regards to where that money would go, knowing that, as Mr. Cookson mentioned, they have the ability to determine whether they want to file in Lancaster County District Court or where the cause and action occurred. So whether it was in Madison County, whether it was in Douglas County, it's up to the Attorney General to determine where they want to do that. If there's fines involved, as we all know, that is determined where the money goes, is based on where

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it's filed. That, in my view, is a whole other separate issue. But the first part of my legislation deals with that issue in regards to whether or not we want to allow separate subfunds or settlement funds that are created at the sole discretion of an Attorney General and with the sole discretion to appropriate that money at their will and their discretion, in comparison to having the Legislature, either that money go to the common schools or have a legislative process that's been established that's transparent and there's oversight provided. That's simply the one, two components of the bill. [LB728 LB777]

SENATOR ASHFORD: Okay. Thanks, Senator Mello. Senator Haar. [LB728 LB777]

SENATOR HARR: Oh, I have no questions. [LB728 LB777]

SENATOR LATHROP: Other Haar. [LB728 LB777]

SENATOR ASHFORD: Yeah, well, Ken Haar. I mean, you know which Senator Haar I was talking about. Okay. [LB728 LB777]

SENATOR HAAR: It's confusing. [LB728 LB777]

SENATOR ASHFORD: Well, then... [LB728 LB777]

SENATOR HAAR: By the way, I just have to say this is a scary committee with five lawyers asking questions, but I'm glad you're here. It goes back to my view from 30,000 feet as a citizen kind of reacting emotionally. I can't go out on the campaign trail, if somebody asked me about this, repeat what we've said here today. It's much too complex. And I think that's the main point I'm trying to make with my bill, that nobody...well, I have not said...I have not said that anything illegal was done. I would be very surprised to see the Attorney General for Nebraska doing anything illegal. But what I'm saying is the appearance of this doesn't make one feel good. I believe we need a much more transparent process. It seems other questions have come up in terms of where you put fines and all those kinds of things. So I just come back to this: I don't feel one person should be in charge of handing out money in Nebraska and that it is really important that we be clear and have a transparent process. And if you'd like to use my bill as a vehicle for solving one of the many problems,... [LB728 LB777]

SENATOR ASHFORD: All the better then. [LB728 LB777]

SENATOR HAAR: ...all the better. I'd love to submit it to that. I feel like today maybe we've sort of opened up here Pandora's can of worms and...to mix some metaphors. There's a number of questions to be answered, and if my bill could be used for any one of those I would be delighted. [LB728 LB777]

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SENATOR ASHFORD: Thank you, Senator Haar. Well, Senator Lautenbaugh. [LB728 LB777]

SENATOR LAUTENBAUGH: Thank you, Chairman Ashford. And thank you, Senator Haar. And I guess it's really a question directed to both of you, and you both can't answer and it probably isn't fair to ask in this venue, but is this something you're hoping we act upon in some way this year realistically? [LB728 LB777]

SENATOR HAAR: Well, it will not be my priority bill because I've already directed my priority to another bill. But I also feel that often when we raise an issue and it gets talked about, that eventually it will be dealt with. But I'd just tell you right now this is not my priority bill so... [LB728 LB777]

SENATOR LAUTENBAUGH: Thank you. [LB728 LB777]

SENATOR HAAR: But from the standpoint...and this gets back a little bit to the citizen's standpoint. Many citizens always look at us with sort of a, you know, that we're halfway crooked or something, and I...any kind of process where it's not transparent and the appearance is not good, I think we should try and correct. So in that respect, I hope we'll get to this someday soon. [LB728 LB777]

SENATOR LAUTENBAUGH: I think you touched upon something that I do want to follow up on in that I think one of our jobs here is to also lead in some ways as well. And I think we can maybe do as much, on the one hand, addressing something legislatively. On the other hand is standing up and saying to people, well, you're wrong, you know, we aren't on the take here, we aren't crooked. [LB728 LB777]

SENATOR HAAR: Yes. [LB728 LB777]

SENATOR LAUTENBAUGH: I mean, I've been dealing with that since I put in our pay raise bill, the comments saying, well, all of you are on the take anyway, we don't know how much you're making under the table, why would we pay you more money. And I think rather than maybe...sometimes I worry that the things we propose legislation on suggest that there is something going wrong here, and I for one am more comfortable more often standing up and saying, well, if you have that impression of us, on the one hand, someday I hope you get the representative you think you have, and on the other hand, you're wrong about what you think about your current representative, whoever it is. Do you have any concern that by raising the issue with an eye towards perhaps dealing with it someday that you're feeding the perception that there's a problem or something untoward going on? [LB728 LB777]

SENATOR HAAR: Yeah, that's possible. And I think any time we talk to the press, you know, we have to be careful what we say. And my reaction was, like I've said, pretty

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emotional to this one, how it seemed to me. And yes, when I go out and talk to people of Nebraska, one of the Nebraska values and one of the reasons I'm so proud to be in the Nebraska Legislature is our politics is squeaky clean, unlike many places. We are squeaky clean and that's a criticism I'll just never take. [LB728 LB777]

SENATOR LAUTENBAUGH: Thank you. [LB728 LB777]

SENATOR HAAR: Yeah, thanks for the question. [LB728 LB777]

SENATOR LATHROP: I might add this though. Listening to the testimony today, we have a system, and I'm not here to suggest that the Attorney General has done anything unlawful. It is a policy issue. But right now we have a system in place where the Attorney General can enter into a stipulated settlement with an environmental polluter, have some of it be fine and have some of it go to a civil fund, and in entering into a stipulated order indicate in that order that he drafts or agrees to that the money is going into a fund that he'll have absolute discretion over. And not that that's against the law or improper under the system as it's set up today. The question I think the bills present is whether that's good policy or whether that money should go into a fund and be appropriated by the legislative process. [LB728 LB777]

SENATOR HAAR: Yeah. [LB728 LB777]

SENATOR LATHROP: So I don't...I think you're right, we shouldn't leave here today and say the Judiciary Committee just figured out that Jon Bruning is a crook. That isn't it. What we're doing is asking the question, is this good policy? [LB728 LB777]

SENATOR HAAR: Exactly. [LB728 LB777]

SENATOR LATHROP: And should the Attorney General be in charge of money that he's putting together in a stipulated order that gives him discretion to spend it any way he wants? Legal, but maybe not the best policy. [LB728 LB777]

SENATOR HAAR: Right, and I would agree with that, that we're...I believe that the current policy is flawed because it's not transparent and it doesn't give the appearance that we would like it to. So again, use my bill however you wish to make good policy. Thank you much. [LB728 LB777]

SENATOR LATHROP: All right. Thank you. [LB728 LB777]

SENATOR ASHFORD: And let me just, from my perspective it seems to me, aside from anything that went on with any particular grant, the bottom line issue, and I think both Senator Lathrop and Senator Lautenbaugh have hit on it, is that if we...this is a complicated process, in a way, because of all the...and, quite frankly, as the money

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comes...it doesn't come in, in an orderly way. It comes in as cases are settled. It's something we don't have any particular control over. And I think when we're talking about millions of dollars, whether it goes to this agency or some other agency and whether there's a constitutional underpinning or there isn't, that the question of what legislative authority is there and what legislative authority is constrained by the constitution are very real issues. And it does go to the issue of public confidence, not because of what may or may not have been done in this particular grant necessarily, but because of the process by which we operate. And I think to me it is confusing. I don't know what the resolution is, but I think it's confusing enough that somehow, somehow we clarify for the public what's going on here. I've always...not so much the Attorney General, but I've always been...law enforcement agencies generally have access to these various settlement funds and fines throughout the state, and federal authorities have similar access, and those funds don't necessarily get appropriated. They are there and they're spent on a variety of law enforcement tools. And I think the underpinning of all that was give law enforcement and public safety agencies more authority because they're underfunded and they're facing issues every day out on the street. So I get all that. I just...I think this is an important discussion about the limits of authority and how money is spent. In all probability, we ought to give the Appropriations Committee their authority back. I mean it seems to me that that was an appropriate authority. It doesn't necessarily have anything to do with this grant that's been referred to that was in the press. So these are the kinds of things I think that build public confidence if we address them in an orderly fashion. And so with that, I will conclude the hearing. But thank you all for your discussions. All right, Senator Lambert is here, Paul is here, he's been waiting patiently. [LB728 LB777]

SENATOR LATHROP: Welcome to the Judiciary Committee, Senator Lambert.

SENATOR LAMBERT: Well, thank you. Thank you, Chairman Lathrop, colleagues. I've got a handout here. From what I've heard, the conversation I heard, this is going to be very simple I think, I hope anyway. (Laugh) [LB1029]

SENATOR LATHROP: We've heard that one before. [LB1029]

SENATOR LAMBERT: Terrible words to say. Yeah, terrible words to say, but I believe it's true in this case. Good afternoon. I'm Paul Lambert, L-a-m-b-e-r-t. I represent the 2nd Legislative District. I'm here today to introduce LB1029. The intent of LB1029 is to give cities and villages contact information when property is in foreclosure, especially when it pertains to property maintenance. One of the problems with vacant property in foreclosure is the maintenance can be neglected and it's difficult for a city or village to identify who to contact to maintain this property. I'm offering an amendment to clarify the intent of this bill. Under AM2034, a party filing a complaint for the foreclosure of the mortgage or a party requesting a sale of property under a deed of trust would be required to include a name and an address at which the party will accept a notice. The

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availability of the address will give a city or village an additional tool to identify and contact parties responsible for property maintenance. A city official will follow me to explain more fully the need for these changes as proposed in LB1029. Thank you. [LB1029]

SENATOR LATHROP: Senator Harr. [LB1029]

SENATOR LAMBERT: Yes, sir. [LB1029]

SENATOR HARR: Thank you, Senator Lathrop. And thank you, Senator Lambert. Welcome to Judiciary. [LB1029]

SENATOR LAMBERT: Thank you. [LB1029]

SENATOR HARR: You, before your life as a distinguished state senator, were a mayor. Is that correct? [LB1029]

SENATOR LAMBERT: Yes, sir. [LB1029]

SENATOR HARR: And is this based on your experience as a mayor that this is an issue, a problem that needs to be addressed? [LB1029]

SENATOR LAMBERT: I did not bring this forward; it was brought by some of my constituents. But I have experienced it as a problem, yes. [LB1029]

SENATOR HARR: Okay. [LB1029]

SENATOR LAMBERT: Children walking home from school, the sidewalks aren't getting shoveled. You send the city crew out to do it. Who do you bill? Same way in the summer, weeds, trash, things like that. And unfortunately, in our society today as we see it, there's more foreclosures and people just up and moving out, leaving things. And absentee owners or the bank owns it in New York City or wherever and it's become more of a problem. Yes, I've seen it in my other life. And it's constituents that have brought it to me here that it's a concern. [LB1029]

SENATOR HARR: Okay, I appreciate that. Thank you very much. [LB1029]

SENATOR LAMBERT: Yes. [LB1029]

SENATOR LATHROP: Senator Lautenbaugh. [LB1029]

SENATOR LAUTENBAUGH: Thank you, Senator Lathrop. Thank you for coming today, Senator Lambert. [LB1029]

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SENATOR LAMBERT: Sure. [LB1029]

SENATOR LAUTENBAUGH: So I just want to get an idea of how you envision this working. This address is being provided and where do we go from there? How does this process play out? [LB1029]

SENATOR LAMBERT: We can at least then bill the people at that address who are responsible for that property. It avoids having to go through the procedure of putting a lien on the property. It would make it much cleaner. And in my past experience I've found that if you can find the correct bank, a good percentage of the time they're willing to work with you because they have an investment in that property. [LB1029]

SENATOR LAUTENBAUGH: And again, this isn't a problem that you would see as peculiar to your legislative district? [LB1029]

SENATOR LAMBERT: No. No, sir. [LB1029]

SENATOR LAUTENBAUGH: Every urban area, every... [LB1029]

SENATOR LAMBERT: It goes everywhere. In fact, to go on a little further with this, in my other life I'm in the auto business also. And to try and find who has a car loan, I've made as many as five different calls to different banks. Well, we sold that loan or we've closed and this banks own this. And anymore, the way the banking system is, it is harder and harder to follow a mortgage or anything, I've found. [LB1029]

SENATOR LAUTENBAUGH: Okay, thank you. [LB1029]

SENATOR LATHROP: (Exhibit 5) I have a question for you. [LB1029]

SENATOR LAMBERT: Yes, sir. [LB1029]

SENATOR LATHROP: And I have a letter here from Hallstrom with the bankers. Have you seen this letter? [LB1029]

SENATOR LAMBERT: I have not seen that one, no. [LB1029]

SENATOR LATHROP: I'm just going to read a sentence out of the second paragraph. "As introduced, LB1029 raises an implication that the lender commencing a foreclosure proceeding or exercising its rights under a trust deed power of sale may be responsible for payment of expenses incurred with regard to the mortgaged property." Your testimony today, in answer to questions is, well, we want them to do that so we know who to bill for the removal of weeds or snow. [LB1029]

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SENATOR LAMBERT: Yes. [LB1029]

SENATOR LATHROP: Is it your expectation that if this passes that the mortgage company, let's say Wells Fargo, is going to be responsible for paying for the upkeep on the property? [LB1029]

SENATOR LAMBERT: Upkeep as far as snow and mowing, yes. Because I have found in the past in situations that most of the lending institutions that have an interest in the property are glad to do that, just as we maintain our own property at home. [LB1029]

SENATOR LATHROP: But that responsibility to do that, I get that we're going to have their address so we know where they live now,... [LB1029]

SENATOR LAMBERT: Uh-huh. [LB1029]

SENATOR LATHROP: ...New York City, (laugh) but this doesn't create the duty to pay for it. [LB1029]

SENATOR LAMBERT: No, no. But if nothing else, it gives the city or whoever an address to send that notice, hey, you've got two weeks to mow the grass or do whatever, and then it's up to them. [LB1029]

SENATOR LATHROP: Okay, but somebody owns it and somebody has the note on it. Now what we're going to do is send to the people that are holding the note and tell them that you're about to mow the weeds and it's going to be a \$200 mow. They don't have the obligation to pay it however. [LB1029]

SENATOR LAMBERT: Um-hum. No. [LB1029]

SENATOR LATHROP: What do we accomplish with the bill in that case? [LB1029]

SENATOR LATHROP: Because if they don't pay it, a lot of communities...and here, from my past experience, has the ability to put a lien on the property because that... [LB1029]

SENATOR LATHROP: And does that lien...and I'm not a mortgage lawyer or a transaction lawyer so I don't know this. Does that lien have precedence over the mortgage? [LB1029]

SENATOR LAMBERT: I don't know that. [LB1029]

SENATOR LATHROP: Does it jump ahead of it? [LB1029]

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SENATOR LAMBERT: To get clear title you've got to clear that lien. [LB1029]

SENATOR HARR: It has to be paid. It wouldn't jump in priority, but it has to be paid before you get clear title. That's right. [LB1029]

SENATOR LAMBERT: Yes. [LB1029]

SENATOR LATHROP: Okay. [LB1029]

SENATOR LAMBERT: That's my understanding. [LB1029]

SENATOR LATHROP: Okay, very good. Senator Lautenbaugh. [LB1029]

SENATOR LAUTENBAUGH: I'm trying to think of ways to couch this into the form of questions now. But so this would give notice to the party doing the foreclosure? [LB1029]

SENATOR LAMBERT: Yes. [LB1029]

SENATOR LAUTENBAUGH: And while it isn't always the case that the party doing the foreclosure is the successful buyer at the foreclosure, that's often the case. Is that your understanding? [LB1029]

SENATOR LAMBERT: Um-hum. [LB1029]

SENATOR LAUTENBAUGH: So this may not help in the circumstance where if some other third party is the successful purchaser because then the notice wouldn't necessarily go to the ultimate purchaser, is that... [LB1029]

SENATOR LAMBERT: But to get clear title, that purchaser to get clear title, if it has...I assume if the bank doesn't have that big of interest or they would put it against the property. But say they don't, they ignore the notices. There would be a lien filed on the property, then the purchaser would get the opportunity to pay for those services. [LB1029]

SENATOR LAUTENBAUGH: Exactly. Thank you. [LB1029]

SENATOR LATHROP: Okay. I think that's all the questions. Are you going to stay to close? [LB1029]

SENATOR LAMBERT: I can, yes, sir. Thank you. [LB1029]

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SENATOR LATHROP: Very good. All right. We'll take those who are here to testify in favor of this bill first, LB1029. [LB1029]

CAROL BLOOD: Committee, I am Councilwoman Carol Blood, the at-large representative for the Bellevue City Council, but here today in reference to the Vacant Properties Committee. In almost every community, the foreclosure crisis is draining government resources and the costs have become substantial. Statistically, local governments can spend between the average of \$5,000 to \$34,000 to maintain and secure a single vacant property. This challenge is magnified when you take into account that this issue increases the need for local government services, it drives down property values, and reduces the number of homes paying property taxes. Combined, these things have significantly reduced the resources local communities have to address this challenge. We cannot forget that these are also resources that are paid with taxpayers' hard earned dollars. Bellevue rose to this challenge and formed the Vacant Properties Committee in hopes of reducing the negative impact of vacant properties and to move forward to promote healthy, vibrant neighborhoods. After much research and lengthy discussion with Senator Heath Mello, we were able to identify several tools that were needed to help us respond to this issue in a proactive fashion. We were then fortunate enough to garner the support of the Nebraska League of Municipalities and given the opportunity to share our research and concerns with the Urban Affairs Committee last fall. Now Senator Lambert has taken us to the next level with the proposed LB1029. The first tool we identified is the need to ascertain who is the party responsible for property maintenance. When we were able to identify the right person to contact at a financial institution to ensure that vacant properties are maintained and secured, it helps our communities jump the hurdle of not being able to contact the traditional property owner who more often than not cannot be found. When we cannot find the traditional property owner or an appropriate contact person at a financial institution, hundreds of dollars, sometimes tens of thousands of dollars in unnecessary maintenance fees stacks up and ends up being liens on the property. Meanwhile, the homes or businesses surrounding this vacant property have to deal not only with the poor visual aesthetics next door, but they have to worry about the value of their own property when wanting to sell. These are properties that many have worked their entire lives to pay off to create personal equity and security for their families. Safety issues pertaining to vacant properties can destabilize communities and create a welcoming environment for criminals or drug addicts. These safety issues result in the utilization of additional city resources, such as police, fire, and rescue. Key benefits to Nebraska municipalities as a result of this bill would be that they have the ability to ensure that vacant properties get cleaned up before problems grow. Financial institutions tend to be responsive when municipalities contact them to raise maintenance or security concerns about properties that are in their portfolio. LB1029 would aid in our enforcement and save staff time and hassle because sending these legal notices to the right person at the right institution can ensure that our municipalities' vacant property ordinances and nuisance abatement programs work more effectively. The bottom line is that all Nebraska municipalities have had to do more

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with less. Do I need to stop? [LB1029]

SENATOR LATHROP: Unless you've got one or two sentences. [LB1029]

CAROL BLOOD: I do. There are multiple bleeds and our budgets can easily be fixed with this legislation. And this is one of these cases. [LB1029]

SENATOR LATHROP: Okay. I have a couple questions for you. [LB1029]

CAROL BLOOD: Yes. [LB1029]

SENATOR LATHROP: These are only properties that are in foreclosure to start with, right? [LB1029]

CAROL BLOOD: Yes. [LB1029]

SENATOR LATHROP: So the only application of this change in the law would be to property in foreclosure? [LB1029]

CAROL BLOOD: Yes. [LB1029]

SENATOR LATHROP: And many banks who put their property into foreclosure because they've not been paid will make a decision to hire a maintenance company to go shovel the walks and mow the yards. [LB1029]

CAROL BLOOD: And had I more time to read what I had written, that would have been one of the things I would have said. [LB1029]

SENATOR LATHROP: Okay. But that's true. [LB1029]

CAROL BLOOD: That is very true. [LB1029]

SENATOR LATHROP: Okay, now... [LB1029]

CAROL BLOOD: And they'd like the opportunity to have that ability. [LB1029]

SENATOR LATHROP: Okay, that's their asset and it's their collateral, so they have every reason to do that if that's their practice. [LB1029]

CAROL BLOOD: Exactly. [LB1029]

SENATOR LATHROP: What we will do now is we will now know who those people are instituting the foreclosure proceedings, many of whom will already have a policy of

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going out and mowing the yard. We now send them a letter from the city of Bellevue that says the grass is getting tall over at this house and you have the note on it. We're sending it to people that already don't have a policy to go out and mow and shovel then, aren't we? [LB1029]

CAROL BLOOD: Not necessarily. [LB1029]

SENATOR LATHROP: Okay. [LB1029]

CAROL BLOOD: I mean, you just said many institutions already do have a policy in place to protect their property. [LB1029]

SENATOR LATHROP: Okay. All right, I'm going to pick on Wells Fargo as a hypothetical bank. [LB1029]

CAROL BLOOD: Right. [LB1029]

SENATOR LATHROP: I have no idea what their practice is. But if Wells Fargo is the bank, they have the note on a property that's in foreclosure in Bellevue. If they have a practice to go mow, they don't need this note, right? They're already going to be out there mowing and shoveling. [LB1029]

CAROL BLOOD: To be very frank, it usually takes a note for them to come out and maintain the property. [LB1029]

SENATOR LATHROP: Okay. So your thought is that if you know who they are and you send them a letter that says we charge more than your guy probably does, come out and mow it yourself or it's going to be a lien on the property. [LB1029]

CAROL BLOOD: Or you could look at it that we're being proactive and we're helping them protect their property. The other sounds more like we're being bullies and really not the purpose... [LB1029]

SENATOR LATHROP: Well, you guys, if you're mowing the yard, it's usually more than a landscape company. Isn't that true? [LB1029]

CAROL BLOOD: I don't know, I've never worked for a landscape company. [LB1029]

SENATOR LATHROP: Okay. [LB1029]

CAROL BLOOD: I know that it's a waste of taxpayers' dollars and that's a big concern for me and our municipality. [LB1029]

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SENATOR LATHROP: Sure. And I sympathize with you. I sympathize with you, although I've never been in city government. I just wonder what this is going to accomplish. [LB1029]

CAROL BLOOD: It is going to allow us to be proactive. And it's one of several bills that are happening here in Lincoln. Another one is in reference to the priority liens because that's what we have to do is put a lien on the property when we have to do the maintenance. And right now there's a loophole where many times judges dismiss those, even though they are a type of priority lien, and we still don't get paid. And that's the big issue is that we're trying to take several different components, this being one of them,... [LB1029]

SENATOR LATHROP: Oh, okay. [LB1029]

CAROL BLOOD: ...and make sure that we have the ability to respect the fact that it's not our money that we're dealing with. The money in our coffers belongs to the taxpayers. [LB1029]

SENATOR LATHROP: Do you...these would be special assessments? [LB1029]

CAROL BLOOD: Yes. [LB1029]

SENATOR LATHROP: Do you have priority over the Wells Fargo in my hypothetical? [LB1029]

CAROL BLOOD: We do not have priority over the mortgage. We are supposed to have priority over several other types of liens, but there was some language that needed to be corrected and perhaps the League of Municipalities can tell you what bill that is that's changing that. [LB1029]

SENATOR LATHROP: Okay. Okay. No other questions. Thanks, Carol. [LB1029]

CAROL BLOOD: All right. Thank you for your time. [LB1029]

SENATOR LATHROP: Certainly. [LB1029]

GARY KRUMLAND: Senator Lathrop, members of the committee, my name is Gary Krumland, that's G-a-r-y K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities, appearing in support of LB1029 and of the amendment that Senator Lambert offered. As Councilmember Blood mentioned, this is actually part of probably four different bills that have been introduced this year relating to vacant abandoned property that cities are trying to obtain tools to address. There's LB1137 is a land bank bill that gives cities authority to create a land bank to take care of the properties. She

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mentioned LB798 which goes through the statutes and clarifies that where a political subdivision in the state can file a lien that it is a special assessment because some court cases on whether a priority lien is really a special assessment or not, and so all that does is clarify they are special assessments. And then there is another bill, LB729, which allows the use of the community development law, which is TIF, to use some of the proceeds for getting rid of dilapidated, unsafe buildings. So this is just one of the tools, and it's probably considered not a large tool but it is very helpful. The intent was to, in a filing that a bank or a trustee is already filing, just to add a name and address so that if something comes up and it's some sort of notice generally related to maintenance, that the city would be able to go there and find out who it is so that they could make the contact rather than try to go through all of the layers that are in the bank, they could directly get to it. And that's what the intent was. I haven't seen the letter from Mr. Hallstrom. He and I talked this morning. And I don't want to put words in his mouth, but he did raise a question about the amendment that it was attached to some sections that may raise jurisdictional questions that if this now becomes a requirement before they're able to foreclose or to act on a trust deed, then that's not the intent. We're not trying to create new obligations. So we still think it's important to have this contact, but it may need to be placed in a different statute or in a separate section. [LB1029]

SENATOR LATHROP: And that was going to be my question, Gary, which is, what the consequence if you don't do this? [LB1029]

GARY KRUMLAND: Well, we're not trying... [LB1029]

SENATOR LATHROP: Is it have you made a mistake that's fatal to proceeding with your foreclosure? [LB1029]

GARY KRUMLAND: I don't know that we want to bring it to the level of, you know, causing the foreclosure to fail. But we would like... [LB1029]

SENATOR LATHROP: You may wish to talk to Mr. Hallstrom, because I think that's a fair consideration. Is that a condition precedent to moving forward with your... [LB1029]

GARY KRUMLAND: Yeah. Yeah, and that wasn't the original intent, but...and we just found it this morning, so I guess I don't have an answer to that question. But we'll find out. [LB1029]

SENATOR LATHROP: Okay. I see no other questions. [LB1029]

SENATOR HARR: Right here. [LB1029]

SENATOR LATHROP: Oh, I'm sorry, Senator Harr. [LB1029]

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SENATOR HARR: And I guess my question, this doesn't...the intent...your intent is not to create a new duty. Correct? [LB1029]

GARY KRUMLAND: Um-hum. [LB1029]

SENATOR HARR: And let's go back to picking on Wells Fargo, since they're not here. And it's just a hypothetical. They could be good people for all we know. But if there is a lien right now, let's say Wells Fargo owns the property and they aren't taking care of the property and you file a lien. How do you know where to send that notice to make sure they have proper notice of the lien? [LB1029]

GARY KRUMLAND: You send it to whoever is listed at the register of deeds, who has filed the lien. But the experience we've had is simply sending the notice to somebody who has filed and doesn't necessarily get you in touch with the actual person who you need to talk to, who's in charge of the maintenance or whatever the issue is. So I guess what we're trying to do is cut through the layers of bureaucracy and find out exactly who it is that we need to talk to. [LB1029]

SENATOR HARR: Okay, thank you. [LB1029]

SENATOR LATHROP: I see no other questions. Thanks, Gary. Next proponent of LB1029. Anyone here in opposition that cares to testify or in a neutral capacity? Seeing no one, that will close our hearing on LB1029 and bring us to LB1134 and Senator Avery. Oh, I'm sorry. Senator Lambert. (Laughter) I couldn't see past Senator Harr, so I was looking at the front row and I just saw Bill Avery. [LB1029]

SENATOR HARR: Now he sees me. [LB1029]

SENATOR LATHROP: Please forgive me. [LB1029]

SENATOR LAMBERT: I understand. No, you brought up some very good questions on this. It is important and it saves a lot of manpower and time for the city officials that have to look this up and, as I say, call four or five banks to find out where the mortgage landed. And I just was thinking of a situation, we have a bad snowstorm, a limb falls through a roof, the police see it at night, how do you get ahold of somebody and, you know, as it melts and the snow goes in. There's a lot of emergency cases I think where it's very important that we have contact information. And I know I've seen cases where, you know, the people just leave the property and nobody has any idea where they're at. And that property is worth something to someone. I think a lot of Mr. Hallstrom's concern is addressed in the amendment as you look at that and have time to study it also. [LB1029]

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SENATOR LATHROP: Okay. [LB1029]

SENATOR LAMBERT: I think this is a good bill and it will help cities and villages make their work easier and I think in essence protect the mortgage holders also because that line of communication is very important. Thank you. [LB1029]

SENATOR LATHROP: (See also Exhibit 6) Okay, thanks, Paul. Now we'll close the hearing on LB1029 and bring us to LB1134 and Senator Avery. Welcome to the Judiciary Committee once again. [LB1029]

SENATOR AVERY: Thank you, Mr. Vice Chair. My name is Bill Avery, B-i-l-l A-v-e-r-y, representing District 28 here in Lincoln. LB1134 has its origins in the Keystone pipeline special session, when we had a private, foreign company come into Nebraska accused of throwing its weight around and sending threatening letters to landowners claiming they were going to take their property if they didn't accept the offers that were made. So we learned something from that, at least I did. They did not have their permits in place. They had no real authorization yet to claim eminent domain authority. They have since been denied their federal permit. They behaved, however, in our state as if they were sovereign, when in fact they were not. The threatening content of those letters was, of course, quite obvious, if you saw a copy; and I believe I brought one to this committee when we had that hearing in the special session. But certainly it had coercive language; it created a lot of anxiety among landowners. What I heard from you during that committee hearing last November was that eminent domain law...maybe I didn't hear it from you. I heard it in the hearing that eminent domain law was antiquated in the state, unclear, and at minimum it required a legislative review. And I have a question, a rhetorical question: Who can remember when our eminent domain laws have undergone a legislative review? Well, certainly not since we've been here. And I suspect if Senator Ashford were here he would be able to say not in his memory either. What I am offering you today is an opportunity to review this important element of our law. In crafting this bill, I worked with a prominent Omaha attorney who appeared before you during that special session hearing and pointed out some of the deficiencies in our current statutes. What I am presenting to you today represents much of the concerns that were raised during that hearing and concerns that were raised in consultation since November as we worked on this bill. The power to exercise eminent domain involves a very careful balance between private and individual property rights and, of course, the public good. And it is entirely proper that we have procedures in the state to take property if necessary and if it serves a sufficient public good or public purpose. If you go to Black's Dictionary, eminent domain is found to be defined as the power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of a public character. In essence, this is great power. It's great power given to entities, public and private, to act as if they are sovereign. And we must be careful about how we craft this language. As the Legislature we ought not lightly to assign entities this power. And we should always be concerned

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about making sure that property rights of landowners are protected. In Article (sic--Chapter) 25, the uniform procedure for acquiring private property for public use, you will note in this bill that we have eliminated Sections 1 through 4 of 25-2501, which provide exceptions to the law to several different entities. You will probably hear from some of those utilities and the city of Lincoln today, who have long enjoyed exceptions, that they don't particularly like this, that they believe they have sufficient procedures in place to meet the spirit of this law and that they always negotiate and provide just compensation. Well, I welcome those discussions and I welcome their input. But I would tell you that none of them came to me in time for me to include it in this bill. I thought the people that would be affected by this bill would have been put on alert back in November when I said very clearly if we do not do it now, we will be looking at this when we convene next year. We are now convened this year, it is the next year. We're here and I am here and they should have known that. And they came in Friday and Thursday and today, and I said, sorry, guys, you know, I can't fix it for you now, you're just too late. You knew this was going to happen, you should have been here earlier. In Sections 25-2502 I pull all the entities with the power to involve eminent domain under one definition. A thoughtful review of Nebraska statutes reveals that there are around 20 places in statute where we have issued eminent domain powers, from library commissions to county fair boards. There are many entities that may undertake this great power. Is this something that we should review? I think the answer to that is, yes, we should. The remainder of the bill outlines a few requirements that should be undertaken to protect landowners from potential eminent domain proceedings. There are notification requirements by first-class mail, 45 days in advance; public hearing notice at least 30 days before a final vote. I would point out to you, you'll probably hear from NPPD that they don't like this provision. They argued that neither the public entity or the private citizen is served by eliminating documented proof of mailing, that is certified mail; but the drafters requested that we only specify first-class mail because that conforms with what is apparently a new norm of statutory notice in our laws. Public hearing notice must be made at least 30 days before a final decision to condemn is made. These are reasonable notice requirements to landowners. Included in that notice are property owner rights. Tell the owners what their rights are, inform them that if you are going to be faced with a condemnation, you have the right to X, Y, and Z; this is how you go about protecting those rights. A projected date of the project would have to included not to exceed 18 months from approval. There's been some concern raised about this provision. I expect you'll hear about that from other testifiers. But I ask the committee to consider what happens in situations where eminent domain is invoked but no project date is set and the first shovel of dirt isn't turned for a decade. The property owner might have preferred to use that land for a few more years rather than have cash in hand. Maybe if the project is not going to start for a decade, you don't need to be engaged in a legal taking of that property. These are just some things to consider. There is some new language in this bill that would be familiar to you because it is directly related to the pipeline special session. Any agency project shall have approval or state or federal permit prior to exercising eminent domain rights. That is to say if

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you're a foreign company, you better get your permits in line before you do business in Nebraska. I don't anticipate that this would apply to any other agencies other than those requiring permits to commence their project, such as foreign corporations. Don't come in and start threatening Nebraska landowners with taking their property if you don't yet know you have approval for the project--and that did happen. And then, of course, they were required to sign confidentiality agreements so that they couldn't even talk about what had happened. These next sections in the bill also are from the pipeline special session and are equally important to me. They deal with false representations. No agency shall intimidate, deceive, beguile, mislead, or impersonate--I don't know if I've missed something here--any other person or direct another person to do the same in order to present, claim, or portray that they have the right to execute, commence, initiate, employ, wield, or use any power of eminent domain before having full and final approval. You know that didn't come from me, that's lawyer talk, not to say that I am any better at writing. I have added some penalty language here, too, that was in the discussion we had last November. Each instance of misrepresentation would constitute a Class IV misdemeanor; I believe that's a \$500 fine. We have learned what happens when you don't have penalties attached to some of these statutes. It's not much of a deterrent if misconduct and inappropriate behavior have no penalties. Finally, I've added some additional language that outlines the procedures should two agencies be competing for the same parcel of land. That might be a rare circumstance but it could happen, and in such a case there is spelled out here a procedure to deal with that. I've also included language addressing emergencies of a public nature that might necessitate taking of private land that would need to expedite the process. I've heard some concerns about this, but I would note that such circumstances are not now addressed in statute and is something the committee should consider. Finally, I've heard other comments that changing the language to read "condemnation" instead of "acquisition" immediately implies an adversarial relationship between the agency and the landowner. This was not my intent. I have no interest in interfering with negotiated acquisitions that are agreeable to both the taking agency and the property owner. That might require some tweaking of the language in order to clarify the intent there. Clearly, fair and honest voluntary negotiations are preferable to contentious eminent domain proceedings. So if some language needs to be changed, I trust that you have the talent on your staff to get that done. I understand that some public agencies prefer the status quo and probably all of them do. And I am quite sure that they see this bill as an irritating inconvenience. But am I trying to cause inconvenience? No. My overriding objective is to always protect the property rights of Nebraska citizens. That has been my objective from the beginning not to gum up the process for public agencies, not to cause difficulties, not to put any ambiguities into law. Let me say, I am not insensitive to the interests of public entities, but they are not my primary focus. My primary focus is protection of citizens of this state. Now, as a practical matter, this bill probably will not receive a priority designation. If there are changes that need to be made, perhaps the committee would like to consider... [LB1134]

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SENATOR ASHFORD: Let me ask you this, Bill. Can I just interrupt for one second?  
[LB1134]

SENATOR AVERY: This is my last statement. [LB1134]

SENATOR ASHFORD: Oh, no, I was going to ask you one quick question on that point  
you just made. [LB1134]

SENATOR AVERY: Okay. [LB1134]

SENATOR ASHFORD: It's not a priority, but is there any specific part of this that is...  
[LB1134]

SENATOR AVERY: Amendable into something else? [LB1134]

SENATOR ASHFORD: No, is there something that's absolute...so that as we listen to  
the testimony today, is there something that is in this bill that is of greater importance  
than...I realize it's all important to you. But is there anything... [LB1134]

SENATOR AVERY: I would answer that by saying the misrepresentation language is  
totally absent right now from our laws, and I would think that's the most important thing  
to do. [LB1134]

SENATOR ASHFORD: Okay, and I didn't...I'm sorry to interrupt. [LB1134]

SENATOR AVERY: Yeah, well, I was just going to say that if the committee would like  
to do an interim study, my office would certainly work with you on that and we could  
bring back perhaps a more mature bill next session. But this is something that I think we  
need to do. Laws that have been on the books for a long, long time and have not  
undergone legislative review I think probably ought to be looked at from time to time.  
[LB1134]

SENATOR ASHFORD: Okay. Thanks, Bill. Thanks for your comments. Yes, Senator  
Harr. [LB1134]

SENATOR HARR: Thank you, Senator Lathrop, and I'm going to skip right to Section 7  
of the bill, which probably raises the biggest right off, up-front, red flag for me. [LB1134]

SENATOR AVERY: Give me a page number, sir. [LB1134]

SENATOR HARR: Page 9, line 25, it says prior to exercising the right of eminent  
domain under Section yada, yada, yada, the agency shall have full and final approval  
for the public purpose project by an affirmative agency majority vote, or have applied

and been granted a permit. [LB1134]

SENATOR AVERY: Um-hum. [LB1134]

SENATOR HARR: Let me throw out a hypothetical at you. Let's say MUD decides, in Omaha, they need some land for further growth on the Platte River. There is a large resort that's going to go up there, they know they're not going to need this capacity for another ten years or so. The land is for sale. If there's a resort, their cost is going to go up quite a bit. Can MUD exercise eminent domain knowing they won't need it for the capacity they're buying their property for, for maybe ten years down the road? [LB1134]

SENATOR AVERY: I would see that as a preemptive purchase and it would certainly be within the scope of law, and I believe this legislation would permit it. But it would probably come under a negotiated acquisition. [LB1134]

SENATOR HARR: Okay. So eminent domain would not apply in that situation? [LB1134]

SENATOR AVERY: It could. It could if... [LB1134]

SENATOR HARR: How? [LB1134]

SENATOR AVERY: Well, if the owners of the planned resort did not wish to sell and MUD believed that they had a genuine public interest in acquiring this property early so as to preempt the development of a resort, then that might be deemed an appropriate public purpose and they could invoke eminent domain if they needed to. Eminent domain is used for extreme cases. It's not the first option. [LB1134]

SENATOR HARR: I would agree with that wholeheartedly. I'm just not sure...so it would have to be...it would be approval for a public purpose and be...it would take an affirmative agency majority vote or agency action or agency action of approval? [LB1134]

SENATOR AVERY: Yeah. If MUD were going to do something like this, it would have to have the approval of their board. That's... [LB1134]

SENATOR HARR: They already do. [LB1134]

SENATOR AVERY: Yeah. Well, that then would...they would be meeting the conditions of this section. [LB1134]

SENATOR HARR: Okay. But you would say that fits under public policy, even though they're not going to build that project for another 10, 15, 20 years? [LB1134]

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SENATOR AVERY: I think that if you ever got into a court, and most of these disputes often wind up in court, I think if you got in court that MUD could probably make a good case that a preemptive purchase for an important public project would be appropriate. [LB1134]

SENATOR HARR: Well, and that's why I asked the question, because if this does end up in court they often look at legislative intent. [LB1134]

SENATOR AVERY: Um-hum. [LB1134]

SENATOR HARR: So it is your, as the introducer of the bill, legislative intent that if there is a need for a project down the road and that entity realizes there's a need for that project, they may take eminent domain prior to the actual project existing. [LB1134]

SENATOR AVERY: But there is language in here though that says the project date must not be more than 18 months out. So... [LB1134]

SENATOR HARR: That's my question, yeah. [LB1134]

SENATOR AVERY: Yeah, now you would have to amend that for that kind of project to be... [LB1134]

SENATOR HARR: You would have to what? I'm sorry. [LB1134]

SENATOR AVERY: You would have to amend this version... [LB1134]

SENATOR HARR: Okay. [LB1134]

SENATOR AVERY: ...of the proposal for that to be permitted. My interest there in putting the 18 months on it was to avoid situations where a public entity could tie up land in perpetuity and it would sit idle for maybe a decade. When by having to specify a project start date, the landowner could say, hey, you don't need this property for ten years, why not let's delay this process and let me use it for nine years and then we'll do the transaction then. [LB1134]

SENATOR HARR: Well,... [LB1134]

SENATOR AVERY: I'm not trying to tie the hands of public entities. [LB1134]

SENATOR HARR: No, and I understand. Yeah. [LB1134]

SENATOR AVERY: I'm trying to empower the landowners. [LB1134]

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SENATOR HARR: And I get that and I agree with it. I just worry a little bit that might be too restrictive. Another situation, OPPD, NPPD might have a future development or there are developments...plans for a development in an area, and they need to be able to plan ahead and know they own property for where they want to put substations. And if they know they can only wait until 18 months ahead of time, that might be a little too restrictive for them. I understand your intent. I don't disagree with that. I just think in practicality we might have to write an exception in there if...for future, if there is a planned future development. [LB1134]

SENATOR AVERY: And that is...in discussions I've had with NPPD and other utilities and with the city of Lincoln and...I have come to realize that perhaps some of the language here is not as clear as it can be. That is one reason why I suggest perhaps you might want to do an interim study on it. [LB1134]

SENATOR HARR: Okay. And I appreciate that. And I'm glad you kept true to your promise and came back. Good to see you. [LB1134]

SENATOR ASHFORD: Thank you, Senator Avery. [LB1134]

SENATOR AVERY: Senator, I... [LB1134]

SENATOR ASHFORD: You're...oh, Senator Council. [LB1134]

SENATOR COUNCIL: Thank you, Senator Ashford. And, Senator Avery, I apologize. I had to step out and take a client call. But...and I know what prompted your introduction of this legislation as well as that which was introduced during the special session. But my question is, other than the TransCanada situation, are you aware of any other abuses by public utilities of the current eminent domain provisions? [LB1134]

SENATOR AVERY: Actually, I think that we have good faith public entities in the state of Nebraska who do try hard to make sure the public is protected. But that's because they have set in place procedures of their own: the city of Lincoln, for example; NPPD. They have rare instances where they have to go to eminent domain. I think NPPD will testify today that 97 percent of their acquisitions are negotiated and they don't even have to bring up the issue of eminent domain. But it's not so clear in law about public notice. It's not so clear in law about misrepresentation and I think it ought to be. That's why I brought this. [LB1134]

SENATOR COUNCIL: Okay. But accepting and appreciating that, but cases of misrepresentation other than those alleged to have occurred with regard to TransCanada. [LB1134]

SENATOR AVERY: And that's what we revealed, deficiencies in our current statutes was what happened with TransCanada. [LB1134]

SENATOR LATHROP: You know, can I just say one thing. We've started talking about TransCanada like they beguiled somebody, whatever that means, or did something abusive. And, you know what, I've read the letter, and for a lawyer that reads the letter I think they'd read letter and go it's a lawyer letter. If you are a nonlawyer and you look at the letter and you go, oh, my God, they're taking my property, there's an easement, it looks like I got to do it or they're going to do something called eminent domain to me and it's my property. I understand where the emotions would get frayed, particularly for a nonlawyer. If I read that letter, if it came to my house, I'd go, oh, better call the guy and talk to him, for a nonlawyer. So I think we should be careful today, and I'm not here to defend TransCanada or anybody else that uses the eminent domain process. But at the same time, we shouldn't start with the assumption that somebody abused landowners. We'll probably hear from some. But we shouldn't start from the process that people have been abused because of that letter, in my judgment. And there may be a lesson for people who want to use the eminent domain process that this letter probably should be more layperson-friendly than it is. But when you tell somebody this is what I can offer you and if you don't like it we will resort to the eminent domain process, that's being unequivocal. And I think people are perceiving it as a threat. And so I say that at the front side. [LB1134]

SENATOR AVERY: Perception is reality to most people. [LB1134]

SENATOR LATHROP: Well, I know, but we can't...maybe if we were legislating something we'd say get it down to the level of a nonlawyer, and maybe that's what they're guilty of here. Anyway, my thoughts. [LB1134]

SENATOR AVERY: I would argue that... [LB1134]

SENATOR LATHROP: And I see people jumping into the front row in support, and we'll probably hear... [LB1134]

SENATOR AVERY: I would argue... [LB1134]

SENATOR LATHROP: ...we'll probably hear that there was more to it than the letter. But at the same time,... [LB1134]

SENATOR AVERY: Yeah. I would argue that the letter was threatening and intimidating. [LB1134]

SENATOR LATHROP: Okay, okay. And I think any lawyer that read it probably might not agree with that though. [LB1134]

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SENATOR AVERY: But, you know...but, yeah. But it didn't go to lawyers. It went to nonlawyers. [LB1134]

SENATOR LATHROP: I get it, okay. [LB1134]

SENATOR ASHFORD: All right. Thanks, Bill. [LB1134]

SENATOR AVERY: I have...if you don't have any more questions, I am in Exec Session in my own committee. And who knows what they'll do without me, so I have to get back there. (Laugh) [LB1134]

SENATOR ASHFORD: Well, okay. Thank you. [LB1134]

SENATOR AVERY: So I won't be able to close. [LB1134]

SENATOR ASHFORD: Okay, thanks, thanks, Bill. [LB1134]

SENATOR AVERY: Thank you. [LB1134]

SENATOR ASHFORD: Let me ask everyone here, it's getting sort of towards 4:00. How many testifiers do we have here today? Okay, quite a few. How many supporters of the bill? And how many opponents? [LB1134]

\_\_\_\_\_: I'm sorry. (Inaudible) I'm normally opposed to these pipeline things, as you know. [LB1134]

SENATOR ASHFORD: Yes, I do. [LB1134]

\_\_\_\_\_: Neutral. [LB1134]

SENATOR ASHFORD: Okay, good. Okay, let's start with the proponents, and then go through everyone with the understanding that in all likelihood this will go to an interim study resolution unless there's something specific in this bill that is narrow in focus that we can do in a short session. But otherwise it probably would...we'll be back again in the summer looking at this. So I don't want to cut anybody off, but just to let you know that. Go ahead. [LB1134]

BRIAN JORDE: Senators and members of the Judiciary Committee, thank you. My name is Brian Jorde, J-o-r-d-e, of Omaha, Nebraska, a lawyer with Domina Law. It's important to remember that the purposes of eminent domain is to transfer property from private ownership into the hands of another entity, typically the government, for public use. It is not designed to give the public entity or the condemnor the cheapest price for

the property. And although this bill is not specifically related to the TransCanada issues, since they've been brought up, the issues as to the misrepresentation and the threat language really goes more to the negotiations between the condemnor and the private party. If you approach a widower in the Sandhills and basically say, well, if you don't agree, we're going to take your land anyway, that's a pretty quick way to get to a negotiated price that it is clearly in the best interests of the condemnor and not the condemnee without them knowing they actually have rights to hire counsel, to say no, to not even respond to the would-be acquirer, condemnor, and to go through the eminent domain process, also the condemnation proceedings in county court, and then maybe appeal. So I think this bill is valuable in many ways. But it also is valuable in balancing the playing field from the condemnor, which has done this many times, as to the individual citizen who is completely taken aback and thinking, my goodness, these people are going to take my land. That's a pretty traumatic experience. And I agree, if a lawyer would have received what has been known as the TransCanada letters, I looked at it and had the same feeling as Senator Lathrop. But the point is on these first negotiations and these first notices I don't see why anyone would be opposed as to putting in more transparency in the process of what the landowners' rights are. The misrepresentation language is key. I guess you'd only be against that if somehow you were going to try to use that in the negotiation process. Perhaps the utilities will say, well, now we don't know what we can say. But what you can say is we have project XYZ, we believe it might be granted approval, and if so we may be proceeding to acquire your property through the rights that we have under the eminent domain statutes. But to say we will take your land if you don't sign this easement, if you don't agree with us, that's going way far afield from what the public policy would have and from what the nature of these laws are to be on an equal and balanced playing field and not against the would-be seller or the landowner who simply doesn't know their rights. So I'm in full support of this bill and all provisions, including the penalty provision. A Class IV misdemeanor is a \$500 maximum fine, \$100 minimum, and so it's really not that severe in these instances. If there's any questions, I'd be happy to tackle them. [LB1134]

SENATOR ASHFORD: Any questions of Gary (sic--Brian)? I don't...thanks, Gary (sic--Brian). Or, I'm sorry. [LB1134]

BRIAN JORDE: Thank you. [LB1134]

MICK MINES: Mr. Chairman, members of the committee, for the record my name is Mick Mines, M-i-c-k M-i-n-e-s. I am here as a registered lobbyist today representing the Papio Valley Preservation Association. We're a not-for-profit organization with about 600 members, landowners, farmers in rural Douglas, Washington, and Burt Counties. I'm here today to talk more about the local condemnation process and what I've seen perhaps as a local elected official, a mayor. Here's what happens at the local level for a trail or a street extension or something within a community: The group decides, you

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know what, this new trail would be a great idea, and they all agree. And they say, okay, well, let's get a design done. All right, so they contract with an engineer and they get a design of this new trail, and they get a budget estimate and they get everything in order. And then they decide that, yeah, this is a pretty good idea, let's go ahead. Well, at that time they notify landowners that are affected by what they're about to do. And they say, listen, we're going to have a hearing in 30 days or 45 days; that's your opportunity to come in and tell us what you think. Well, without notice, these landowners don't have an opportunity to research, to get people together to talk about the other affected landowners that are involved. So they show up at this hearing, they're mad; they don't understand why. And then after an amount of time, let's say another month, the local governing body decides, okay, let's vote on it, and they put it through. And we like in the bill the fact that there's an advance notice, a 45 day notice before any local body makes a determination on whether or not to proceed with the action. We like the idea that there's transparency up-front, because condemnation is awful, painful, and personal not only for those that their properties are condemned, but for those on the board of the condemning organization or body because it's not fun to condemn someone's land. We believe that advance notice, a mere 45 days, lets property owners all know that there's a project in the works, let them understand that their property may be taken, and then proceed just as normal. So we appreciate Senator Avery bringing this bill. I'd be glad to answer any questions. [LB1134]

SENATOR ASHFORD: I don't see any, Mick. Thanks. [LB1134]

MICK MINES: Thanks. [LB1134]

RANDY THOMPSON: (Exhibits 8 and 9) My name is Randy Thompson, T-h-o-m-p-s-o-n. I'm from Martell, Nebraska. I'd like to thank the Chairman and the committee for having me here this afternoon. I am here to testify as a landowner and a concerned citizen. A couple of days ago, I sent all of you on the committee an e-mail containing a letter that TransCanada sent to my mother, who was 92 years old at the time, back in July of 2010. Apparently some of you have had a chance to look at it. I was hoping that you all would. But in the event that you have not, I would like to give you a brief overview of that letter, and I also have submitted a copy of the letter for the record. The letter contains an offer from TransCanada for an easement across my mother's property, and it outlines the terms and conditions that they have set forth for the easement. I would like to read a few excerpts from the letter. In paragraph two, it says, "In the event we cannot come to an agreement, Keystone will use eminent domain to acquire the easement." In paragraph five, it says, "This is Keystone's final offer, and it will remain open for one month after the date of this letter or until you reject it." In the final paragraph it says, "While we hope to acquire this property through negotiation, if we are unable to do so, we will be forced to invoke the power of eminent domain and will initiate condemnation proceedings against this property promptly"--and I think that's a key word--"promptly after the expiration of this one-month period." Now, if you read

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the letter, please note that there is no reference in the letter to the word "permit." In other words, eminent domain is not being tied to any type of a permit. So this would give the reader a distinct indication that TransCanada does possess the power of eminent domain. And since I am just an ordinary citizen, like my 92-year-old mother was, we found this intimidating; we found it damn intimidating. And it's caused me many sleepless nights over the last two or three years. Now, for some of you guys that are not directly affected, you have no idea. And the thought, if I wouldn't have been here and my 92-year-old mother would have gotten this letter, what would it have done to her? You know, I'm thankful that I was here to help her--and unfortunately, she is gone now. But this is the thing that is so frustrating to me in all this political stuff, the personal element and the things that families go through is totally left out. We're not...it's not all about cold, hard facts. And you can talk to many, many landowners that have been in my position for the last three, four years, and they'll all tell you the same thing. This thing tears you apart, you can't sleep at night, and it wears on you. So all we're asking is for a fair shake. I see my time is up. But, you know, I've been fighting this for four years, so I'm going to take a little bit of extra time. We need a fair shake. You know, we need to be notified in advance. We don't...this idea of a letter coming and it says you got 30 days or we're going to take your property, that's not right. I mean, for crying out loud, let's be fair to the landowners. We're the ones giving up our property for these projects. That's all we're asking. So I support this bill. Thank you. [LB1134]

SENATOR ASHFORD: Thanks, Randall, very much. Thanks for coming down. [LB1134]

RANDALL THOMPSON: Any questions? [LB1134]

SENATOR ASHFORD: Pretty clear I think. Okay. [LB1134]

JOHN HANSEN: Mr. Chairman, members of the committee, for the record my name is John Hansen, H-a-n-s-e-n. I'm the president of the Nebraska Farmers Union and appear before you today as my organization's president but also our lobbyist. The need for eminent domain is very clear I think. As a former public official who's exercised eminent domain authority, there's a clear need. But it's also important to be very clear about what those standards for use and need are, because to the extent that there's ambiguity and a lack of clarity, there will be a stretching of the definitional standard based upon the lack of clarity. And so as I look at eminent domain as a whole...and during my lifetime I've been involved in helping clarify what I thought, as a former public official working with the Legislature, areas that were less than clear. But as I look at it, this is a case of the sins of the few are borne by the many. The few in this case was clearly the use and misuse of alleged eminent domain authority by a particular entity. And it became clear to a lot of folks, especially if you represent landowners as I do, that there were a lot of folks who knew that things were not going as they should and that the treatment that they got was in stark contrast to the kind of treatment that those landowners would have gotten had they been impacted by or dealt with the Nebraska

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Public Power District or Omaha Public Power District or their local NRD. And it seems to me that if we're going to look at an interim study, that the way that we give eminent domain authority to oil pipelines in particular is substantially different than it is in other areas. So here we have local public officials taking land for what is clearly a public interest, a public need, a high use. In the case of TransCanada, there was none of that prescription, none of that clarity, none of those things. We just, as a state, pretty much handed it off to this entity without also the clarity of what constituted a public interest or a public benefit. It's less than clear that the landowners or the state of Nebraska particularly received a public benefit. So as areas go, that is a problem. In all the years I've been doing this, I have never ran into a bigger train wreck than the train wreck that I've gone through the last two years over the pipeline. And so I'm not exactly sure what caused the train wreck, but I know a train wreck when I see one. And so here's an area that does need clarification. We made some progress in the last session. We have much more clear use of when it is that eminent domain can be used. But I would urge the committee to continue to investigate that particular area in particular, because that's the area that has, to my memory and my experience, caused the most problem. Thank you. [LB1134]

SENATOR ASHFORD: Yeah, and it would seem to me, John, that for the...we all know we're in a...a month, a couple of months left to go in the session. If there's one thing that I gleaned from sitting in the special session and in here today, there's more testifiers, but it is this whole idea of whether or not somebody has the authority to exercise eminent domain when they make the offer. That seems to be a very specific thing that has created pain and suffering around the state. I don't need an answer to that. But that's what my sense of it is for like now. You know, we can't transform eminent domain in this short a period. But if somebody does and it goes around, and it's almost as if the exercising the authority without the...to be a police officer, for example, or... [LB1134]

JOHN HANSEN: Exactly. And that example, Mr. Chair, was used by one of my members who said, I thought it was against the law to impersonate a police officer or an officer of the court, but how come it's not against the law to impersonate somebody who has eminent domain authority? I thought it was a good observation. [LB1134]

SENATOR ASHFORD: Right. And mean I just...I don't know, I just...that's what I hear from people. But anyway, thanks, John. [LB1134]

JOHN HANSEN: And thank you and good luck. [LB1134]

SENATOR ASHFORD: Okay. Other proponents. Senator Larson has a question. [LB1134]

JOHN HANSEN: Oh, I'm sorry. [LB1134]

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SENATOR LARSON: It's fine, I can wait for somebody other than... [LB1134]

JOHN HANSEN: I'm sorry. [LB1134]

SENATOR ASHFORD: Go ahead, I mean, I'm sorry I didn't...I was focused on myself, Senator Larson, which is...go ahead. [LB1134]

SENATOR LARSON: It's okay, Chairman Ashford. And I, too, am concerned about protection of landowners. And I noticed in this bill, and I don't know if you've been through it. Have you been through it pretty well, Mr. Hansen? [LB1134]

JOHN HANSEN: For me, I've read it twice. [LB1134]

SENATOR LARSON: You read it twice. All right. [LB1134]

JOHN HANSEN: I'm not sure that that qualifies as good, but... [LB1134]

SENATOR LARSON: This changes the notification sent from registered or certified mail to first-class mail. Does that lessen the protection for property owners in terms of making sure they receive proper notice? I mean, I think in your mind does that lessen their protection? [LB1134]

JOHN HANSEN: Yes. [LB1134]

SENATOR LARSON: Okay. [LB1134]

JOHN HANSEN: Personally, I'm not comfortable with that. We do a lot of business in the mail and we've had too many mail failures. [LB1134]

SENATOR LARSON: So this essentially...I mean the bill does something, but it does...at some point it has a few issues with it that definitely needs to be solved. [LB1134]

JOHN HANSEN: Yes. In my opinion it just...there needs...the old standard is much more clear and better because there are first-class mail failures. [LB1134]

SENATOR LARSON: Thank you. [LB1134]

JOHN HANSEN: But thank you for the question. [LB1134]

SENATOR ASHFORD: Thanks, Senator Larson. Thanks, John. Next proponent. [LB1134]

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KEN WINSTON: Good afternoon, Chairman Ashford, members of the Judiciary Committee. For the record, my name is Ken Winston. The last name is spelled W-i-n-s-t-o-n, appearing on behalf of the Nebraska Sierra Club in support of LB1134. Two major concerns that we believe the bill addresses. First of all, we believe there needs to be a clear process for the use of eminent domain by entities that have such authority and that there needs to be more of a clear definition of who has that authority. And part of that definition is included in this bill by requiring that there be a public purpose for the use of the authority. And secondly, it prevents the use of threats of eminent domain by entities prior to obtaining the authority or if they lack the authority. And as Randy Thompson talked about, there were numerous threats of eminent domain. And it's unclear if you read 57-1101. I know that there was a colloquy during the special session about whether pipeline companies have the authority or not. And at that time, if you just look at 57-1101, on its face it would appear to grant a blanket authority for pipeline companies to exercise eminent domain without any further authority, and that could mean that any pipeline company anywhere could come to the state of Nebraska, whether they had a project, regardless of the state of their project, they could exercise eminent domain in the state of Nebraska. And we think that that needs to be clarified as well. So there's a number of issues here. Also concerned about the fact that the potential impact of when does the LB1 procedure begin? LB1 was passed during the special session. And now there's a question of whether there's an intent by TransCanada to have that particular provision not apply to their future actions in the state of Nebraska. And we think that at the bare minimum that the procedures that were passed by the Legislature during the special session ought to apply to all future projects as was evidenced by the unanimous vote of the body during the special session. So I'd be glad to answer questions if there are any. [LB1134]

SENATOR ASHFORD: I don't see any. Thanks, Ken. [LB1134]

KEN WINSTON: Thanks. [LB1134]

SENATOR ASHFORD: Next proponent. [LB1134]

BEN GOTSCHALL: Good afternoon and thank you. My name is Ben Gotschall, that's B-e-n G-o-t-s-c-h-a-l-l. I am here representing Bold Nebraska as their energy director. I'm also the District 5 and Lancaster County president of Nebraska Farmers Union, and I'm also representing my friends and family in Holt County, Nebraska, in the Sandhills. I'd like to thank Senator Avery for proposing this bill and also for visiting landowners in the Sandhills. I think that was a very good thing for him to do, and I would encourage all of you to come visit some time too. I am in support of this bill. Although I don't believe that foreign, for-profit private corporations should qualify as public utilities, because I think that sets kind of a complicated precedent, and other states are dealing with this also. For one, Kansas is kind of disputing TransCanada's common carrier status in their state, because as they define a common carrier that would have to pick up or drop off

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product in the state boundary. And they do not do that in Kansas and to my knowledge they don't do that in Nebraska either. I don't believe that corporations or entities should be allowed to threaten landowners with theoretical eminent domain authority. There's a big difference between notifying a landowner of possible authority that's conditional on a permit approval, and then there's another thing that's threatening the use of authority while imposing an arbitrary and artificial deadline, such as the 30-day deadline that was imposed on the previous testifier, Mr. Thompson, and others who are not here today. And the others that are not here today is another big reason why I am here today, because we've got a situation here where landowners have been afraid to fight for their rights. They've been afraid to stand up and speak their concerns. And I think that when we have a situation like that where citizens are crippled by fear, I think that we need to do something to help those people feel empowered under the law. Landowners who feel like they signed these easements under duress are afraid to tell their story because they fear retaliation and they fear the legal framework that they would be going through at that point. So in a lot of ways I hoped to give those people some voice here, because they feel like they can't be here today. They're scared. And I just don't think that that's right. Nebraska needs a legal framework that gives those citizens a clear and fair negotiating power. This can end up being less time-consuming actually and less costly because, you know, negotiations are less likely to break down and litigation is less likely to occur if you have a clear framework. And that's what, you know, this bill as I see it will do, is it will establish kind of a clear framework. And I think this is kind of timely, because just today a Texas judge issued a temporary restraining order on TransCanada because their common carrier status is in question in Texas. So if you have a pipeline-friendly state like Texas doing something like that, I think it's something that we need to pay attention to. And with that, I'll close and accept any questions. [LB1134]

SENATOR ASHFORD: Yes, Senator Larson. You both come from a very beautiful part of the state, so. [LB1134]

SENATOR LARSON: Thank you very much. And I, too, am concerned about the pipeline. But obviously this bill reaches far beyond Keystone and Keystone XL... [LB1134]

BEN GOTTSCHALL: Right. [LB1134]

SENATOR LARSON: ...and public entities. And as a...I had a grandfather that worked for the REA for 46 years in Niobrara Valley, which I'm guessing you're in the Niobrara Valley. [LB1134]

BEN GOTTSCHALL: Yeah. [LB1134]

SENATOR LARSON: And this...one of the concerns I have with this, in this bill a lot of the language it takes the process from acquisition, they change "acquisition" to

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"condemnation" or "condemned" a lot in this bill. And does that limit the ability of our actual property owners to negotiate with public entities through the language of the bill? Because it's going from acquisition...acquisition is the art of negotiation, and I'm familiar with how the REAs do it and NPPD and whatnot. With this bill are we actually taking power out of our landowners to negotiate and putting it more into a court setting, a condemnation process as the bill says? And I guess that's my question, in your opinion. [LB1134]

BEN GOTTSCHALL: Well, I...you know, yeah, there's a lot of back and forth over the context of the words used, the "acquisition" versus "condemnation." [LB1134]

SENATOR LARSON: And words mean a lot when we're writing statute. (Laugh) [LB1134]

BEN GOTTSCHALL: Right, exactly. And I'm not...I don't have as good of a legal background as I'm sure some of you on the committee here do. I would hesitate to comment on the effectiveness of specific language. But I think, you know, we need to do something so that landowners feel less threatened. And maybe it's not changing specific language but changing the process. And that's what I see as the biggest point here is... [LB1134]

SENATOR LARSON: You can understand my concern. [LB1134]

BEN GOTTSCHALL: Yeah. [LB1134]

SENATOR LARSON: I mean, because this bill does...it reaches far beyond the pipeline. It reaches into our public entities, it reaches into our REAs, which are building, you know, substations or they're building transmission lines for renewable energy projects. I mean, this reaches far beyond just what the pipeline is going to do. [LB1134]

BEN GOTTSCHALL: Right. And I just used the pipeline because it's kind of the talking point of the day, the hot topic. So I... [LB1134]

SENATOR LARSON: And I just wanted to make sure the language is done right and when we're working with a number of other projects other than the pipeline, such as windfarms near Bloomfield or Crofton, that are also coming into my district. [LB1134]

BEN GOTTSCHALL: Yes. As a former English teacher, I believe language is important also. (Laugh) [LB1134]

SENATOR LARSON: So I just wanted to see what your thoughts were, and I'm very concerned about that type of language in terms of working with our property owners in the future. [LB1134]

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SENATOR ASHFORD: Thanks. [LB1134]

BEN GOTSCHALL: Thank you. [LB1134]

SENATOR ASHFORD: Next proponent. [LB1134]

JANE KLEEB: (Exhibit 10) Hello. Thank you, Chairman Ashford. I just want to be actually just real brief. First, I do have an advocate that wasn't able to be here. I'll give this to committee; it's her statement for the record. There is a fundamental problem right now on eminent domain when it comes to private corporations. I think that there are two types of entities that require eminent domain sometimes. There's the public entities, like the very good NPPD and all the public power entities in our state versus private oil corporations, in particular this foreign private oil corporation, threatening landowners when they don't have eminent domain authority. All of us involved in this pipeline fight realize that eminent domain is at times necessary, whether it's for public or private projects. What we are not okay with is for a private company to tell landowners that they have 30 days, and when that 30 days is up, if they don't sign, they're taking them to court. TransCanada likes to brag that they have a 90-some percent success rate in our state. It's probably because, and we know for sure because we know those landowners and have been in their living rooms, that they signed because they thought they were going to be taken to court for eminent domain, and they didn't have the money for a lawyer to fight that. If you can't pass a law this session, we ask at the very minimum that we do an in-depth interim study to make sure that landowners have a level playing field when it comes to private entities. I don't think any of us fighting this pipeline want to limit what our public power districts are doing. We just want to make sure when private companies come in here and try to take land for their profit that there is a fair deal for landowners. [LB1134]

SENATOR ASHFORD: Yeah. I just...what we hear all the time here is words do have consequences. And though this is a deep, deep issue in many respects that go into issues beyond how the public is dealt with, but that go into the whole international law and who has authority to do what, which is an in-depth discussion, I grant you that. I am bothered and have been. We sat through the session in November. And what bothered me the most was not so much the...it was not the pipeline, that didn't bother me the most. What bothered me the most was how Nebraskans were in fear. And we get people coming in here every day that are in fear of some either governmental or someone acting under color of state law and puts them in fear. And we hear it all the time, every day. And you go home at the end of the day and say, why, why...these are great people, why are they in fear? And sometimes we can do something about it and sometimes it's harder to do something about it. But it is common sense and being able to deal with people fairly in this case and not presenting facts that were...I'm giving a little, because we all have our little...how we're touched by this, but making comments or

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making threats or whatever you want, just using words that put people in fear, and obviously they're going to put people in fear. You can't read this and not be fearful of your rights. It does belie common sense. And whether or not this company or any other company approached citizens in a more commonsense way and a kinder way, a more appropriate way, maybe they would have had 100 percent approval or whatever of the price. So I think all of us on this committee share, I'm sure I'm not speaking out of school here, share a deep caring for people who are in fear. And whether it's the poorest people in our society or those that are landowners and have some means, whatever it is, you know, our citizens should not be put in fear by anybody. And with that, thank you for your comments. [LB1134]

JANE KLEEB: Thank you. And perhaps an interim study would really let us look at some of the other problems like, for example, right now, since their pipeline permit was denied, all of these easements are still active. So TransCanada theoretically could sell them to another oil pipeline company. We've read the letters that landowners have gotten since then, and they're not allowed to build--unless they notify TransCanada--on that land, for a pipeline permit that's already been denied. I mean, that just doesn't seem right. So I think that there are some other then issues that this brings up. [LB1134]

SENATOR ASHFORD: No, there are clearly other issues. And that's why I was asking if there was anything specific, very small that could be done. [LB1134]

JANE KLEEB: Yeah. Right now, I do think that it's the notification process. If anything that could be done immediately it would be that. [LB1134]

SENATOR ASHFORD: Okay. Thank you. Any other questions? Yes, Senator. [LB1134]

SENATOR LARSON: Again, I just had a short discussion with Mr. Gotschall about my concerns in some of the language of the bill and whatnot. And first of all, I'd like to...you commented like especially the public utilities and TransCanada in general, God forbid I say this, they're not taking the land; it's an easement process. I mean it's still your land but they do have an easement on it. My biggest concern with this bill and as some of you who supported the special session and whatnot, but this goes far beyond Keystone XL. And as I said, I had a grandfather that worked for the REA and NPPD. And I'm just going to walk through this real quick. And you know, Bold, your group, supports renewable energy quite heavily if I understand right. And who builds the transmission lines, if you would humor me, for the most part? NPPD would build most of your transmission lines. [LB1134]

JANE KLEEB: Sure. [LB1134]

SENATOR LARSON: And my question is, what happens when, you know, a property owner on those transmission lines would say, no, and NPPD...I mean this process, and

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I see NPPD here, and Senator Avery said they had problems. So I'm assuming they feel it's a little onerous. I mean, this is going to cause a lot of, I mean for them... [LB1134]

JANE KLEEB: Um-hum. [LB1134]

SENATOR LARSON: ...this is going to be extremely concerning when it comes to, you know, the issues that you are passionate about. I mean this bill goes way beyond what the scope of...and can hurt your group's aims in the end as well. [LB1134]

JANE KLEEB: Senator Larson, if there are things with the bill that would prohibit us growing our energy base, American-made energy, energy that does not threaten the Ogallala aquifer, then we should make amendments to that bill. [LB1134]

SENATOR LARSON: And I think... [LB1134]

JANE KLEEB: It doesn't mean that therefore then the bill doesn't have merits, in particular the type of language that right now TransCanada can use threatening landowners when they don't have the authority to do so. [LB1134]

SENATOR LARSON: And I think the bill at this point does. And I just want everybody to understand that at this point that the bill would inhibit a lot of that. And that's a concern to me because, you know, they built new transmission lines in Bloomfield, like I said, for those projects. And NPPD... [LB1134]

JANE KLEEB: Um-hum. Or in Broken Bow right now. [LB1134]

SENATOR LARSON: ...or Broken Bow right now or Crofton in the future. And under this bill, if it were to pass, we could have essentially a few landowners stopping those entire renewable energy projects. [LB1134]

JANE KLEEB: I think we're all in agreement that that's not, you know, good for Nebraska's energy future. But what is good for Nebraska's energy future is making sure that landowners aren't threatened by a foreign oil corporation when they don't have eminent domain authority. [LB1134]

SENATOR LARSON: And I can understand that. And maybe that's something, you know, we look towards in the future. I'm just...and you can understand my concerns with this bill, especially as drafted. Honestly, I've gotten a lot of e-mails from constituents that they support it. And I understand why. I understand the intent behind it. But the bill has some fundamental flaws within it that can inhibit, you know, renewable energy growth as well as the pipeline. And to me that's a deep concern as I see renewable energy growing in my district. [LB1134]

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JANE KLEEB: Um-hum. [LB1134]

SENATOR LARSON: And I hope you would recognize that as well that this bill does have those flaws in it, and it needs a lot of work. [LB1134]

JANE KLEEB: And I hope that you then amend the bill to address those issues (laugh) and give money to build the transmission lines, which is what I think NPPD would say too. [LB1134]

SENATOR ASHFORD: Thanks, Jane, very much. [LB1134]

JANE KLEEB: Thanks. [LB1134]

SENATOR ASHFORD: Next proponent. How many more proponents do we have? Why don't we come up front, proponents can come up at the front of the... [LB1134]

JACK GOULD: Senator Ashford, my name is Jack Gould, G-o-u-l-d. And I'm here representing Common Cause Nebraska. I had some written testimony, but I'm going to pass that quickly. I just am reminded in the discussion that's been going on about the social contract that John Locke wrote about, and it affected the Founding Fathers. And it seems that, you know, we're born into this society and we surrender all of our rights to our government or to society, and then it's society's responsibility to give back to us the freedom to the point where we would hurt someone else. And that's a logical contract between people. When we come to the question of eminent domain, that is one of the rights that the government retains. And at that point the contract still remains simple. If a dam needs to be built to protect the town, we have to take the land. People can understand that. But when you throw in a third party, and in the case of building a pipeline or anything else, you're entering into a third party which a corporation. And despite the Citizens United decision, corporations are not people. And at that point, it becomes foggy. It becomes foggy to the other members of the contract. And so I think what Senator Avery is trying to do, and Common Cause supports him in this effort, is to simply clarify what this all means to the people, the other members of the contract. And I think any time that a third party is allowed to use any kind of a threat to intimidate a citizen, he's also intimidating the government. And so the public has a right to expect that contract to be upheld and to be upheld clearly and explained clearly. Thank you. [LB1134]

SENATOR ASHFORD: Thanks, Jack. That was good comments. Next proponent. [LB1134]

LINDA DUCKWORTH: Good afternoon and thank you. I'm Linda Duckworth, L-i-n-d-a D-u-c-k-w-o-r-t-h. I'm president of the League of Women Voters of Nebraska. And I can be very quick because other people have spoken well. But, Senator Ashford, you

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mentioned the word "fear." And I feel like maybe we do have a little bit of time with this to improve the bill. Because there has been so much fear and there have been so many experiences and there is so much information out there about this, I think that a lot of landowners, most landowners now know that if they receive a letter like this, and I'm talking about in the next couple of years, I'm not saying we have, you know, 20 years to do this, but I think they will know to contact their elected representatives, their senators, their whoever. And so I think that that's actually not a terrible thing that at this point we are more aware of that. One thing I've noticed over the years is that laws become laws because of people behaving badly. And I believe that's what happened here, that there was really not a problem with our eminent domain laws. They may have been deficient, but all of a sudden we realized how deficient they were I think because of somebody, I won't name names, but somebody behaving badly. And so the League of Women Voters of Nebraska says, please do something about this. If you don't pass it this year, if you don't take care of it this year, as a previous testifier said, please look into an interim study. Thank you. [LB1134]

SENATOR ASHFORD: Thanks, Linda. Thanks for your comments and thanks for spending the day with us. Next proponent. [LB1134]

JEAN LEWIS: My name is Jean Lewis and I represent myself. I'll be brief in support of LB1134. I've always thought that eminent domain was available only to government entities to be used for the common good, and I think that most people would think this is the purpose. Eminent domain should be only to take land for things like post offices, schools, and the like. Corporations, like TransCanada, are profit-driven, not motivated by the public good. I don't know how a foreign corporation got a government--not a government entity--got the power of eminent domain, but I think it is wrong. Please be fair to all residents of Nebraska and take this power away from nongovernment entities. Thank you. [LB1134]

SENATOR ASHFORD: Thanks, Jean, very much. Next proponent. Okay, let's go to those who are opposed. If you want to...you're ready to go. How many opponents do we have? [LB1134]

STEVE GRASZ: (Exhibit 11) Chairman Ashford and members of the committee, my name is Steve Grasz, S-t-e-v-e G-r-a-s-z. I'm an attorney with Husch Blackwell, and our firm serves as government affairs counsel to the Papio-Missouri River Natural Resources District. Natural resources districts have authority to acquire land by the exercise of eminent domain under certain limited circumstances, and they are expressly subject to the provisions of LB1134. The Papio NRD is concerned the provision of this bill would interfere with the voluntary negotiation and sale of property and could actually harm property owners' interests while making acquisitions for public use projects more expensive and contentious. Current law requires agencies to give notice to affected landowners and to hold a public hearing prior to even beginning negotiations with

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landowners regarding the purchase of project right of way. The purpose of the public hearing is to inform landowners of their procedural rights prior to commencement of right-of-way negotiations. As Senator Larson pointed out, LB1134 would change this process to institute a belated public hearing prior to condemnation rather than negotiation. This has the potential to encourage last-minute opposition to projects after the agency has already expended significant resources. Another provision of LB1134, which was discussed somewhat earlier, is that it makes it a criminal offense for anyone in a government agency, including a natural resources district, to tell a property owner that the agency has authority to use eminent domain to condemn a parcel of real estate unless the governing authority has first voted to approve the use of eminent domain regarding the specific parcel. We believe that existing law already provides severe consequences for anyone who fails to negotiate in good faith with a landowner, including voiding the condemnation and also attorney's fees. The Papio-Missouri River NRD is committed to protecting property owners and to providing a reasonable and workable process when, as a last resort, eminent domain is considered. However, LB1134 is not a helpful or reasonable addition to this process. [LB1134]

SENATOR ASHFORD: Thanks, Steve. I think maybe the problem here is that had that...some...any of those things happened that you do in this case we might not have all this concern. [LB1134]

STEVE GRASZ: And I do get the feeling that perhaps if there is an interim study perhaps there could be a separation between the existing governmental entities and the rules it might apply to, for example, a pipeline. [LB1134]

SENATOR ASHFORD: Right, because I don't...I think, I mean, no one, I don't think, has suggested that what you guys do is outside the normal and appropriate course, so. But I know you're talking about the bill. So I appreciate that comment. [LB1134]

STEVE GRASZ: (Exhibit 12) Yes. Mr. Chairman, I also have a letter here from the Nebraska Association of Resources Districts which I would like to also submit for the record. [LB1134]

SENATOR ASHFORD: Okay. Thank you. Next opponent. [LB1134]

HEATHER TIPPEY PIERCE: (Exhibit 13) Good afternoon. My name is Heather Tippey Pierce, Heather, H-e-a-t-h-e-r, Tippey, T-i-p-p-e-y, Pierce, P-i-e-r-c-e. I'm here with my colleague, Tim Phelan, T-i-m P-h-e-l-a-n, and we are representing the city of Omaha Public Works Department. I want to stipulate to what our previous testimony with Papio NRD as to municipalities and our good faith efforts with negotiation, condemnation being less than 1 percent of our right-of-way actions. But one thing I do want to call out to your attention today is regarding the additional process that's created by this bill. It creates a situation where municipalities in undertaking public projects actually have a

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less flexible and longer system. Right now, our design process and our right-of-way acquisition process work in tandem with each other and can be responsive to each other. If the state statutes changes that go through here as written, that process is elongated and is in direct conflict with the review and approval process of the Federal Highway Administration. And that could result in the loss of millions of dollars in federal funds for our transportation projects. Those are certainly of concern. I do have a written statement detailing all of our concerns with this bill that I'd like to enter into the record. And we certainly are available for any questions. [LB1134]

SENATOR ASHFORD: Thanks, Heather. Yes, Senator Council. [LB1134]

HEATHER TIPPEY PIERCE: Um-hum. [LB1134]

SENATOR COUNCIL: Yes, thank you. The federal highway process,... [LB1134]

HEATHER TIPPEY PIERCE: Yes. [LB1134]

SENATOR COUNCIL: ...when you say the language in the bill runs counter to that... [LB1134]

HEATHER TIPPEY PIERCE: Yes. [LB1134]

SENATOR COUNCIL: And is that because the design phase has to occur at a certain point in time before the federal funding can be applied for? I mean, how does...what's the... [LB1134]

HEATHER TIPPEY PIERCE: Sure. There are several points in this that run in opposition to the federal highway process, one being that in this language the design phase has to be concluded. We have to have 100 percent plans before we can even take and assess the ordinance authorizing eminent domain specifically to counsel. [LB1134]

SENATOR COUNCIL: Okay, okay. [LB1134]

HEATHER TIPPEY PIERCE: That puts us into a loop because the Federal Highway Administration requires us to finish right of way before we can finalize plans. It also stipulates an 18-month time line from that eminent domain approval to construction start, which is pretty difficult for the majority of complex processes that we undertake. But right now the federal highway process is at minimum 27 months, so that's another problematic area. [LB1134]

SENATOR COUNCIL: Thank you. [LB1134]

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HEATHER TIPPEY PIERCE: Um-hum. [LB1134]

SENATOR ASHFORD: Thanks for your comments, Heather. [LB1134]

HEATHER TIPPEY PIERCE: You bet. [LB1134]

SENATOR ASHFORD: Next opponent. [LB1134]

JOHN McCLURE: Good afternoon, Chairman Ashford, members of the committee. My name is John McClure. I'm vice president and general counsel with Nebraska Public Power District. I'm here today on behalf of the Nebraska Power Association, which is a voluntary association of Nebraska's consumer-owned utilities, in opposition to this bill. Having heard the discussion today, I think it's fair to say that this legislation has some sweeping impacts. But the concern that really brought it is a much narrower concern. If you look at the public entities in the state that have the right to exercise eminent domain, I think you would generally find that we use that as a last resort. We want to achieve voluntary acquisition. We also, prior to getting to that stage, operate in a glass house in terms of budgets and projects. And so the public is well aware of initiatives that we have. As drafted, and we have expressed our concerns to Senator Avery, we think that the legislation in its current form is fundamentally flawed. And I'm encouraged to hear that there is interest in looking at an interim study in maybe these areas of more specific concern. And one of the fundamental issues that I would bring to your attention, Section 25-2501 et seq., which is this uniform procedure for acquiring private property for public use, is really a great statute. It was put in place in '73. And unfortunately, this bill substitutes the word "condemnation" every time it talks about "acquisition," and destroys a very good notice process that goes out to the public before a public entity can start acquiring property, whether it's voluntary or through condemnation. And we're really concerned that this legislation would destroy that. I would also point out there are some phrases in here, Senator Harr mentioned Section 7, that we have great difficulty really understanding how they work. I know the bill was put in to clarify. But we're actually confused, as a number of lawyers in our industry have spoken to it, about it. Also, just for your interest, there are a couple of Nebraska Supreme Court cases. There was question earlier, can you wait ten years? And I'd be happy to bring this citations to the committee. But the Nebraska Supreme Court has said you cannot condemn on a speculative basis, you can only take the minimal interest you need; you can't take fee if an easement will do. You can't take 320 acres if you only need 140, and you can't speculate that I might need this in the future. So the only way to buy something for a future purpose is an arm's-length voluntary acquisition. And with that, I'd be happy to attempt to answer any questions. [LB1134]

SENATOR ASHFORD: My guess is this letter would not have gone out from NPPD... [LB1134]

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JOHN McCLURE: I've not read the letter. [LB1134]

SENATOR ASHFORD: Well, the TransCanada letter that everybody got. [LB1134]

JOHN McCLURE: I'm not familiar with it. We go through months and sometimes years of... [LB1134]

SENATOR ASHFORD: No, I know. I'm not asking. That's not a trap question. I am confident that our public agencies in Nebraska, as like yours, would never...(laugh). [LB1134]

JOHN McCLURE: Prior to the required announcements, we have put in place, and I know a number of other public entities have, a voluntary process of going out and talking to citizens about here's a project, we'd like your input, because we have found that dialogue is critical. And if we're trying to site a 75-mile transmission line, we need to gather an extensive amount of information before we can effectively place that and minimize impacts. [LB1134]

SENATOR ASHFORD: And we're a community in Nebraska where we know, we live in the same towns (laugh)... [LB1134]

JOHN McCLURE: Sure, right. [LB1134]

SENATOR ASHFORD: ...and we don't treat people that way. So anyway, thank you. Gary, do you wish to speak here? [LB1134]

GARY KRUMLAND: Thank you. Senator Ashford, members of the committee, my name is Gary Krumland, G-a-r-y K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities, appearing in opposition to LB1134. I won't repeat what everybody has said. There was just two specific things I wanted to mention about the bill, kind of to follow up to Mr. McClure. The changing in Section 2, Section 25-2501, from "acquiring" to "condemnation" creates some question about the status of some procedures. And, for example, there is an exception to the "acquiring" statutes so that if a city or county approves a subdivision and accepts the dedicated streets, you don't have to go through the whole process since it's basically a gift. That language is completely eliminated, and so the question is, what is the status of all that? And I think that needs to be clarified. The other thing is I know there's been some question or some talk about Section 9, which is the claimant has the authority to exercise eminent domain prior to the approval of the project. I think the language in the bill raises questions, and I'll give you an example. The city of York recently went through a street widening project that included some water service. They had to buy some additional right of way. In order to get the federal funds, the grant requirement said that you had to hold a public meeting and at the public meeting you had to explain the acquisition process, had to explain that

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eminent domain is possible, and explain that whole process and that it could be used. And then they had to hire an appraiser to go to each individual property owner on site and explain the process and so they were aware of what it would be. The language in Section 9 may have prevented them from doing that. And this was required to be done prior to the approval of the grant. So there's just some language I think that needs to be clarified and worked together, but I'd be happy to work with the committee. [LB1134]

SENATOR ASHFORD: Thanks, Gary. Thanks for your comments. Next opponent. Neutral? [LB1134]

BILL BLAKE: (Exhibits 14 and 15) Members of the Judiciary Committee, my name is Bill Blake. I'm an attorney, Baylor Evnen law firm, 1248 O Street, here in Lincoln. I am appearing today on behalf of the Nebraska State Bar Association. The bar association is truly neutral as to the merits of this bill, but the bar opposes LB1134 as drafted. This does not...again, does not go to the merits of the legislation. The bar does not take a position on whether the eminent domain procedures in Nebraska should be amended to solve newly recognized problems or to create improved procedures for future projects involving the acquisition of private property through the power to condemn. The NSBA is interested in the administration of justice. I have provided the committee copies of my biography from my firm's Web site only for the purpose of indicating my background and my qualifications to speak to you with knowledge regarding eminent domain. I have practiced extensively in this area for over 35 years, representing hundreds of property owners, as well as condemning authorities. And I am the editor of the recently completed compendium of The Law of Eminent Domain in the 50 states for the litigation section of the American Bar Association. It's a mouthful to say that publication. I'm also the author of the Nebraska chapter of that compendium. I've been active for a long time in several national organizations devoted to this practice area. We have a system for eminent domain or condemnation proceedings in this state. That system is somewhat rare. It's a fairly uniform system for all types of public projects and for all condemning authorities. Condemnation is dealt with primarily in two articles of the Nebraska Revised Statutes. The uniform procedures for public notification and hearings for proposed projects under the threat of condemnation are set forth in Chapter 25, Article 25. The statutes governing the condemnation proceeding itself are at Chapter 76, Article 7. In many states, each type of project has its own requirements, and each type of public agency may have its own set of condemnation procedures. It sometimes ends up to be a confusing mess requiring costly and time-consuming litigation to determine what law applies and how conflicting laws should be interpreted. Our eminent domain system is not perfect, and as problems are encountered or new areas of public need arise, the system needs to be amended. However, we do not have the difficulties faced in states that have answered the problems with piecemeal legislation. LB1134 would replace the early warning system currently found in the uniform procedures for notice and hearings prior to deciding whether to acquire property through the power of eminent domain with a new procedure for notice and hearing before actually filing the condemnation

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proceeding against the property owner. It calls... [LB1134]

SENATOR ASHFORD: Bill, I'm going to ask you to...I'm sorry, we're going to ask you to sum up. We have your comments. [LB1134]

BILL BLAKE: Okay. The procedures... [LB1134]

SENATOR ASHFORD: I guess the point is you can provide us with that, which is good, you can provide us with expertise. As we look at this potentially this summer,... [LB1134]

BILL BLAKE: Yes. [LB1134]

SENATOR ASHFORD: ...you can help us chart through this. And maybe there are remedies that would address some of the concerns of landowners in Nebraska and still be consistent with the current law. [LB1134]

BILL BLAKE: The consideration of the bar association is simply that if this is sent to the Legislature on General File for consideration, we just ask that it be amended to better fit within the existing statutory framework. [LB1134]

SENATOR ASHFORD: Right. And that there are opportunities possibly to do that, and the bar would be willing to work with us. [LB1134]

BILL BLAKE: I have to assume so. I certainly would be willing to work with you. [LB1134]

SENATOR ASHFORD: My guess is they would, but anyway...Katie is nodding yes back there. So thanks, Bill, very much. Thank you. [LB1134]

BILL BLAKE: Okay, thank you. [LB1134]

SENATOR ASHFORD: Yes. John. [LB1134]

JOHN LINDSAY: Senator Ashford, I apologize. You switched to neutral before I could get up in opposition. With your permission, could I testify in opposition? [LB1134]

SENATOR ASHFORD: No. (Laughter) [LB1134]

SENATOR HARR: We've already heard from your brother. [LB1134]

SENATOR ASHFORD: You've already heard...yeah. No, that's fine or you could submit it in writing, or... (Laughter) [LB1134]

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JOHN LINDSAY: Thank you. That would take more of your time than the quick...my name is John Lindsay, L-i-n-d-s-a-y, appearing as registered lobbyist on behalf of the Nebraska Natural Gas Association. The Nebraska Natural Gas Association consists of Black Hills Energy, NorthWestern Energy, and Source Gas, which are basically the investor-owned natural gas utilities serving most of the state. The NNGA opposes the bill. We work very closely with our communities and the people in our communities. We deal with our communities on franchise legislation, on consumer complaints. They can get involved in our rate cases, etcetera. So we have to maintain and do maintain a good relationship with the communities, and we value those relationships. Eminent domain is a necessary tool used by utilities to promote the orderly development of our facilities within our service areas, but we resort to eminent domain only as a last resort. All other alternatives are explored prior to using eminent domain. In fact, two of our three members have not exercised eminent domain in at least the past three decades. So it is a rarely used event, but when necessary, it should be in a manner that can be used efficiently. We would urge...and we would be happy to participate in the interim study process, Senator Ashford, if that's the direction this takes. [LB1134]

SENATOR ASHFORD: Thanks, John. Bill, let me think. [LB1134]

BILL MUELLER: Mr. Chairman, members of the committee,... [LB1134]

SENATOR ASHFORD: Are you in neutral? [LB1134]

SENATOR LATHROP: Are you here in a neutral capacity? [LB1134]

BILL MUELLER: I'm neutral, I'm neutral. [LB1134]

SENATOR ASHFORD: All right, who are you neutral for? [LB1134]

SENATOR LATHROP: Somebody besides the bar association that already testified? [LB1134]

BILL MUELLER: They already testified. [LB1134]

SENATOR LATHROP: I know. [LB1134]

BILL MUELLER: We had an expert here. Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Eastern Nebraska Development Council. The Eastern Nebraska Development Council are builders and developers in the metro area. These are the folks who develop SIDs. And believe it or not, SIDs are affected in this bill, too, specifically on page 3, lines 2-5. The exemption for SIDs to go through the notice, the public notice period, is being removed from the bill. Currently, SIDs do not have to

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comply with the public notice if they're acquiring easements for proposed projects involving ten or fewer owned tracts. And again, SIDs need to get easements to get sanitary sewer outfall lines. So we would ask that this exemption be put back in. We still have to pay just compensation. It's just we don't have to give the 45 days' notice to the public. We can go to the affected landowners and negotiate with them for the easements. So as the committee looks at this, please remember that the SIDs are affected by this law. Be happy to answer questions you may have. [LB1134]

SENATOR ASHFORD: Seeing none, thanks, Bill. [LB1134]

BILL MUELLER: Thank you. [LB1134]

SENATOR ASHFORD: (See also Exhibit 7) Any other neutral, neutral-only testimony? Seeing none, Senator Avery is waiving closing. Thank you all. [LB1134]