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Natural Resources Committee  
February 10, 2016

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[LB1038 CONFIRMATION]

The Committee on Natural Resources met at 1:30 p.m. on Wednesday, February 10, 2016, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1038 and gubernatorial appointments. Senators present: Ken Schilz, Chairperson; Curt Friesen, Vice Chairperson; Dan Hughes; Jerry Johnson; Rick Kolowski; Brett Lindstrom; John McCollister; and David Schnoor. Senators absent: None.

SENATOR SCHILZ: (Microphone malfunction)...Chair of the committee. I represent District 47, from Ogallala. We have many of the committee members with us today. I see we've got Senator Kolowski and Senator McCollister out there probably introducing bills in other committees. And so...but at this time, I'd like the rest of the committee members to go ahead and introduce themselves, starting with Senator Schnoor.

SENATOR SCHNOOR: Senator Dave Schnoor. I represent District 15, which is Dodge County.

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

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

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

SENATOR HUGHES: Dan Hughes, District 44, ten counties, southwest Nebraska from east to west today, Gosper, Harlan, Furnas, Red Willow, Frontier, Hitchcock, Hayes, Dundy, Chase, and Perkins.

SENATOR SCHILZ: Thank you, Senator Hughes, for our daily geography lesson. (Laughter)

SENATOR HUGHES: Geography lesson.

SENATOR SCHILZ: That's right.

SENATOR HUGHES: You're welcome.

SENATOR SCHILZ: Appreciate it. We also have with us today, Barb Koehlmoos, who is the committee clerk, and Laurie Lage, who is the legal counsel for the Natural Resources

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Committee. We also have a page with us today is Jake Kawamoto. He's a junior, I believe, from UNL and so we're happy to have him today. Today we have two things on the agenda. Confirmation hearing for Hilary Maricle for the Environmental Quality Council, as well as the hearing on LB1038 from Senator Davis. And so, if you're planning on testifying, please pick up a green sheet that's at the tables in the back of the room. If you do not wish to testify, but would like your name entered into the official record as being present at the hearing, there's a form on the table that you can sign, and this will then become part of the official record. Please fill out the sign-in sheet before you testify. Please print, and it's important to complete the form in its entirety. And when it's your turn to testify, give the sign-in sheet to the committee clerk and this will help us make a more accurate public record. If you do not wish to testify, you may also submit comments in writing and have those read into the official record. If you have handouts for the committee, please make sure you have 12 copies for the pages and hand them to them when you come up to testify and they'll hand them out. When you do testify, please speak clearly into the microphone, tell us your name, spell your first and last name even if it's an easy one because we need that for the record as well. Please turn off all your cell phones to silent. And if you do need to take a call or have any other conversation, we would like it if you would please take that out into the hallway. We've got probably quite a few folks to testify today and we want to make sure we give them the respect they deserve while they're testifying by not interrupting them. We don't allow any displays of support or opposition to a bill, vocal, or otherwise. So we need to make sure that we, once again, treat all the testifiers with the respect that they deserve so the senators can hear what their concerns are. We will use the light system today. We'll have five minutes on it, so you'll get four with the green light, one with the yellow light, and then when the red light comes on, we need you to wrap up your comments and keep moving. And remember with the number of folks testifying, if you've got testimony that you need to come up and give, but a lot of folks have said a lot of the same things that you're going to, try to...you know, try to just bring up the new stuff. You can tell us, hey, I agree with this, I agree with that, but let's not...let's not continue to repeat testimony as we move forward. One thing I'd like to know. Could we see just by a show of hands proponents for LB1038? Okay. Thank you. And opponents for LB1038? Okay. And then do we have any neutral testimony today? Okay. I think that what we will do for the sake of time here, we've got some folks that are on tight schedules, so I'm going to do the proponents. And once we hit an hour, then we will change to opponents. And then after that, we'll see where we're at and we may move to the limited neutral testimony, and then we'll go back around and we'll finish up if there's any other proponents or opponents as we get there. So hopefully, hopefully, from what I saw with the hands and everything, we may have an opportunity to get through it without having to go back through, so that would be my goal if we can. If not, we'll be here until the hearing is over. So, appreciate that. And with that, I would invite Ms. Maricle up to come and find the testifier's table and we will get started on the confirmation hearing. And I hope I did pronounce your name right. [CONFIRMATION]

HILARY MARICLE: You're close enough. [CONFIRMATION]

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SENATOR SCHILZ: Okay. Thank you. Well, maybe you could pronounce it and then spell it for us. And then if you would, just give us a little bit of your background, why you're interested in the Environmental Quality Council and what you see as important moving forward as your participation in that. [CONFIRMATION]

HILARY MARICLE: (Exhibit 1) All right. My name is Hilary Maricle, H-i-l-a-r-y M-a-r-i-c-l-e. And good afternoon, Senator Schilz and senators of the Natural Resources Committee. Thank you for the opportunity to stand here before you and to be considered to serve Nebraska as a member of the Environmental Quality Council. It would be an honor and a challenge to work with and learn from the current membership as well as Director Jim Macy. As a Boone County Commissioner, a farmer and a mom, I feel strongly that the work of protecting our environment while at the same time balancing the needs of many different industries, including agriculture in Nebraska, is an essential and challenging role. In my current position as the Boone County Commissioner, it's amazing to me the regulations and the paperwork that go into ensuring that our county and communities are doing their part to protect the environment. From building roads and repairing bridges to ensuring a safe drinking water supply, we know what steps need to be taken to ensure that the environment is considered in any decision. It is only through cooperation with the communities, cities, counties, our state as well as our national government, that we are able to make progress into the future. I've been impressed by how hard the Environmental Quality Council and the Nebraska Department of Environmental Quality work to balance all of these needs as well as considering the individual needs of citizens and businesses. Having grown up here and now raising my children here in Nebraska, my first goal is to ensure that their generation has the ability to enjoy this lifestyle and to earn a living in our great state. My husband, Brian, and I have five children. They're ranging from first-graders to a freshman in college and they do a pretty darn good job of reminding us what really, really matters in life. We're sixth generation farmers and ranchers in Nebraska. We live near Albion and we're blessed to work with Brian's family on the family farm. Our farm has evolved over the years, but it's always been a farm that's really looked at what's best for the future and that includes the environment, from windbreaks to grass waterways, to working and installing pipelines for better grazing management in our pastures. Our decisions are made carefully and with the environment in mind. My background is food and education. I grew up in my parents' grocery store and on my grandparents' farm. It gave me a love for the entire farm to fork process, which is really what Nebraska runs on. I carried that passion to college at the University of Nebraska at Lincoln where I found the opportunity to share my passion for agriculture with others through formal and informal education. As an undergraduate, I was able to blend these interests and earned degrees in animal science and ag leadership education and communication. As a graduate student, I had the honor to work with both of those same departments on a USDA grant as I worked towards earning my master's degree in leadership education. Following graduation, I spent time as an ag educator at the junior high and senior high level before moving into postsecondary education. Working with students at Northeast Community College as an agribusiness instructor and later as

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the associate dean of agriculture, math and science allowed me to work closely with young leaders who are making a difference in their communities and their careers. Nothing is more exciting than seeing a young person reach their goals. I spent time serving my community and state in volunteer roles such as being a 4-H leader, a youth coach, being active in my church. Additionally, I've been very active in agriculture. I'm currently a LEAD 34 Fellow and I have had the opportunity to serve in many roles on the state and national level. It's through this involvement that I was introduced to the world of government and policy and I determined that being a county commissioner would help me be a part of making a difference in our future. Thus, I moved into public service and I'm really proud to be able to represent my county and I'm excited for the opportunity to serve on a state level. And I appreciate your support of my nomination for the Environmental Quality Council. Thank you for the opportunity to share some about myself and why I'd like to serve on the Environmental Quality Council. And I would be glad to answer any questions. [CONFIRMATION]

SENATOR SCHILZ: Thank you very much. Any questions? I guess...I guess...is this a first time appointment or is this a reappointment? [CONFIRMATION]

HILARY MARICLE: First time. [CONFIRMATION]

SENATOR SCHILZ: And I take it you've been to some of the meetings already.  
[CONFIRMATION]

HILARY MARICLE: Yeah, I've been to the first public hearing and definitely was eye-opening as well as very interesting to learn and hear different testimony from the people that the issues are affecting. [CONFIRMATION]

SENATOR SCHILZ: Sure. And as you move into this role, what do you think, obviously, obviously, your ag background and things like that, you're a strong component, but what do you think are going to be your strongest areas of influence and, or your strongest opportunities to serve on this? [CONFIRMATION]

HILARY MARICLE: Yeah. I think my strongest opportunities are to be able to learn and listen, initially, absolutely, but I definitely think that I have some background and the ability to get people to work together and to come to a resolution that works well for everyone. I know some of the issues will be strong proponents and opponents and I really think through my education and leadership background, that will help me, hopefully, help to find that happy medium that best fits everyone. I definitely have a lot of interest in water, less background in air issues, so definitely the water issues are something that I'm interested in. I'm interested to hear today what people have to say. [CONFIRMATION]

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SENATOR SCHILZ: Very good. Thank you. Any other questions? Seeing none, thank you very much for your testimony today. [CONFIRMATION]

HILARY MARICLE: Thank you. [CONFIRMATION]

SENATOR SCHILZ: (Exhibit 2) Do we have any proponents for Ms. Maricle? We do have a letter of support from Larry Dix with NACO. Do we have any proponents? Seeing none, do we have any opponents? Seeing none, do we have any neutral testimony? Seeing none, and with that, that will end the confirmation hearing for Ms. Maricle. And we will move on now to LB1038, and I see that Senator Davis is here and we will turn it over to him to open up on LB1038. Welcome, Senator Davis. [CONFIRMATION]

SENATOR DAVIS: Thank you, Senator Schilz and members of the Natural Resources Committee. I am Senator Al Davis, A-I D-a-v-i-s, and I represent the 43rd Legislative District. I'm here today to introduce you to LB1038 and ask you to advance it from committee. LB1038 is a complex bill and today you will hear from experts representing all sides of the vision embraced by LB1038. LB1038 addresses allowing the owner of a hydroelectric facility with a water appropriation for the manufacture of power to willingly transfer the ownership of the water appropriation jointly to the Nebraska Game and Parks Commission and the Niobrara River Basin Alliance, a coalition of five NRDs with Niobrara River drainage. We are talking about NPPD and the decommissioning of the Spencer Dam and the transfer of the ownership of one water right to the partnership between the Niobrara River Basin and the Alliance and the Nebraska Game and Parks Commission. The use of the water appropriation would change from manufacturing to maintaining a stream flow for the conservation of fish, wildlife, and recreation below the dam. There is an intent also to develop an integrated management plan for ground and surface water through the basin. Thank you to Senator Schilz, Laurie Lage, the board members and staffs from the NRDs, the Nebraska Game and Parks Commission, Department of Natural Resources, the Office of the Attorney General, NPPD, Surface Water Irrigators Association, and multiple individuals who have contributed to making the bill a better bill. Thanks to all of them for the effort put into trying to resolve concerns brought by each of the parties in interpreting this new application of water law for Nebraska. I am certain that I probably included...not included everyone who participated in these discussions, but because they aren't mentioned only means that I forgot to include them. Innumerable meetings have been held to address concerns brought by various parties about the long-term ramifications of the bill, the latest being an evening meeting yesterday between representatives of all of these entities. The Niobrara River is a unique river entering Nebraska as an ordinary, modest trickle of water, adding water with every mile as it moves to the east and merges with the Missouri River east of the Spencer Dam. Unlike other rivers which originate out of state, the Niobrara continues to add volume as it crosses Nebraska. The river drains large parts of the Sandhills portions of South Dakota and Wyoming with tributaries like the Snake River and the Keya Paha River. The Niobrara Basin is quite large,

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running south of Highway 2 through portions of Sheridan County and across northwest and north center Nebraska. Two irrigation projects exist on the Niobrara or its tributaries with a dam on the Upper Niobrara in Box Butte County which benefits an irrigation district south of Hay Springs called Mirage Flats and the Ainsworth Irrigation District whose dam sits south and west of Valentine on the Snake River. The Mirage Flats project was built in the 1940s and the Ainsworth project came on line in the 1960s. There are also other surface water irrigators who pump directly from the river. Approximately 70 percent of the water moving through the Niobrara is through seepage from the High Plains Aquifer. The Nebraska Sandhills are particularly good at soaking up rainfall and there is little runoff and water seeps into the ground quickly, replenishing the aquifer and providing a fairly constant flow of water in the Niobrara and Sandhills rivers and streams. Water law is quite technical and complicated. There are tiers of water usage with domestic water taking preference over agriculture, which again takes precedence over manufacturing. And the water rights granted first take precedence over subsequent water rights. Junior water users must shut off their water consumption ahead of senior water users and all users are subject to the tiers of consumption, so a domestic water user will always be able to shut off water users in the other two categories once the need is demonstrated. There are consumptive and nonconsumptive uses also which impact how water is allocated. Under current law, when a water right ceases to be used, it loses its preference in time. LB1038 is the result of an extensive period of negotiation between the Niobrara River Alliance, Game and Parks Commission, and NPPD. In return for consideration, NPPD is selling the Spencer Dam to the Alliance and will cease production of power at Spencer. The lynchpin of this agreement, and why we are here, is to address the need to retain the seniority right and priority right of the industrial use at Spencer for the purposes of this agreement. This will provide the instream flow necessary for fish and wildlife below Spencer which benefits all Nebraskans. The bill also demonstrates to the federal government that Nebraska is being proactive in protecting the river, a real concern by all landowners in the basin who have seen the heavy hand with the federal government in water projects elsewhere and on the Niobrara itself. LB1038 represents what we do best as Nebraskans, and that is our working together to identify opportunity and resolving the unintended consequences of acting on an opportunity. We have worked through many issues up to today. I believe there is a real commitment to work through remaining problems and I believe today you'll witness that commitment. If you have any questions, I'll be happy to answer them, but let me assure you, the experts are all behind me. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Senator Davis. Any questions for Senator Davis? Seeing none, thank you very much for your opening. Will you be around for closing? [LB1038]

SENATOR DAVIS: I will. [LB1038]

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SENATOR SCHILZ: Very good. At this point, we would ask proponents to LB1038. Good afternoon. [LB1038]

DON BLANKENAU: Good afternoon, Mr. Chairman, members of the committee. My name is Don Blankenau. I'm a lawyer in Lincoln and I represent the Niobrara River Basin Alliance. My first name is spelled D-o-n, my last name is spelled B-l-a-n-k-e-n-a-u. My testimony here this afternoon will be relatively brief. I want to focus on the history of events that led to why this bill is now before you this afternoon. And very simply, it really starts in 2007 when NPPD, the owner of the Spencer hydro facility which is located on the Niobrara River, decided to call for water administration for a handful of water appropriations it has at that location. These appropriations allow NPPD to run water through its turbines and generate hydropower. When NPPD placed its call in 2007, that was the first time they had done so. And DNR, the Department of Natural Resources, issued closing notices to some 400 junior appropriations upstream. Naturally the issuance of those closing notices caused quite a bit of acrimony and what followed were numerous challenges in various forums to, number one, the validity of NPPD's appropriations, and number two, whether DNR appropriately issued those closing notices and administered the water rights. After seven years of review at both the administrative level and in judicial forums, the Nebraska Supreme Court decided after seven years that NPPD's appropriations were valid in their full amount, the 2,035 cubic feet per second, and that DNR had properly issued those closing notices. So at the conclusion of that opinion what occurred to the NRDs, the members of the NRDA, was that you have a battle-tested water right, that is, it has been examined judicially. It's sound, it's for a large quantity of water, and it has a favorable priority date. So at that point in time, my clients concluded that it was probable the basin would be declared fully appropriated in which case it would need to engage in the development of Integrated Management Plans, or IMPs, with the DNR. And one of the things that they got to thinking about was whether they could join forces with the Game and Parks Commission who had long since considered an instream flow appropriation for this portion of the river and acquire that water right. And what doing that would mean, would be that the Game and Parks Commission could get a favorable water right for instream purposes that would be probably better than anything they could get through the traditional instream flow process. It would also allow the NRDs to have a water right, again jointly held with the Game and Parks Commission for Integrated Management purposes. The objective, though, of the acquisition of this right would be to change its use and allow for these new uses to occur and retain that favorable priority date. And that's what the two parties decided to do. NPPD graciously agreed to hear our overtures and after a period of about a year, we negotiated an MOU, or Memorandum of Understanding, which allowed for this change of use to occur and a change of ownership. But everything rests upon the Legislature authorizing this change in use and that's why we're here today. We believe that AM1966 accomplishes our goals and does so in a very elegant fashion. We were...we did have the opportunity to discuss this with Director Fassett from DNR. He had some useful suggestions that we intend to entertain as well in the coming days. And we think

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this bill will really be good for not only our constituency, those of the NRDs, NPPD, and Game and Parks, but for Nebraska as a whole. And again, the objective is to maintain these river flows for future generations. And with that, I will conclude my testimony. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Blankenau. Are there any questions for Mr. Blankenau? Senator Friesen. [LB1038]

SENATOR FRIESEN: Thank you, Chairman Schilz. Mr. Blankenau, you stated that they made a call on the river at some point in time. What...first time ever, what prompted them to make a call on the river that started all this process? [LB1038]

DON BLANKENAU: I believe they had been unaware that a call was not already in place. That is, that they assumed that water administration was already occurring on a priority basis on that right. Once they became aware that it was not, then they promptly placed that call. [LB1038]

SENATOR FRIESEN: So do you think the DNR has been following, I guess, their...their duties in adjudicating water rights in the past? [LB1038]

DON BLANKENAU: Well, I don't have an opinion about whether they've properly adjudicated those. I do think they have properly administered these rights. We challenged that in various forums. The courts have looked it over and they were satisfied that they were being properly administered, so we certainly agree with that. [LB1038]

SENATOR FRIESEN: Okay. So this solves a lot of problems because of that call. And I know you've worked together with the NRDs and Game and Parks and so at this point, creating this new water right I think is restricted fairly well to this basin, this Spencer Dam. [LB1038]

DON BLANKENAU: We've considered how...we've constructed this legislation so it would theoretically apply across the state, and we did that because we didn't want to create special purpose legislation. If you look at the actual practical application of this, we can see of no other circumstance around the state where it would ever be used. So even though it functions very specific to the Niobrara Basin, I find it unlikely it will be used anywhere else ever. [LB1038]

SENATOR FRIESEN: Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Mr. Blankenau, a couple questions then, maybe somebody else that's coming up later can tell us when we talk about...there's a couple things. We hear about the call that was placed on that system. As you

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move forward, if this would go through, what is your...what do you think happens to those calls? Does the call stay on the river all the time? Will there be more times when the call is on than when the call is off, or will it be about the same as it was before? How do you foresee that moving forward, and if you can explain that a little bit. [LB1038]

DON BLANKENAU: Certainly. NPPD, as I understand it, presently has a call on the river all the time except when they shut down the facility for maintenance purposes, and that coincides typically in the fall which allows certain reservoirs to fill. Our expectation is that we would have call times that would not be disruptive of those sorts of fill events, but that it probably would not be 24/7, 365 days a year, as is presently the case. But I can't answer definitively how frequently those calls will occur. I think it's unlikely and probably impossible to get any more restrictive than the calls presently exist. [LB1038]

SENATOR SCHILZ: Okay. Thank you. And then, do you know as we talk about...as we talked about protection of the water and then the protection of the right itself, do you know how many acres out there within the basin that fall underneath where this right would affect, how many acres would be available for new development? [LB1038]

DON BLANKENAU: I do not, and I will say that the objective is not to allow a lot of new development. I think this gives us the opportunity to do so if a meritorious plan comes along, but there's no plan or objective to develop any new acres at this point. [LB1038]

SENATOR SCHILZ: Okay. Any other questions? Senator Hughes. [LB1038]

SENATOR HUGHES: Thank you, Chairman Schilz. Thank you, Mr. Blankenau, for coming today. Just a little background for my own information. Is the Niobrara Basin fully appropriated now? [LB1038]

DON BLANKENAU: It is not at this point. We fully expected that it would be by now. Director Fassett, I think who will testify in a neutral capacity later, I think, can explain that better than I can. But my understanding is that he held up on the development of a rule that would allow him to evaluate what is fully or not appropriated. [LB1038]

SENATOR HUGHES: Okay. [LB1038]

DON BLANKENAU: And the delay in the implementation of that rule probably delayed the designation. [LB1038]

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SENATOR HUGHES: Okay. Then you said the water right that NPPD has is 2,035 cubic feet per second, is that right? [LB1038]

DON BLANKENAU: Correct. [LB1038]

SENATOR HUGHES: So what percentage of the river flow is that? Is that 100 percent or 75 percent approximately? [LB1038]

DON BLANKENAU: It varies because the flow of the river varies. Now during the summertime typically you'll have around 1,400 CFS at Spencer, CFS is cubic feet per second. At other times of the year it flows more than 2,035 CFS. [LB1038]

SENATOR HUGHES: So at 14 would be the low late summer? [LB1038]

DON BLANKENAU: Yeah, I think 1,400 is probably a typical summer flow and you will frequently get flows over 2,500 CFS. [LB1038]

SENATOR HUGHES: Okay. Thank you. Appreciate it. [LB1038]

DON BLANKENAU: You're welcome. [LB1038]

SENATOR SCHILZ: Thank you, Senator Hughes. Any other questions? Seeing none. [LB1038]

DON BLANKENAU: Many thanks to the committee. [LB1038]

SENATOR SCHILZ: Thank you for your testimony. Next proponent. Good afternoon. [LB1038]

TIMOTHY McCOY: Good afternoon, Chairman Schilz and members of the committee. My name is Timothy McCoy, T-i-m-o-t-h-y M-c-C-o-y. I'm the deputy director of the Nebraska Game and Parks Commission. As you heard in the opening, the Niobrara River is unique. It's unlike any other river in our state. It's very unique from the standpoint of Game and Parks. It's unique ecologically. It's surrounded by the interaction of many different ecosystems. It's where we have collisions of ecosystems that are in the western part of the U.S. and from the eastern part of the U.S. and north and south. And so it has an incredible diversity of plant and animal species and very unique features for our state. It's important that natural diversity actually provides a host of recreational opportunities. Fishing, hunting, floating, wildlife viewing, are all very high priorities in that area from the public. The public loves to use that area of the state. It's also very important

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to Nebraska for agriculture, providing water for our crops and for livestock. It's also important as a nation. It's been designated as a national scenic river by Congress in 1991, and really those are critical reasons that water management becomes something we have to all be looking at. And so we are pleased to have the opportunity with the Niobrara River Basin Association and the Nebraska Public Power District to discuss potential options with essentially a very substantial water right as a way to try and meet multiple needs, and a way to try and balance, you know, the needs of that basin and also trying to conserve and protect the Niobrara River. You know, the ability that we have, if we can do this, are to meet those needs of fish, wildlife, and recreation that have been established. We've been working on the Niobrara River doing studies since, I believe, about 2008. The agency started working on this because it was identified by our board of commissioners as a high priority. We proceeded with eight different studies looking at everything from recreational floating to fish and wildlife, which is what you expect from me. Then also looking at hydro geomorphology, you know, how the river functions, how it flows, what makes that river unique. Sociological research and also looking at social and economic benefits of that water in and out of that stream system. As we went through that, you know, we had a lot of folks that were interested in what we were doing. One of the agencies that's the most interested is the National Park Service because of that wild and scenic river. They have asked a lot of questions. They want to know when we're going to act on doing something in terms of...to protect stream flows in this section of the Niobrara River. How much water would we designate? How much water would we be able to protect? And also, I will tell you the interest by the National Park Service in figuring out if there's a way they could intervene in any of those efforts to sort of force the state to make sure that we address and recognize their issues and their concerns. That has continued. That has continued recently as we've been discussing these bills, as we've discussed the arrangement that we've worked with with our partners in the state to try and resolve this issue. They continue to ask us when are we going to act, how are we going to act, what's it going to mean, is this going to solve the issue? The closest assurance they can give to us is that, yes, we think you're on the right track. We think this goes a long way to meeting the needs that they've identified as they look at this issue. So with that, I would just want to say that this is a very unique opportunity where we have the ability to work with the NRDs with this sizable water right to meet...try and meet all the needs and try to maintain the uses by all the current users. And that's...it's challenging because it's different than anything that's every been done before. You will hear...I'm sure you will hear question marks about this relative to instream flow. You'll hear question marks about this of, you know, how does this water right work in terms of an Integrated Management Plan. But from the standpoint of being able to manage the resource issues that we're looking at, and I think the user concerns in the basin, I think doing this in a way that provides everybody flexibility and managing this in Nebraska is our best way to go. [LB1038]

SENATOR SCHILZ: Thank you, Mr. McCoy. Any questions? Senator Friesen. [LB1038]

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SENATOR FRIESEN: Thank you, Chairman Schilz. What kind of instream flow rights do you hold currently? [LB1038]

TIMOTHY McCOY: We hold instream flow rights on Long Pine Creek, a very small instream flow right for trout. It's a cold water stream. We also hold instream flow rights on the central Platte River for fish and, I believe, whooping cranes. [LB1038]

SENATOR FRIESEN: On the Niobrara? [LB1038]

TIMOTHY McCOY: We don't have any...we don't hold any currently on the Niobrara. We have an application in conjunction with the NRDs from below Spencer to the mouth of the Niobrara, but that is with DNR at this point in time. There's not been any action on that yet. [LB1038]

SENATOR FRIESEN: Okay. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. We heard Mr. Blankenau before talk about the different flows that you see at different times of the year. So, when it's flowing at 1,400, there would...obviously, there wouldn't be any opportunities to capture any water. But when there's excess flows, when there's excess flows and it's over the amount, as you look at those, what...are there opportunities for those flows or should they just pass down the river? How do you see that? [LB1038]

TIMOTHY McCOY: We see it from the standpoint of protecting those fish, wildlife, and recreation flows and I think you sort of hit the key and I think that's...hopefully, you'll hear that from the national resources district partners behind me. That...you know, what they're really looking for is some opportunities to manage water, and maybe that's managing water by retiming some flows. Maybe that's managing water when there are excess flows to the fish, wildlife, and recreation needs that some of those can somehow be stored somewhere and released at a separate time. Maybe they can be used for additional groundwater recharge. A lot of those activities that are especially going on right now and the Platte basin has been doing a lot of those of trying to, you know, retime some water, take excess flows and get a beneficial use of those rather than completely passing them all down. [LB1038]

SENATOR SCHILZ: Okay. Any other questions? Seeing none, thank you for your testimony. Next proponent. [LB1038]

MIKE MURPHY: (Exhibits 1 and 2) Good afternoon, Senator Schilz and members of the Resources Committee. My name is Mike Murphy, M-i-k-e M-u-r-p-h-y. I'm the general manager

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of the Middle Niobrara Natural Resources District headquartered in Valentine, Nebraska. I am here today to speak in support of LB1038, as amended, on behalf of the Niobrara Basin Alliance and the Middle Niobrara NRD. The Basin Alliance consists of the Lower Niobrara NRD based out of Butte, the Middle Niobrara NRD based out of Valentine, Upper Elkhorn NRD based out of O'Neill, Upper Loup NRD based out of Thedford, and the Upper Niobrara White NRD, based out of Chadron. Over the past ten years, and in some cases longer, the Niobrara River has been the focus of much controversy. As you can imagine, not everybody was happy with the federal designation of the Wild and Scenic River. Also, as shown by the multiple lawsuits, not everyone was happy with the 2007 ruling by the Department of Natural Resources that the Niobrara River above Spencer Dam was fully appropriated. One of the main concerns was the loss of local control. These concerns continue today with the looming threat of a Federal Reserve water right, which you have heard about. Over the past two years, the five NRDs and the Nebraska Game and Parks Commission have worked on a plan to retain local control in the basin, at the same time protecting all uses, those being fish, wildlife, recreation, and agriculture. By working with the Nebraska Public Power District, this plan took its initial big step forward in September of 2015 with the signing of the memorandum of understanding that will transfer the Spencer Dam facility and associated water rights to the districts and the Commission. The Niobrara River Basin, in general, has an ample water supply to meet all beneficial uses. In fact, stream gauging information collected in the mid and lower basin show an increasing trend in the average annual stream flow since Merritt Dam was completed in 1965. The Nebraska Department of Natural Resources District's INSIGHT data also show the water supply in the basin is in good shape. I've included with my testimony two graphs. The first shows an assessment by the department on the balance of the water supply versus demand in the river reach above Spencer Dam. As you can see, there are quite a few years where the supply does not meet the demand. That's the nonconsumptive demand of Nebraska Public Power District's water rights. The second chart was also generated by the department at the request of the Basin Alliance and removes NPPD's water rights from that analysis. This shows a sufficient supply to meet all demands. To ensure protection of the water supply into the future, the Niobrara River Basin Alliance has taken a proactive step in the management of the hydrologically connected water in the basin by undertaking the development of an integrated management plan with the Department of Natural Resources. The goals and objectives being developed will consider all existing uses and take into account input from stakeholders. Through this process, all uses will continue to be protected. That's our number one goal. With the assistance of this Legislature, the parties will be able to complete the transaction between the willing seller, NPPD and willing buyers, the Game and Parks and the NRDs. This transaction will ensure the protection of the river for all users, and assist the state in its negotiations with the federal government. The transaction will also allow for greater opportunities to truly provide for sustainable conjunctive management of water supply in the basin. I want to thank you for your time. I urge you to advance this amendment of LB1038 and we can all work together to grow Nebraska. I've also included a short statement from Craig

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Derickson, NRCS, and their support to do this locally and their support of NRD local management. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Murphy. Any questions for Mr. Murphy? Seeing none, I just have one here and I see your chart and I understand how that works, and then I see it without the hydro power permit in place, but we're not...you're not talking about alleviating that right. [LB1038]

MIKE MURPHY: No. Maintaining that water right is critical. [LB1038]

SENATOR SCHILZ: Correct. So as look at new uses or other things like that, because the right's in place, this chart wouldn't look any different as far as the department or anything would look at it as in overappropriated or fully appropriated. [LB1038]

MIKE MURPHY: Correct, because that call will still remain at Spencer. [LB1038]

SENATOR SCHILZ: I just want to make sure everybody knows that we're not finding a whole heck of a lot of water that wasn't there is there. [LB1038]

MIKE MURPHY: It's simply an opportunity to potentially capture upstream additional water in the basin, you know, for those needs of retiming, reuse, recharge. In 2011, we seen plenty of opportunities, 2012 we wished we would have had some of that water. [LB1038]

SENATOR SCHILZ: Now, let me ask you this, and I asked Mr. Blankenau before. What is the opportunity out there for...if you just...if there weren't any restrictions at all for new development in the basin, if you know, and... [LB1038]

MIKE MURPHY: It's limited. You know, right now all five NRDs have moratoriums in place to allow or not allow new development. And we've requested DNR to do the same with surface water. After the reversal of the fully appropriated determination by the Nebraska Supreme Court, we saw limited development in our district. And I think you saw that in the other districts. To the tune, you know, I mean, we took...we didn't even use up all our total allocation of the 2,500 acres per year over the four years, 10,000. There's some, but what you're seeing is people cleanup some of them old fields, maybe jockey some fields around and move them to some better sites. And yes, if that technology has continued to increase and change and improve so people are able to farm some of the locations and sites that maybe historically they hadn't, but that water efficiency that C-genet (phonetic) technology and the ability of individuals to make good

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economic decisions is what will continue to benefit us locally with the reduction of water use, but also improve our soil and water quality. [LB1038]

SENATOR SCHILZ: Right. And as you talked about...a little bit about the IMP processes, you know, not being fully appropriated at this time, you're not compelled or forced to enter into the IMPs. Can you explain a little bit of why you're doing that, what...how you see that moving forward if this would get put into place, and who should be sitting at the table? [LB1038]

MIKE MURPHY: Yeah, we saw this as an opportunity, one as a basin. So that's why we came together to start looking at truly...looking at the water supplies and demands throughout the basin. That's why we as the five NRDs initiated the whole...the voluntary integrated management process with DNR. And all five of us NRDs have also started that as individual districts with the Department of Natural Resources. And we've kind of been slow to move because we knew some of this was in the works over the last year and a half, but we've had a couple of initial stakeholder meetings. There's been one held in Valentine which would kind of be a central location. And then another one in Johnstown, Nebraska. These are open public meetings that we've tried to encourage anybody and everyone to be involved. You know, we've had our irrigation districts, we've had our friends with the federal government, we've had probably a limited public, you know, support, but that public involvement in talking to us locally through phone calls or visits in our office and stuff to try to become aware. And I think that will be our biggest hurdle in this basin is to give fair representation from east to west to take time to have the meetings, you know, whether it be in Chadron, Gordon, Valentine, Ainsworth, Atkinson, you know, clear down to Butte and O'Neill and try to make sure that we truly do represent everybody in the basin. [LB1038]

SENATOR SCHILZ: Will you...and you talked about having a couple of stakeholder meetings already, probably organizational meetings, things such as that. [LB1038]

MIKE MURPHY: Real simple to begin possibly drafting some potential goals and objectives, is what it's been so far. [LB1038]

SENATOR SCHILZ: Okay. And as we move forward, if this process continues and if this is put in place, do you see the need to reach out to others or reformulate who all is invited, and how would you go about doing that? [LB1038]

MIKE MURPHY: I would hope that through this process, whether it be the voluntary process or the mandatory process of integrated management, if we...once the new Department rule would come out and we...we anticipate being declared fully appropriated with the new rule that the Department has been working on. With that...I guess that mandatory process changes to make

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more entities mandatory become involved and sit at the table. I don't think in the Niobrara Basin anybody has to mandatorily be there, we want to be there, they want to be there. You know, we've talked with out local irrigation districts and we've had those good working relationships and that's what, I guess, I've enjoyed. And that's the benefit of this whole deal is we're at a point that instead of continuing to fight and argue and have to have lawsuits maybe like what we've seen in other parts of the state, we have an opportunity here to sit at the table and make those decisions locally. And that's that win-win situation. [LB1038]

SENATOR SCHILZ: Sure. Thank you. Any other questions? Seeing none, thank you for your testimony. Appreciate it. [LB1038]

MIKE MURPHY: Thank you. [LB1038]

SENATOR SCHILZ: Further proponents. [LB1038]

TERRY JULESGARD: (Exhibits 3 and 4) Good afternoon, Senator Schilz and members of the Natural Resources Committee. My name is Terry Julesgard, T-e-r-r-y J-u-l-e-s-g-a-r-d. I'm the general manager of the Lower Niobrara Natural Resources District in Butte and a member of the Niobrara River Basin Alliance. I am here today to testify in support of LB1038. This legislation is very important to the district as well as the basin and provides the tools needed to continue moving forward protecting all groundwater and surface water users in the basin. It also provides tools needed to protect the fish, wildlife, and recreation that is vital to the tourism industry in the basin. Since 2008 when the basin was declared fully appropriated by the Department of Natural Resources, we as a district and as the districts of the basin, have been working to protect all water uses in the basin and maintain and improve the economics of the district and the basin. With the reversal of the fully appropriated status in 2011 and the Supreme Court decision upholding Nebraska Public Power's water right, it became very apparent to the districts of the basin, now is the time to develop true conjunctive water management to meet the goal of protecting all water uses and users in the basin. The Lower Niobrara NRD has a voluntary Integrated Management Plan in place. The Upper Niobrara White, they also have a portion of their district that has an Integrated Management Plan. The rest of the districts are working on their plans. The basin is also in the process of working on a basin-wide plan in conjunction with the Department of Natural Resources. We, as the Lower Niobrara, we have stays on the addition of new irrigated acres, both groundwater and surface water. I believe the work that we, the directors and the managers of the basin have accomplished thus far, shows we are committed to ensuring water availability to everyone now and into the future. This legislation provides the tools we need to protect all water uses now and into the future, and I'd strongly encourage the committee to move LB1038 with AM1966, to the floor. [LB1038]

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SENATOR SCHILZ: Thank you. Any questions? Thank you, Mr. Julesgard, for your testimony. [LB1038]

TERRY JULESGARD: I've also included a letter of support from one of my directors. [LB1038]

SENATOR SCHILZ: Very good. Thank you. Next proponent. [LB1038]

ANNA BAUM: Good afternoon, senators. My name is Anna Baum. I'm the general manager of the Upper Loup Natural Resources District out of Thedford, Nebraska. And I'm here to testify for support of LB1038. Anna, A-n-n-a, Baum, B-a-u-m. [LB1038]

SENATOR SCHILZ: Thank you very much. [LB1038]

ANNA BAUM: Yes. Our district is part of the Niobrara River Basin Alliance. And we're rather unique that we have no surface water acres in that area in the basin and we have less than 2 percent of the total hydrologically connected areas, acres in the basin. Therefore, we would not be as directly affected by the legislative change as the other Niobrara Basins are or NRDs. With that being said, we do understand how important this legislation is to the entire basin as a whole as a tool for water management. This legislation is a proactive approach to basin management that will keep decision making at a local level. We believe this legislation to be a means to protect all current water users as well as any potential future water users. [LB1038]

SENATOR SCHILZ: Thank you for your testimony. Any questions for Ms. Baum? Senator Friesen. [LB1038]

SENATOR FRIESEN: Thank you, Chairman Schilz. Ms. Baum, when you talked about the Integrated Management Plan, how is that process working for you guys? [LB1038]

ANNA BAUM: Actually we are in the very end stages of our own individual IMP for our district. We are looking at holding our public hearing in March, as a matter of fact, for that. Our district is over four million acres and actually the majority of our acres is in another basin as in the Loup Basin. So our Integrated Water Management plan is really geared more towards the Loup Basin than what it is for those acres that we have that were hydrologically connected to in the Niobrara Basin. But we do have several monitoring tools in place in...that's going to be in our plan, and we, too, also have a limited number of acres and then there are places in our district that we're not allowing any new acres at this point in time. [LB1038]

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SENATOR FRIESEN: Down the road, if a basin-wide plan is implemented, do you see any problems doing that? [LB1038]

ANNA BAUM: No. [LB1038]

SENATOR FRIESEN: Okay. Thank you. [LB1038]

ANNA BAUM: Yeah. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, thank you for your testimony. Next proponent. Good afternoon. [LB1038]

DENNIS SCHUETH: Good afternoon, Senator Schilz and the rest of committee members. I'm Dennis Schueth, general manager of the Upper Elkhorn NRD, D-e-n-n-i-s S-c-h-u-e-t-h. The Upper Elkhorn NRD is one of the five NRDs that make up the Niobrara River Basin Alliance. And on behalf of the Upper Elkhorn NRD we support this legislation that provides a new tool for the basin management in the Niobrara River Basin. Like Anna's district, only 2 percent of our district is in the hydrologically connected area and we do not have any surface water streams in our portion of that area of the Niobrara River Basin. So we're kind of unique also, but we want to be sitting at the table because anything that moves forward could potentially have impacts on groundwater users there. This legislation would be a collective effort to protecting existing surface water and groundwater and if feasible, even allow to grow those uses in Nebraska. Those additional water uses would be for wildlife, recreation, and fish. Ag production is related to retiming, storage, and recharge of excess flows throughout the year, many of the questions that you've asked already. And the Upper Elkhorn NRD is also in the beginning stages of our own voluntary IMP plan. We have contacted the Department of Natural Resources and again, the majority of our district is the Elkhorn River which is a tributary of the Lower Platte Basin. So we don't see any problems incorporating what we would be doing in the Niobrara River Basin into our own voluntary IMP plan. And so, the other thing within our district, you've heard some of the other districts make comments about their development that has happened over the last couple years within their district on be...on the own accord of the local NRD board of directors, 2016, 2015, and 2014, there has not been any new development of groundwater usage for irrigation purposes due to the fact of what we wanted to be considered as being proactive of what the drought of 2012 did. Our static water level started decreasing a little bit. The average was 3.5 feet across our district just like the whole state of Nebraska. That opened up a lot of the eyes, not just for our district, but for the state of Nebraska and so our board of directors are trying to take a proactive approach to manage the groundwater and also, if needed, surface water within our district. And so, on that, to save some time, I hope this here committee would support the amendment to LB1038 and move it through the system. Thank you. [LB1038]

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SENATOR SCHILZ: Thank you, sir. Any questions? Seeing none, thank you for your testimony. Next proponent. [LB1038]

MARTIN GRAFF: (Exhibit 5) Good afternoon, Senator Schilz and committee members. My name is Martin Graff, M-a-r-t-i-n G-r-a-f-f. Chairman Schilz and members of the Natural Resources Committee, I am here to testify in support of LB1038, AM1966. I am a member and surface water user of the Ainsworth Irrigation District, a groundwater irrigator, board member of the Middle Niobrara NRD, and lifelong resident of Brown County, Nebraska. My history of the Ainsworth Irrigation District project dates back to 1965 when my father began to use flood irrigation. Over the years I've been part of numerous university and NRD sponsored water efficiency studies. Some include from 1966 to 1967, our farm was the development farm for the Ainsworth Irrigation District. 2004 to 2006 we...there was a University of Nebraska Variable Rate Irrigation Study done on one of my center pivots. And also with that we did a nitrogen efficiency study at the same time. I have personally had to make many changes to my operation to gain better utilization of water. With ever changing economics of production agriculture, I have had to keep up with modern technology and equipment to enhance my farming operation. If it wasn't for the time and efforts that I and many others have spent over the past 30 years to learn and adjust to the ever changing needs for water and the advancement in state water law, I have seen the need to be proactive in water management. One of the toughest changes I have seen was the need to manage surface water and groundwater conjunctively. Locally in the NRD basin we are blessed with water and overall, water has never been a limited factor in our local NRD. By being a member and stakeholder to help develop district groundwater management plans and Integrated Management Plans for the past 21 years, I've learned and seen the need to listen and understand others needs for water use. Locally, we have had to implement rules and regulations for both water quality and quantity that has impacted not only my operation, but all of my neighbors within the Ainsworth Irrigation District and northern Brown County. I strongly feel that our local NRD has done an exceptional job of working with the Ainsworth Irrigation District in managing our surface water through cost share programs. As a Middle Niobrara NRD representative of the five NRD Niobrara River Basin Association, I've been part of the conversations to protect all of our existing uses that we currently have and understand the supply and demands of water in the basin. I am in support of the local ownership in the hands of locals through the MOU that has been signed between NPPD, Nebraska Game and Parks, and the Niobrara River Basin Association. The intent of this agreement is to maintain local control and protect existing uses in the interest of the people of north central Nebraska. The number one goal of this legislation is to protect all existing uses throughout the entire basin. Water right priority dates along with the preference category should be maintained to allow all future potential uses for fish, wildlife, recreation and agriculture to be considered as beneficial. Your support of LB1038 and AM1966 will help keep our water management local and proactive. Thank you for your time. [LB1038]

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SENATOR SCHILZ: Thank you, sir. Any questions? Excuse me. So you operate under the Ainsworth Irrigation District, is that correct? [LB1038]

MARTIN GRAFF: Yes. [LB1038]

SENATOR SCHILZ: You have rights under the District? [LB1038]

MARTIN GRAFF: Yes. [LB1038]

SENATOR SCHILZ: And as you look at this and also you're involved with the NRD obviously, so, one of those. [LB1038]

MARTIN GRAFF: Yes. [LB1038]

SENATOR SCHILZ: Dual user, huh? (Laugh) So the question that...the question that I have for you is, do you see this as you move forward as you've studied it, do you see...do you see if this would be put into place, do you see any changes that would happen, any opportunities, any challenges, any concerns as this would move forward? [LB1038]

MARTIN GRAFF: I don't see any changes. The river is basically is under a 365-day call now. Is it going to change the management of Ainsworth Irrigation District and how they can store water? Not really. In fact, it may enhance it, give them some opportunities. And the main goal of this is to protect...in my estimation, the main goal of this is to protect all existing uses that are out there and have an opportunity, if possible, to grow north central Nebraska's economic viability. As long as we are under a fully appropriated status, we become stagnant and we all know what happens when economies become stagnant. [LB1038]

SENATOR SCHILZ: And as you talked about possible opportunities, were you talking about opportunities for the irrigation district or for those...? [LB1038]

MARTIN GRAFF: I'm talking about opportunities, yes, for the irrigation district, for other new uses that we may not even know of right now. I mean, can I tell the future? No. [LB1038]

SENATOR SCHILZ: Okay. Thank you. Appreciate it. Any other questions? Seeing none, thank you for your testimony. Further proponents. Good afternoon. [LB1038]

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BRUCE KENNEDY: Chairman Schilz, members of the Natural Resources Committee, my name is Bruce Kennedy, B-r-u-c-e K-e-n-n-e-d-y. I am here this afternoon representing Friends of the Niobrara and we are a citizens conservation group. We are statewide and our mission is to work to maintain the environmental integrity and natural beauty of the Niobrara River, Niobrara River Valley. We are really excited about this memorandum of understanding that has developed. We consider it to be one of the best statewide things that has come forward for the Niobrara and we would take this opportunity to commend Senator Davis for introducing this to take this matter up as a state matter and come to some resolve. We are very thankful also of our Nebraska Game and Parks Commission and the five NRDs who have also come forward to come up with an agreement. Therefore, we are extremely supportive of LB1038 and at this time I guess we would...the reason for appearing here this afternoon is that we would ask this committee to join with all of the other folks who have worked so hard to come up with an agreement. Our Niobrara River is an asset to Nebraska. It is one of our most beautiful places in Nebraska. It is truly the jewel of the north and we ask you to help us manage and protect it. [LB1038]

SENATOR SCHILZ: Thank you, sir. Any questions of Mr. Kennedy? Seeing none, thank you very much for your testimony. [LB1038]

BRUCE KENNEDY: Thank you. [LB1038]

SENATOR SCHILZ: Other proponents. Good afternoon. [LB1038]

MARJORIE KENNEDY: My name is Marjorie Kennedy, M-a-r-j-o-r-i-e K-e-n-n-e-d-y. And I am here at the request of Wachiska Audubon Society. Last night at the Wachiska board meeting, the board did vote to support LB1038 for all of the reasons that I have already heard stated. So that's about what I have to say. [LB1038]

SENATOR SCHILZ: That's just awesome. Thank you. Hold on. Hold on. Any questions? Seeing none, thank you very much for your testimony. Other proponents. We've got about ten more minutes. Good afternoon. [LB1038]

BUFFALO BRUCE: Good afternoon, Mr. Chairman and committee. I'm Buffalo Bruce, B-u-f-f-a-l-o B-r-u-c-e from...I represent Western Nebraska Resources Council. We have members who are ranchers where the Niobrara River goes through their property and we are proponents for this bill, and for all the reasons stated so far. I just wanted to go on the record. And also to clarify, somebody mentioned here before it's adding a new water right. It's not adding a new water right. I believe it's just transferring water rights. Any questions? [LB1038]

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SENATOR SCHILZ: Any questions? Seeing none, thank you for your testimony. [LB1038]

BUFFALO BRUCE: Thank you. [LB1038]

SENATOR SCHILZ: Further proponents. [LB1038]

DUANE HOVORKA: Good afternoon. My name is Duane Hovorka, that's D-u-a-n-e H-o-v-o-r-k-a. I'm executive director of the Nebraska Wildlife Federation and I'm delighted to be here to testify in favor of LB1038 and the amended version. Let me point out, this is not an ideal solution for fish, wildlife, and recreation on the Niobrara. It's a compromise, but it's a reasonable compromise and I think it's a fair and workable compromise. For example, I think under current law, NPPD could transfer their water right to Game and Parks solely to be used for fish, wildlife, and instream flow uses. Examples of that we have around the state. We have irrigation districts in the Platte Basin that are selling or leasing their water rights to the Platte River Recovery Program for instream flow purposes. They're making some decent money doing that, and that's not a bad thing. That's one of the things we allow under our state law, under LB962, to allow those water rights to be used for purposes that meet other public needs. So that's a good thing, that flexibility. But to take that approach on the Niobrara would not be a compromise and it would largely ignore the needs of the other water users in the basin, of the natural resources districts in the basin and the potential for new uses in the basin. To accomplish that compromise, what we need to do is what this bill tries to do is to allow for a new water right, new type of water right that allows for a joint use for a multiple use for fish, wildlife, recreation and integrated management planning. That's what we're trying to do with the bill. That's why we need this bill is to allow for that flexibility so that water right can be transferred to be used for those multiple purposes. In addition to the flexibility, it will provide for managing the Niobrara River. The bill would provide other benefits to the state. By protecting the river flows that are needed to meet the needs of fish, wildlife, and recreation in the National Scenic River, in the Fort Niobrara National Wildlife Refuge and in the Niobrara portion of the Missouri River National Recreational River downstream, the bill should avoid the need for those federal agencies to press their federally reserved water rights in the Niobrara River. We've obtained and we've seen several different legal opinions on those federally reserved water rights. They are real. The courts have upheld and recognized them in other states. We think they're already in place on the Niobrara because the refuge, the Scenic River, the Recreation River is in place, but they haven't been recognized by the state. So to avoid that fight over whether those water rights should be recognized, we think this bill would preclude those federal agencies from having the need to act. The Niobrara is certainly a precious resource in our state. It's a precious resource nationally. The outstandingly remarkable values that have been identified in the river include fish and wildlife resources, recreation resources with tens of thousands of people that canoe and kayak and float down the river every year, and the scenic nature of the river. What we have in Nebraska is really...it's a national

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treasure and what you have in front of you is a compromise solution, a Nebraska solution, to protect that national treasure for future generations. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Hovorka. Any questions? Seeing none, thank you for your testimony. Next proponent. I believe after this...how many other proponents do we have? One, two...make it quick and maybe we can get them all in. Good afternoon. [LB1038]

TONNY BECK: (Exhibit 6) Good afternoon. My name is Tonny Beck, T-o-n-n-y B-e-c-k. I'm a resident of Ainsworth, Nebraska. I am a water well contractor from Ainsworth, Nebraska. My wife and I own Beck's Well and Irrigation. I am the past president and current vice president of the Nebraska Well Drillers Association. My business has provided access to the groundwater resources of the Niobrara Basin for use and benefit of its people, livestock, and crops since 1950. I am a third generation water well contractor and have been involved with the family business since my early childhood. My business performs work for groundwater users of all types in Cherry, Brown, Rock, Keya Paha, Boyd, and Holt Counties, essentially from Cody, Nebraska, to Butte, so. I am here to support this proposed legislation. I have followed and have been closely involved with the surface and groundwater issues in the Niobrara Basin for the past 20 years. It is my belief that this proposed legislation gives the NRDs, the Game and Parks, and the Department of Natural Resources the best and most equitable way to administer and manage the Niobrara Basin for the future. This jointly held water right give the parties the ability to manage the basin. I feel that with this legislation we can protect all of the current interests in the basin and also make room for some additional new uses. My fear is that without this legislation that all of the new uses in the basin will be rejected, not because of a lack of sustainable groundwater resources or a lack of adequate flows in the river, but because of an inability to manage the basin in a manner that is equitable and responsible to all parties. The last thing that I want to see is for the federal agencies to come in and to start to dictate to us how this basin should be managed. I am certain that their view of how the basin should be managed will not be fair and equitable to all the parties that are affected. I am also certain that any local input on the matter will be lost forever at this point. We need to keep management of this basin at the regional and state level. We can protect the basin's beauty, its wildlife, recreation, agriculture, and economic vitality with this new cooperative agreement and with the transfer of this water right. It is in the entire state of Nebraska's best interest for this legislation to be passed and become law. I encourage you to move forward and allow this bill to leave this committee and go to the full Legislature for debate and hopefully passage. If you have any questions of me, I would be happy to answer them. And if not, I thank you for your time and attention to this matter. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Beck. Any questions? Seeing none, thank you for your testimony. [LB1038]

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TONNY BECK: Thank you very much. Thank you. [LB1038]

DALE WILES: (Exhibit 7) Good afternoon, Chairman Schilz and Natural Resources Committee members. I am Dale Wiles, D-a-l-e W-i-l-e-s, from O'Neill, Nebraska, an interested individual in north central Nebraska. This piece of legislation fits nicely into the framework of LB962 that was approved by this Legislature back in 2004. LB962 was a major change in the water laws and challenged everyone to look outside the box. Well, Senators, it appears that the Game and Parks, NRDs, and NPPD collectively looked outside the box and found a tool that was missing. This legislation calls for a new instream basin-management appropriation, would be administered by DNR, the Nebraska Department of Natural Resources in the same way as it is currently administrated by the...for NPPD's manufacturing right. Remain in the same preference category, this legislation would allow for current water appropriation held by NPPD to transfer to the Nebraska Game and Parks Commission and five local NRD resources districts. This new surface water appropriation would then utilize the management for fish, wildlife, agricultural uses. The other benefits of this legislation is it would allow for management of integrated ground and surface water. A couple uses that are currently not available without this legislation are potentially additional storage and retiming of the water not just in the Niobrara River, but also of its tributaries. NPPD was to completely forfeit or cancel this water appropriation which is truly a nonconsumptive right if there is nothing to protect the water from totally becoming a consumptive use. This legislation would provide protection of NPPD's existing water appropriation for the multiple use and previously mentioned within this basin. I have been on a couple of water tours in the last couple of years in Arizona and California and they have some serious water issues and needs. I believe that this legislation would be beneficial to the state of Nebraska in their goal to conjunctively manage surface water and groundwater and benefit north central Nebraska. Thank you for your time. Is there any question? [LB1038]

SENATOR SCHILZ: Thank you, Mr. Wiles. Any questions? Seeing none, thank you for your testimony. [LB1038]

DALE WILES: Thank you. [LB1038]

SENATOR SCHILZ: Hold on a second. How many...I'm sorry. How many more folks do we have that want to testify for...in positive? One, two...any more? Okay. After that, we'll move on and that's just right at about an hour, so. [LB1038]

JAREL VINDUSKA: I'll make it quick. My name is Jarel Vinduska, J-a-r-el V-i-n-d-u-s-k-a. Live and farm in Sarpy County, Nebraska. I think everybody before me has covered the issues very well. The only thing I might add is, I think Game and Parks, it's very important for them to have a seat at the table because as we've seen in other areas in the state, if only consumptive uses

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have a say in it, is where we get in trouble sometimes as we've seen in the Central Platte and the Republican Basin. So it's appropriate that we have a voice for fish, wildlife, and recreation. Thanks. [LB1038]

SENATOR SCHILZ: Thanks. Hold on. Any questions? Seeing none, great job. Thank you. Next testifier, please. [LB1038]

LYNDON VOGT: (Exhibit 8) Good afternoon, Senator Schilz and members of the Natural Resources Committee. Appreciate the opportunity to be here today. I'm Lyndon Vogt, that's L-y-n-d-o-n V-o-g-t. I'm the manager of the Central Platte Natural Resources District and I'm testifying today on behalf of the Nebraska Association of Resources Districts in support of LB1038 and AM1966. I'm a native of Naper, Nebraska, which is in the Lower Niobrara NRD and grew up on a family farm and ranch, it's about 30 miles from the Spencer Dam. I remain an active landowner in the basin. I was also the NRD manager for the Lower Niobrara NRD for five years and the Upper Niobrara White for 12 years. So growing up there and being involved with the NRDs in the basins for 17 years has provided me with a rich history of the issues in the basin. In my previous positions with the Niobrara NRDs, I have been involved with many of the discussions about protecting the Niobrara River. Since the Scenic River designation, there has been pressure from the federal officials to develop a plan to protect the flows. I have been in meetings with them when discussions about perfecting a federal water right on the river has been discussed. I want to assure you that this is a real issue if something is not done to address protection of the stream flows. There's also a rich history of water litigation in the basin. Since '07, there have been multiple lawsuits that have gone all the way to the Nebraska Supreme Court. Coupled with the Scenic River designation, the legal battles have created situations where no instream flow right could be obtained to adequately protect the flows. There are also limited options for true conjunctive management in the river basin with the current instream hydro right. There needs to be some flexibility in the basin to develop a plan for the basin to protect all uses, including domestic, ag, manufacturing, recreation, and wildlife. The provisions included in AM1966 and LB1038 provide that opportunity for the residents of the Niobrara Basin to determine their own future when it comes to water management and beneficial uses in that basin for the future. The parties involved in this agreement traditionally have been on opposite sides. It's a relief to see that they have come together and developed a local solution to their problem. I want to commend the Nebraska Public Power District, the Nebraska Game and Parks, the Nebraska Attorney General's Office and the five NRDs included in the Niobrara Basin for setting past issues aside and developing a plan that protects all water users in the basin. The basin management plan and joint integrated management plans in the basin will assure that local residents, water users, local NRDs, the Nebraska Game and Parks Commission, and the state of Nebraska are working together to protect the water for existing users and for future generations. The Niobrara is in a much different management position than the Platte, and this legislation will help those NRDs manage water in ways that will be much less controversial and expensive than

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what occurs on the Platte today. Specifically, the Niobrara is not a basin that is significantly impacted by groundwater depletions and there are not a lot of surface water appropriations in the basin. This legislation will ensure flows will be protected and avoid the need to restore flows. In the Platte, the federal government got involved with the three states to force changes to the Platte to protect endangered species. This is an opportunity for this proposal to avoid that. The legal cost to Nebraska taxpayers to fight a federal water right alone could be more than the acquisition cost of NPPD's water right. Going down this avenue would not provide protection for all of the existing water uses in the basin either. In closing, I want to point out that restoring flows to a river is very expensive. For example, in the Platte Basin, just in the Central Platte NRD, we spent \$4.6 million to put 2,400 acre-feet of water back to the river. The program permanently retired irrigation on 4,300 acres of some of the most productive cropland in the nation. We have spent another \$16 million in conjunction with three other entities on partnerships with four irrigation districts to address conjunctive management options, which resulted in approximately 17,000 acre-feet restored to the Platte in 2015. This project did not result in any acres being taken out of production. In the process of partnering with our surface water irrigation districts did not result in any retirement of acres. The proposals we have with AM1966 avoids the need to restore flows in the Niobrara Basin and avoids these unnecessary costs. The residents of the Niobrara Basin deserve a chance to grow and prosper, and I urge you to advance the bill with AM1966, for allow for that opportunity. And I have to say, being from the Platte Basin now, I'm jealous of the opportunity that lays before them moving forward in water management. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Vogt. Any questions? Seeing none, thank you for your testimony. [LB1038]

LYNDON VOGT: Thank you. [LB1038]

SENATOR SCHILZ: Further proponents. We should have one or two, correct? Okay. And we've got some opposition folks that need to go, so if they could be ready to come up, we'll get them through as timely as possible. [LB1038]

DAVID COOKSON: Mr. Chairman, members of the committee, my name is David Cookson, D-a-v-i-d C-o-o-k-s-o-n. I'm here today on behalf of the Nebraska Appropriated Basins Coalition, which is a coalition made up of the basins that have been designated fully or overappropriated by the Department of Natural Resources under LB962. My purpose today is to speak to a couple historical points that puts this agreement into context. First, I'll talk briefly about the state's interactions with the federal government and the claims of federal reserved water rights in the Niobrara River Basin in which I was actively and intimately involved in my time in my previous employ in the Attorney General's Office. The second, I will speak to the interrelationship or the correlation between the existing integrated management plans structure that was created in

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LB962 and has been modified a couple of times by the Legislature and this particular agreement, and how they fit together and how this agreement is really the culmination of the purpose and object of what we did in LB962. First, to the federal reserved water right. Federal reserved water rights are simply that. They're water rights reserved for federal lands. Generally, it's expressed specifically in statute by whatever authorizes the taking of the federal lands. In the case of the Wild and Scenic River in the Niobrara which was designated in 1991, in 1968 the federal government, Congress designated or created the Wild and Scenic River Act and it's codified at 16 USC 1284(c) and in there it specifically says, the Wild and Scenic River creates a reserved water right for the purposes set forth in this act and in an amount necessary to accomplish those purposes. To give you an idea of the threat that can be posed by a federal reserved water right, there's two very famous reserved water right fights that have gone on over the last 30 years. The first would be the Snake River Basin adjudication in Idaho. There are six wild and scenic rivers in that basin covering more than 400 miles. There are numerous natural historic sites and BLM forest land. That adjudication started in 1987. It concluded in 2014. It took 27 years, it cost well over \$30 million by the time it was finished. It's probably higher than that. When we were discussing the cooperative agreement several years ago, the tab on the Snake River Basin adjudication was roughly over \$20 million and we were talking about doing the cooperative agreement on the Platte so that we wouldn't have to do that same thing. So, a federal reserved water right exists. The question and the litigation comes over how much. And in another famous basin, the Klamath River Basin in Oregon, not only did it result in years of litigation, it resulted in literally eliminating irrigation districts in order to meet the necessary federal reserved water rights both for wild and scenic rivers, other federal lands, and endangered species purposes. What you have before you in this agreement virtually negates the possibility that we'll litigate how much water is necessary for this federal reserved water right in the Niobrara because there's no way, no way the feds could ever get as good a deal as what has been worked out by Game and Parks, the NRDs and NPPD. So, in that instance, this deal alone is saving the state a lot of heartache. And it was a real threat because we spoke to appropriations committees in the time that I was in the Attorney General's Office every year about the possibility of needing an appropriation to defend the state against a federal reserved water rights claim in the Niobrara. I sat in multiple meetings with the lawyers from the Department of Justice, Natural Resources Service, and from the Office of Interior Solicitors Office. Finally, this agreement provides a couple of things that are consistent with LB962. Integrated management plans are designed to protect existing water users. It's one of the goals and objectives that must be in the plan. This amendment protects those existing users and the subordination agreements that exist. This agreement fits within the context of what we were trying to do when we crafted LB962. It makes a solution, it brings stakeholders to the table, it provides DNR oversight through the integrated management plan process and it allows for stakeholder involvement through the provisions of the integrated management plan process. It checks all the boxes. It hits all the marks and it's going to end up saving the state money, and again, putting us at the forefront of water management and regulation. Thank you. [LB1038]

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SENATOR FRIESEN: Thank you, Mr. Cookson. Are there any questions from the committee? Seeing none, thank you for your testimony I think we have one more proponent. [LB1038]

JOHN HANSEN: Mr. Vice Chair and members of the committee, for the record, my name is John Hansen, J-o-h-n, Hansen, H-a-n-s-e-n. I'm the president of the Nebraska Farmers Union. I guess I've been working on water issues, either as an NRD official or as the president of a farm organization, for 42 years. And what I have...I think I've learned is that one of the worst ways to develop good water resource management is to turn it over to the court. I think that however flawed and however painful and however conflicted our own efforts in the Legislature and through local efforts are, I think that is far preferable to letting the court set policy. There is a genuine issue here and I think that the efforts that Senator Davis has made, NPPD, Game and Parks, the NRDs, and all of the other stakeholders that have been involved, I give them high marks for thinking out of the box and coming up with I think a negotiated approach that I'm sure we're going to hear some of the problems with in a bit, but I still think it represents a good faith effort and I prefer that process, strongly, over the alternative. I'm reminded of two things that I've learned in life. One is from my mother, the other is from Kenny Rogers. And when my mother told me that if I wanted to whine, that she would give me something to whine about. That was always a mistake to find out what that was. And so I believe that there is a bona fide threat and risk at not doing anything. And the other is from Kenny Rogers who rightly summed up that you have to know when to hold them and when to fold them, and I think that we ought to wrap our arms around this process, make whatever additional changes, if any, are needed, and walk away from the table since I think we've done pretty well. And with that, I'd close my comments and be glad to answer any questions if I could. [LB1038]

SENATOR SCHILZ: Any questions for Mr. Hansen? Seeing none, thank you. [LB1038]

JOHN HANSEN: Thank you and good luck. [LB1038]

SENATOR SCHILZ: Thank you. And now we will move to opposition testimony. Oh, we have some support letters here, don't we. Real quickly. Yeah, and we may...if...we'll check it when we go back and make sure. [LB1038]

DAVID COOKSON: Thank you, sir. [LB1038]

SENATOR SCHILZ: Welcome. Thank you. [LB1038]

LEE ORTON: (Exhibit 9) Good afternoon, Senator Schilz and members of the Natural Resources Committee. My name is Lee Orton, first name L-e-e, last name, O-r-t-o-n. I'm here

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this afternoon representing the Nebraska State Irrigation Association. We have been defined by some people as recalcitrant or opposed to this whole process and that's not true. And I want to make that very clear at the outset. We wholeheartedly support the need to protect the Niobrara River Basin. It is a beautiful resource as has been pointed out by other people here this afternoon. I'm not going to go into detail about that and it does need the river protected for the future needs, not only of the basin, but for the world because it's such a unique place. So we are very much in support of what happens...needs to happen in this process. We are concerned about where we are with this bill at this point in time. And that's really what I'm here this afternoon for. I want to make just one quick point at the front end and that is that time is not of the essence here. Doing it right is of the essence. We need to make sure that what we do here doesn't someplace along the line create another additional problem or several problems. We've done that on several occasions with water law where we think we're fixing something that is already terribly complicated and by doing so, we put one fix in and we create five or six more issues, and we don't want to do that here. As Senator Davis pointed out in his opening remarks, the water law that deals with surface water prior appropriation doctrine in Nebraska is very complicated. And a simplistic approach that has been proposed in this amendment may still have some things that needs to be done with it to make it work better. We're not convinced that...and by the way, you all know this, but special legislation in Nebraska doesn't work so this piece of legislation is drafted so that it will fit anywhere and everybody has suggested that the Niobrara is unique enough that it probably will be the only place it will happen. We'd like to suggest that maybe the best way to do that would be to make some reference in the amendment that deals with the fact that this deals with any river basin in Nebraska that has a designation of a federal wild and scenic river; that's the Niobrara. You don't see that happening anyplace else in this state, at least not in my lifetime, and probably sometime into the future. We'd like to suggest that as a change that could be potentially solvable in some of that respect. We're also concerned that the Department of Natural Resources still has to have administrative capability over what's done with these water rights. It had that authority over the water right that exists for NPPD now. It deals with all of the water rights that are important to the two irrigation projects that are in the Niobrara River Basin and it needs to deal with any modifications and changes that are done here. And that's our major reason why we're here on the against side today. We want to see this happen. We want to be involved in the process to help find the way to make that happen. We think there's some changes that can be made in the bill that will probably come a long ways toward solving the concerns that we have. And we want to be able to offer help to make those changes happen. We, over the course of the last couple of months, have submitted a whole series of questions and we haven't seen the answers to those until just the last few days. So it's been a little bit tough for us to be able to react and suggest things that could or should be done and that's what has brought us here to this table. I've had passed around here this afternoon a brochure that was created by a program that the Nebraska State Irrigation Association has worked on now for five years. We run the Nebraska Water Leaders Academy, trying to teach people better how to play together. And one of our academy work groups, a couple of years ago, created this brochure talking about

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stakeholders and how important it is to have the people who are involved and invested in this process have an opportunity to have a seat at the table. You heard a lot of comments made this afternoon about how all...everybody worked well together, but you didn't hear any place where the irrigation districts were actively involved in that process. We didn't even know this was going on until the memorandum was signed. Now there may have been some rumors and suspicions, but there was no official word. So we haven't been at the table and that's unfortunate because I think if we had, we'd be here on the support side as well today because I think we can find a way to make this work. So, I have to say we have a problem with it right now because of the nature of the way the language is written; it's too general, it doesn't provide enough protection in our way of thinking, and because it may not apply just to the Niobrara. But if we can make this work, we want to be a part of that process. And I think that means we need to have a seat at the table to talk in regard to basin-wide innovative management plans and have some process that makes certain that the surface water rights in the Niobrara River Basin are adequately protected. You'll hear somebody from the Bureau of Reclamation in a little while talk about how much they've invested in those two projects and that investment needs to be assured and protected as well. Now I don't know that you'll have very many questions for me, but I will close by saying, the Nebraska State Irrigation Association and its members want to work with everybody else to make this process work to protect the Niobrara River. Thank you for your time. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Orton. Any questions? Senator Friesen. [LB1038]

SENATOR FRIESEN: Thank you, Chairman Schilz. You mentioned that there would be no oversight, but really the DNR is very well-ingrained into the integrated management plans that are in place or currently going to be in place and they have indicated they're going to have a basin-wide plan, is that correct? [LB1038]

LEE ORTON: Yes, and I think some of the answers to the questions I've mentioned a few moments ago, go right to the integrated management plan as dealing with some of these problems and solutions. We want to make sure that we are there and invested in that process because we've got a lot invested in the water, number one. And number two, if, in fact, that's going to be the case, we need to make sure that the statutes will, in fact, assure that DNR can and is involved in that process. I don't think we're there yet, Senator. [LB1038]

SENATOR FRIESEN: So were there people from the Upper Niobrara anywhere that have been in opposition to this so far? [LB1038]

LEE ORTON: In the Upper Niobrara? [LB1038]

SENATOR FRIESEN: The Niobrara Basin. [LB1038]

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LEE ORTON: I don't think so. The irrigation districts there, I think are very well invested and you'll hear from both of them yet this afternoon after I'm finished, Senator, so they can speak to the situation they have in their own particular areas. I think they also support the idea that the Niobrara is unique, that it needs to be preserved and protected and that there is a logical way to get to that end, but we need to make sure we don't make a mistake doing it. [LB1038]

SENATOR FRIESEN: Okay. Thank you. [LB1038]

LEE ORTON: Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, Mr. Orton, and we understand the questions and concerns that you have and obviously the sheets that went out and the answers that went out you have received them. [LB1038]

LEE ORTON: I have. I looked at them for the first time a day or two ago. [LB1038]

SENATOR SCHILZ: And I understand how that is. [LB1038]

LEE ORTON: And I have not had a chance really to even think through them very much in detail yet. [LB1038]

SENATOR SCHILZ: Sure. [LB1038]

LEE ORTON: But I think there are solutions to every one of the problems we expressed. I'm not sure that I understand all of the answers at this point in time, nor do the rest of our people that have looked at them, but there is at least a road map ahead that we can get there with. That's why I said at the outset though, Senator, I know it's important to get this done, but let's not let time drive the issue. Let's make sure we do it right. [LB1038]

SENATOR SCHILZ: Okay. And on the other side of that, we hope and look forward to hearing from you guys if there are any further concerns after those answers have been provided that we will... [LB1038]

LEE ORTON: We have a group of people who have agreed today to sit down together later this week and again early next week and I think we will be prepared within a week or so to provide some suggestions of what will satisfy our needs. [LB1038]

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SENATOR SCHILZ: Okay. And I would remind you, too, that you know how things move here, so. [LB1038]

LEE ORTON: I do indeed. That's why we're trying to work on this as quickly as we can possible. I wish we had been invested in the process sooner but we're not, so now we need to find a way to get it done. [LB1038]

SENATOR SCHILZ: And we're working to make sure that you... [LB1038]

LEE ORTON: Thank you so much. Thank you. [LB1038]

SENATOR SCHILZ: Thank you. Any other questions? Seeing none, thank you very much. [LB1038]

LEE ORTON: I have to excuse myself as you know, so. [LB1038]

SENATOR SCHILZ: I understand. Thank you very much for your testimony. Next opponent. Good afternoon. [LB1038]

BRETT SKINNER: (Exhibit 10) Good afternoon, Senator Schilz and committee members. I am Brett Skinner, B-r-e-t-t S-k-i-n-n-e-r, and I'm here on behalf of the Mirage Flats Irrigation District and I'm testifying in opposition. Mirage Flats Irrigation District is a surface water irrigation district in the northwest corner of the Panhandle. We get our water from Box Butte Reservoir, an on-stream storage facility located on the Niobrara River in Dawes County. We provide water to approximately 60 irrigators on 11,700 acres. Mirage Flats Irrigation District has been a water short district almost since the inception of the project. Box Butte Reservoir has only been full twice, the last time being 1951. Our average deliveries are only four to five inches per acre. As you well know, that does not raise much of a crop. The only way the farmers of the Mirage Flats Irrigation District are able to survive on this scarce amount of water is that we, that we deliver it by supplementing our water supply with groundwater wells. When I first came to the irrigation district in 1990, I was told that if we done nothing more than charge the system, we would be beneficial to the area with the groundwater recharge we supply. The majority of the water that the landowners of Mirage Flats Irrigation District and the surrounding areas pump out of the ground comes from the water that we have put in the ground. I've actually been told by NRD people that within a week or two of us turning on our water they can see an increase in the ground temperature...the temperature of the groundwater. There has been some groundwater decline since the 1950's, but very minimal when you look at the intensely irrigated area. We not only help maintain the groundwater levels, but we also contribute to the flow of the Niobrara

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River. We take what could be a highly fluctuating flow in the river and retime it to maintain a fairly constant flow below Box Butte Reservoir. Any damage to the Mirage Flats Irrigation District will eventually result in a negative impact on the Niobrara River. I would assume this would hold true for Ainsworth Irrigation District. We've been told by the coalition of the NRD's that they want to maintain the status quo on the Niobrara River. And we can all agree that this is a great concept. The question is, what is the status quo? Prior to 2007, Mirage Flats Irrigation District and the Ainsworth Irrigation District never had to pass water due to a call being put on the river by NPPD. When you look at the fact that Mirage Flats Irrigation District first started delivering water July 16, 1946, I would argue the status quo would be that Mirage Flats Irrigation District and Ainsworth Irrigation District would not have to bypass inflows for the Spencer Dam water right. We've been told that this is not the place to address how the Department of Natural Resources administers the Niobrara River, and we believe this is probably true. However, our concern is how will this affect our ability to address how DNR administers the Niobrara River? If this legislation is passed, and future legislation on the administration of the Niobrara River could be viewed as detrimental to the NRD coalition and the Game and Parks water right, therefore making it impossible to get back to the status quo. In 1943, the United States Bureau of Reclamation signed a subordination agreement with the Nebraska Hydro-Electric Company that allowed for the storage of water in Box Butte Reservoir. The subordination agreement was a direct result of the protest by Nebraska Hydro-Electric Power Company of a storage right that the Bureau of Reclamation had applied for. Therefore, I believe the intent of all parties involved was for the Mirage Flats Irrigation District not to be required to pass water due to a call being put on the river. With that being said, we believe it is very important that the intent of the legislation should be something that does not harm Mirage Flats Irrigation District, or Ainsworth Irrigation District, or any surface water irrigator on the Niobrara River. We also feel that it is of the utmost importance that we take our time as we go through this process to make sure that the wording is clear and that the true intent of the legislation is carried out. We would be lying if we were to say that we are not concerned about the potential harm this legislation could cause to the irrigation districts. One of our concerns is that right now there is a handshake agreement in place between NPPD and the Spencer Hydro Plant...and the Spencer Hydro Plant shuts down for maintenance at the same time Ainsworth Irrigation District closes their gate for the season. This allows for Ainsworth Irrigation District and Mirage Flats Irrigation District to start storing water. If the legislation were to pass, no maintenance would be required. Therefore, Mirage Flats Irrigation District and Ainsworth would have to pass the inflows down the river. It appears to us that the Niobrara River management agreement between the coalitions and Game and Parks, there would be a call on the river 24/7, 365. If this were the case, we could potentially have a storing closing notice from May thru September. This can also happen now the way the river is being administrated. If this scenario were to happen, our water supply could be reduced by approximately 30 to 35 percent. When you look at a district that's only delivering four to five inches, it's a significant amount. A reduction like this would be devastating to the water short districts such as Mirage Flats Irrigation District. It is our understanding that there are

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no groundwater pumping restrictions below the Mirage Flats Irrigation District on the Niobrara River. The landowners on the Mirage Flats Irrigation District have had pumping restrictions... Am I done already? [LB1038]

SENATOR SCHILZ: Go ahead. [LB1038]

BRETT SKINNER: I've got quite a bit left to go. I'm sorry. I don't read fast enough, obviously. [LB1038]

SENATOR SCHILZ: You're fine. Are there any final thoughts that you'd like to say? [LB1038]

BRETT SKINNER: You know, they talk about the federal reserve water rights. There are federal water rights on the Niobrara River already. The Bureau of Reclamation holds Ainsworth Irrigation Districts and our water rights. The Bureau has invested millions of dollars into our project, Ainsworth Irrigation District project. In fact, in 2017, they are going to start repairing a toe drain...toe drain repair work that's estimated about \$9.8 million. We will have to repay a portion of that and that will be by taxing our landowners. I mean, there's a lot of investment here that we really can't afford to have any more harm done to us than already has been. You know, we really need to address the subordination agreements and get those, you know, they're there. But I don't think they're being handled the way we've...everybody intended for them to be handled. [LB1038]

SENATOR SCHILZ: Any questions for Mr. Skinner? Senator Friesen. [LB1038]

SENATOR FRIESEN: Thank you, Chairman Schilz. You mentioned in your testimony here the spot where you talked about the Spencer Dam being shut down for maintenance and therefore you get some water storage rights, but everybody that's in it, later on you indicated also that they don't have to do that if they don't want to. [LB1038]

BRETT SKINNER: They don't have to, no. [LB1038]

SENATOR FRIESEN: It's a voluntary thing they do for maintenance and they time it for the Ainsworth Irrigation District, so. [LB1038]

BRETT SKINNER: Right. [LB1038]

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SENATOR FRIESEN: I guess what...show me what changes with this agreement. It's stated over and over, I think, that we heard, all of the irrigation rights and stuff were supposed to be operated exactly the same as they were before this agreement. [LB1038]

BRETT SKINNER: Yeah, it will change. There will be no maintenance required on Spencer Reservoir and that's, you know, a fairly short period, but, you know, for a water short district like myself, any extra water we can store is, you know, is beneficial. I mean, we're at the head waters. I mean, I've been up above the dam. In the fall, I could jump across that. I mean, it's no wider than this table. I mean, this is a small creek really is what it is. [LB1038]

SENATOR FRIESEN: Would there be a reason they wouldn't do that for you, I mean, operate it exactly as it was before? Is there any particular reason they wouldn't? [LB1038]

BRETT SKINNER: You'd have to ask them, I mean. [LB1038]

SENATOR FRIESEN: I mean, obviously, when they operate at Spencer they didn't have to do it either, they just did it. [LB1038]

BRETT SKINNER: Right. [LB1038]

SENATOR FRIESEN: And they timed it for a beneficial purpose to everyone else. So, I mean, do you see any reason that they would not do that? [LB1038]

BRETT SKINNER: No, I don't. You know, and I've told Pat O'Brien, the general manager of Upper Niobrara White that I do trust him. You know, and that he's got our interest at heart, but he's not always going to be there. I mean, who is next in line, you know, and what's their intent and how do they view this? [LB1038]

SENATOR FRIESEN: Okay. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Seeing none, Mr. Skinner, thank you very much for your testimony. Further opposition. Opposition testimony. Good afternoon, Mr. Strauch. How are you? [LB1038]

DENNIS STRAUCH: (Exhibit 11) Good afternoon, Senator, members of the committee. My name is Dennis Strauch, first name is spelled D-e-n-n-i-s, last name, S-t-r-a-u-c-h. I'm here representing Pathfinder Irrigation District which is not on the Niobrara, it's on the Platte. We're

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one of the largest irrigation districts in the state serving over 800 irrigators with about 100,000 acres of land. I'm here in opposition to this piece of legislation because I don't think all the parties have had an opportunity to really understand what the implications are. It does represent to me a major change in water policy. I served on the Water Service Policy Task Force. I know Senator Schilz and Senator Friesen both did. The topic of transfers of surface water were discussed. I mean, we talked about the need to transfer from one preference to another. At that time most of the debate was coming from municipalities who wanted the ability to transfer to a municipal use. And we ended up looking at leasing and so, under our current statutes, you can lease a surface water right to a different use, but it's limited to a 30-year term. From an irrigation district standpoint, leasing doesn't upset the apple cart. I mean, when you start taking chunks of irrigated land out of a project or a district, it starts having an effect on the district's the remaining customers being able to operate. So what we see here is, yes, we're talking about a power plant, but our concern is what comes next because currently in the Platte River, and the NRDs have talked a little bit about, several NRDs are leasing surface water, and I think that's just perfectly fine. It's meeting a need, but it's not taking that right permanently out of use for its original intended use, which supports the rest of that irrigation district's users. So it's a concern that this could lead to further...and I understand that's got to be a whole new proposal, but it could lead to new requests in the future of transferring actual irrigation surface water rights to other uses. You've heard...I understand instream flow. I don't understand basin water flows. I'm not sure what it is. I've heard...we heard people today say, well, it allows for the new uses, things like that. And I think from a surface water standpoint, new use is usually, if you look at it, any new use that impacts the stream, impacts surface water...existing surface water irrigators and their water. I think right now, and I might be totally wrong, but the only time there's a requirement in the statute under LB962 to protect existing water uses, is if a basin is fully over appropriated. As of right now, I don't believe the Niobrara Basin is. We could fix that with this legislation. I mean, you could legislate that it's fully appropriated. That would make sure those uses get protected. You know, right now it's being left up to an integrated management planning process that by statute I don't believe fully enforces that. I don't want to repeat a lot of the comments. I've heard...you know, we've heard about the need for a federal reserve water right. You know, short of some written assurances that that's not going to still move forward, I think we should take our time and do this right. Like I said, we're not opposed to what's being intended to be done here. We just want to make sure it's done right and done to where it doesn't impact other areas of the state adversely. And so, as Lee said, you know, I'm on a committee that we're willing to sit down and start talking about what our issues, how do we get them addressed in the legislation and still make the legislation work for what's being intended here. And that's protection of a viable resource such as the Niobrara. I'll close with that, and thank you for the opportunity to testify, and be glad to answer any questions you might have. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Strauch. Any questions for Dennis? Dennis, when we talk about...and I'm going back and trying to remember all of the negotiations we did, and when we

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talked about transferring of certain rights, if I understand it right, were we just talking about ag rights, or was that...was everything encompassed in that? I'm trying to remember myself. [LB1038]

DENNIS STRAUCH: Yeah, I don't remember any discussions that specifically said it would be limited to transferring ag rights. You know, I think we talked about...at that time we didn't want to allow transfers between preferences, just on a permanent basis because I don't think at that time there was no need really identified for that. And so that's why we went through the leasing approach and buy some time. Now we have a new concept, of a new need that possibly could be very beneficial to that basin. I just think we need to be very careful that we don't affect other parties adversely with this piece of legislation. I think it can be crafted right that meets everybody's needs. I really do. [LB1038]

SENATOR SCHILZ: And I appreciate that and I know having worked with you in the past, you don't say that without some...meaning it, so. As we talk about that and if we would move forward with this and there would be the process that DNR has to go through, in order to grant a new right or transfer a right, does DNR not have to prove that current users won't be harmed, is that...? [LB1038]

DENNIS STRAUCH: It is, but I think when they're looking at that they're looking at not being harmed by the transfer of the surface water. But here we're dealing with a new term that may have new consumptive uses associated. That's where we're lost. We're not sure to understand what that means. I don't think DNR can look at that and say, okay, if there's a new groundwater use that depletes the stream by allowing this, I don't think they can see that. I mean, I just don't see where they would...you know, if they could qualify the permit somehow to make it applicable, I don't know if they can under current law. I know it can be dealt with under a good integrated management plan. [LB1038]

SENATOR SCHILZ: That was going to be my next question. [LB1038]

DENNIS STRAUCH: That's why I say it needs to be in integrated management plan. I think it can be accomplished there. [LB1038]

SENATOR SCHILZ: But then those two have to work closely together... [LB1038]

DENNIS STRAUCH: Yes, yes. [LB1038]

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SENATOR SCHILZ: ...to make sure that you're getting what you intended. Very good. Yeah, thank you. Senator Friesen. [LB1038]

SENATOR FRIESEN: Yeah, Senator Schilz, thank you. I guess the biggest concern I'm hearing from you is that just to make sure it doesn't happen on some other basin. What are the unintended consequences of what we're trying to do here? [LB1038]

DENNIS STRAUCH: Well, there are other power plants on other basins. Some of them have very senior water rights like this. You know, it's not an on-stream hydro plant, but Kearney Canal with the Kearney hydro has one of the most senior water rights on the Platte River. If that was transferred to an instream flow, which has no preference over irrigation, you would have to go through condemnation, I assume, or go through subordination if that right tried to exercise its preference, or its priority. I mean, I think there's just fears out there because we don't understand it, Senator Friesen. I think if we understand how we can structure this so it doesn't have adverse impacts elsewhere, I think everything can be done. [LB1038]

SENATOR FRIESEN: So you think there's a potential that down the road that storage...or that water use could be sold. I mean if we had willing buyer, willing seller to deal with. [LB1038]

DENNIS STRAUCH: Yeah. Right now, you know, that is probably the most senior water right on the system that involves hydro in the Platte Basin, which I'm involved in. [LB1038]

SENATOR FRIESEN: But if...okay, I'm just trying to come up with a scenario, I guess. So if something like that would happen there and a senior water right then is sold and obviously the way this one was done, the parties, it's Game and Parks and whoever else, it establishes a, what you might say, is a stream, instream flow with a senior water right, which is...is that what you'd call this or...? [LB1038]

DENNIS STRAUCH: I'm not sure how it would be operated. That's part of the problem. I mean, how would be called...currently, currently, Kearney doesn't call for administration for that water right, but somebody that knew that could acquire it, may call for it on a regular basis. You know, there is in some places there are going to be differences on how that water right is being asked for. Like I said, right now, NPPD doesn't issue a call or request for administration, mostly because it's normally met, if they could. [LB1038]

SENATOR FRIESEN: NPPD, nobody made a call on the Niobrara either until... [LB1038]

DENNIS STRAUCH: Yeah, right. [LB1038]

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SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions? Just one last one. As we talk about this and as we look at the potential opportunities of something like this, if someone would have come and talked about this on the Platte, our system, that's a completely different question than what we're dealing with on the Niobrara, would you agree? If nothing else, it's...as far as the flows go and the... [LB1038]

DENNIS STRAUCH: It's a different system and the issues are probably somewhat different too, so. [LB1038]

SENATOR SCHILZ: And the only reason I said that is on a system like...on the river like the Niobrara where we've seen pretty steady flow over time... [LB1038]

DENNIS STRAUCH: Steady over time, yes. [LB1038]

SENATOR SCHILZ: ...that makes this a bit different than trying to deal with it on the Platte. So it simplifies it a little bit. [LB1038]

DENNIS STRAUCH: And I applaud the parties. I mean, looking at a way to stabilize flows and protect the resource, I mean, that's very important to the state. [LB1038]

SENATOR SCHILZ: And we just...last year and the year before allocated \$100 million to be able to do some of those kind of things, so. [LB1038]

DENNIS STRAUCH: We're on the right track, Senator. [LB1038]

SENATOR SCHILZ: I hope so. We're going to find out. All right. Any other questions for Mr. Strauch? Seeing none, thank you very much for your testimony. [LB1038]

DENNIS STRAUCH: Thank you. [LB1038]

SENATOR SCHILZ: Next opponent, please. [LB1038]

STEVE SMITH: (Exhibit 12) I'm Steve Smith, Chairman Schilz and members of the committee. S-t-e-v-e S-m-i-t-h. I'm an attorney from Scottsbluff, Nebraska, and I represent the North Platte Valley Irrigation Association which is on the North Platte above Lake McConaughy. It consists of over 300,000 acres of surface water irrigated ground which unlike anywhere else in the state, there's more surface water irrigation in our area than there is groundwater irrigation. Dennis

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Strauch referenced a concern we have about if you pass a bill here that is not limited to this basin, the Niobrara Basin, and that does not protect the existing surface water users up there, we're concerned about its application on the Platte. Our entity, the North Platte Valley Irrigators consists of four: Scotts Bluff, Morrill, Garden, and portions of Sioux County and as you all know, that's a semi-arid portion of the state. We're the only substantial area in the state that depends on irrigation water, surface water appropriations more than groundwater, and we have to make this...we want to make these comments in opposition to the bill because I think there are serious constitutional questions with the bill that will be addressed some day if it passes in its present form. Now, again we recognize the value of instream flows. We would like to see the Niobrara River protected, too, but not at the expense of surface water irrigators and in possible violation of our constitution. I'll explain why briefly. Back in the mid '80s, I think this legislation for instream flow...and this is related to instream flow. It's undefined instream flows, some combination. That legislation was introduced and it was controversial as you might imagine at the time. You know, every irrigator in the state was scared to death of what that would mean to their farming operations. Assurances were given and I was practicing law out in Scottsbluff. I was in the Attorney General's Office earlier. Assurances were given by Game and Parks Commission, other proponents, that if the instream flow legislation passed, it would never trump irrigated agriculture with priority dates prior to an instream flow permit. In other words, if an instream flow permit...Game and Parks had just filed one for 2016, that could...they could not administer for any right that was older than 2016, but they could administer to future ag rights. Those representations were made and relied upon. Now this...my biggest concern, I think the concern that raises the constitutional questions, is the current proposal asked this body to allow them to obtain, not only the Spencer rights by retiring, but have a 1923 and a 1942 priority for it, which was totally contrary to the initial representations on the instream flow. Basically, the way the priority system works and why it's important for agriculture in Nebraska, this is...what they're asking for is to allow the Alliance to cut in the line ahead of the junior surface water appropriators that depend on flows when they're not being used by seniors, which would be Spencer, or are relinquished or otherwise given up. This raises the constitutional questions and I'll try to get through this and make it as clear as I can and would welcome questions. We have a constitutional provision in this state that makes water for domestic use and irrigation purposes declared to be a natural want, meaning that it's essential for survival in the state. We all know that. That makes sense. There's no such constitutional or statutory declaration with respect to instream flows or the undefining instream basin management use. They're not deemed to be essential for our livelihood. Agriculture has been and remains a foundation of our economy and our constitution and the founders drafted the...or excuse me, 1895 Irrigation Act which recognized the need to protect those surface water appropriations so that we could continue to maintain our economy. And the Supreme Court on several occasions has noted this is especially true in the semi-arid portions of our state. The Supreme Court has declared that our constitution grants constitutional protection of the doctrine of prior appropriation. Now the court has also observed that...and this is in the Long Pine case and in the Birdwood case, both decided by the

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Nebraska Supreme Court that the lack of a priority system for surface water appropriators would hinder development in the more arid regions of the American West which describes not only the North Platte Valley area, but... [LB1038]

SENATOR SCHILZ: Go on, Mr. Smith. [LB1038]

STEVE SMITH: Oh, I'm sorry. [LB1038]

SENATOR SCHILZ: No, you're fine. No, no, I want you to keep going. [LB1038]

STEVE SMITH: Okay. Not only the Panhandle, but parts of the Mirage Flats area, the western part of the state. One of you fellows, one of the senators here I think is from the southwest. You know what semi-arid is. The court went on to observe that Nebraska responded to the natural want for irrigation water by adopting the doctrine of prior appropriation. It went on to say that it's the policy to compel an economical use of the waters of natural streams. One of the very purposes of the state is in the administration of public waters is to avoid waste and secure the greatest benefit possible from the waters available for appropriation from agricultural purposes. Now, given the Alliance and the Game and Parks a senior priority and effective control over either irrigation or domestic uses is contrary to those constitutional provisions declaring domestic and irrigation natural wants. The...one other brief constitutional concern is the purpose of the appropriation is undefined. To assist in the implementation of integrated management of ground and surface water, the laws to meet due process have to be drafted in a manner that...or people of ordinary intelligence can read them and understand what they can and cannot do. And we don't know what's going to become of this appropriation. The only federal agents...we've heard this federal reserve water rights scare. With a 1991 priority, I don't think we'd have that big a problem with a 1991 priority. But the only federal agency here today that I think will express some concerns about this legislation is the Bureau of Reclamation who has great investments in Mirage Flats and Ainsworth Irrigation District. This entire subject, there are people here on LB962 and it has been mentioned several times, requires the type of study that you fellows...that you folks did and other people did on LB962. A free discussion, open sharing of information, and ideas among all affected parties. Any process which changes water laws established well over a century ago, and which fueled this state on its way to becoming an agricultural leader, deserves nothing less. This committee as it well knows and respects that it has that important responsibility to fulfill your legacy and we respectfully urge all of you to first thoroughly review and clearly understand the full effect and implications. We thank you for your attention and our association remains willing at a moment's notice to help fashion this piece of legislation to something that protects those concerns and avoids constitutional problems, which we think can be done and frankly we were included in the process, in any meaningful means, late in the game here, so. I'm sorry I went over my time. [LB1038]

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SENATOR SCHILZ: You're fine. Thank you. Hold on, one second. First of all, I'd like to say thank you for being a part of those meetings. I know they're important and I know that we were working to get those caught up to where we need to be. As we talked about, and as you talk about...and maybe you can help me here. I'm going to ask a few questions. The...let's just talk about the junior rights on the stream and we're talking about the irrigation districts, I would suspect, and maybe a few individuals, I would suppose. [LB1038]

STEVE SMITH: Yes, yes. Well, yes, let's talk about junior rights on the stream in general. [LB1038]

SENATOR SCHILZ: Thank you. [LB1038]

STEVE SMITH: What this does is gives the holder of this new permit for instream basin management seniority, so they will call for administration which means DNR then has the duty to go out and shut those folks off when there aren't flows at Spencer and possibly other locations under the permits to meet those demands. At the meeting yesterday, and some of the questions that were answered, or answers were provided yesterday, was made clear that this right, if transferred with a 23 and 42 priority, will definitely be used to administer those surface water interests. So, that ties into my biggest constitutional concern in that when you're letting some uses that aren't constitutionally protected, trump agricultural uses, then you're running into trouble constitutionally. So, and we're worried about on the Platte, I know up on the Niobrara and it hasn't been touched on too much and it's probably more confusion, but there are subordination agreements for Mirage Flats and Ainsworth and as long as they're not altered and honored, I think that's...you know, that's our main concern there too. [LB1038]

SENATOR SCHILZ: And so...and so, let's talk about the subordination stuff itself. [LB1038]

STEVE SMITH: Yeah. [LB1038]

SENATOR SCHILZ: And as we look at that, so we have a hydropower right that's sitting there that has a lower priority or lower preference than the ag rights that are there. [LB1038]

STEVE SMITH: Right. [LB1038]

SENATOR SCHILZ: So there is a system in place to allow those folks that hold that higher priority, higher preference right to go in and fix that through what is called these subordination agreements, correct? [LB1038]

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STEVE SMITH: Pay money. [LB1038]

SENATOR SCHILZ: Pay money in order to have a subordination agreement... [LB1038]

STEVE SMITH: Right. [LB1038]

SENATOR SCHILZ: ...it has to be worth something, correct? [LB1038]

STEVE SMITH: Well, yes, but the...you know, the real question here is, sure that's clear between power and ag. That's what the constitution and statutes say. But we're talking about undefined and really unprotected rights here. And why should surface water irrigators have to pay anything to continue to irrigate when it's no longer being used for manufacturing. [LB1038]

SENATOR SCHILZ: Okay. [LB1038]

STEVE SMITH: You can call it manufacturing, but, you know, is it? I don't think so. [LB1038]

SENATOR SCHILZ: Okay. I appreciate that. Thank you. Any other questions? Senator Schnoor. [LB1038]

SENATOR SCHNOOR: Yes. Mr. Smith, you referred to Article XV, Section 4 of the constitution and you talked about natural want. Can you define that for me, please? [LB1038]

STEVE SMITH: Yes, what the cases have said a natural want is, is it means it's essential for human survival and prosperity. And the only two rights in this state that are recognized as such are domestic, true domestic and ag. [LB1038]

SENATOR SCHNOOR: But agriculture, just as in irrigation. [LB1038]

STEVE SMITH: Well, yes, I mean, because that refers to water. Yeah. Surface water irrigation is what they were talking about, yes. [LB1038]

SENATOR SCHNOOR: Is livestock in that category anywhere? [LB1038]

STEVE SMITH: Well, livestock, no, except to the extent maybe to domestic, and then you get into a big question like a big feedlot operation, is that domestic? Probably not. Are a few cows

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and pigs around the farmstead domestic, probably. But it's not...there's no fine line, or there's no black and white line in Nebraska that's separated it. But regardless of what you think...you know, maybe things should be readdressed as what's important, what's not, but that's what our constitution said and still says. [LB1038]

SENATOR SCHNOOR: Okay. Thank you. [LB1038]

STEVE SMITH: You're welcome. [LB1038]

SENATOR SCHILZ: Thank you, Senator Schnoor. Any other questions? Senator Friesen. [LB1038]

SENATOR FRIESEN: Senator Schilz, thank you. When we look at the odds of this happening somewhere else in the state, like Lake McConaughy, the power generating station there, what kind of dollars would we be talking about for that to happen? [LB1038]

STEVE SMITH: Well, I'm not...I don't think, at least our association isn't too worried about Lake McConaughy. I think they'll have some concerns of their own about this legislation. They have a fairly senior priority...I mean, junior priority. They're not...even if they converted it somehow, which I doubt will ever happen, it's not going to affect us in the Panhandle. It will affect other irrigators. But as Dennis mentioned, the Kearney Canal which is owned and operated by NPPD has roughly 200-second feet of power generation, and I believe that is one of the two or three oldest rights on the Platte River. And if this occurred there, then they would most likely call for administration to put these instream flows, or whatever it is, basic management flows, back in the river so they could continue to develop groundwater among other things, not Central, but the person who buys it which might be an alliance in Central Platte. I don't know. The other thing as Dennis says, and it isn't much of a leap to go from converting power to instream flow to trying to convert ag into the instream flow and there's several senior ag users in the central part of the state that can call for administration on western Nebraska, and the same thing is true in any river basin that's still governed by the priority system. So it's a concern. And I think one of the things we talked about in the meeting yesterday was you could probably fashion this with a little input and a free exchange of information to make it only apply to this basin without facing any constitutional questions. [LB1038]

SENATOR FRIESEN: Well, we've...I mean, I think with LB962 we were always concerned about some of these issues, I agree with that. [LB1038]

STEVE SMITH: Right. [LB1038]

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SENATOR FRIESEN: I just...I guess I'm so far failing to see how that could possibly happen anywhere, but I am concerned about that happening because that's not what anyone intended. I think we will look at it further, but I understand needing the date there I think in the Niobrara Basin and what it means to the parties involved. And so I still think it has to have some of that protection in order to serve the purpose that we're looking at. So, dates are important and I understand that, so thank you. [LB1038]

STEVE SMITH: Thank you, Senator. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any other questions for Mr. Smith? Thank you very much for your input and your testimony. [LB1038]

STEVE SMITH: Thank you. Thank you, folks. [LB1038]

SENATOR SCHILZ: (Exhibits 13, 14-31, 32-35.) Further opponents. Further opponents. Okay. Seeing none, we'll move on to...we have one letter from David Ford from Central Nebraska Public Power and Irrigation District in opposition. Is there any...and we'll go back and just ask for...to make sure. Is there anyone else that was in support? Any other supporters that didn't get a chance? And we'll go one more time. Are there any other opposition that didn't get a chance? We do have letters of support from this. I'll start down the list. It's a little extensive, so. Cherryl Lovejoy from Valentine; Gary Kelly from Ainsworth; Leonard Danielski from Cherry County; Greg Wilke from Ainsworth; Paul Schock, founder and majority owner of The Prairie Club, LLC in Valentine; Mike Danielski, Valentine; Luke Moser from Valentine; Gary Garvin from Valentine; Tom Danielski from Valentine; Mark Johnson, sales associate with Heartland Country Real Estate, Valentine; the Keya Paha Board of Commissioners, Mike Tuerk, Corey Nilson and Bruce Ritterbush; Jasper Fanning, PhD, general manager of Upper Republican NRD from Imperial; Jody Dexter from Valentine; Steve Koinzan from Valentine; the Brown County Board of Commissioners, Les Waits, Reagan Wiebelhaus, Raymond "Buddy" Small; Robert F. Hilske, general manager of the Nemaha Natural Resources District; Michael D. Kreycik, president of the West Plains Bank, Ainsworth; and Michael K. Sotak, P.E., FYRA Engineering. And then we also have in support: John Winkler from the Papio NRD; Mace Hack from The Nature Conservancy; Lee Simmons from the Niobrara River Ranch; and J. Larry Hutchinson from Crete. And so with that, that will end up our support and opposition. Do we have any neutral testimony? Good afternoon. [LB1038]

CRAIG SCOTT: (Exhibit 36) Good afternoon, Chairman Schilz and committee members. My name is Craig Scott, C-r-a-i-g S-c-o-t-t. I'm presenting testimony here today on behalf of Aaron Thompson, area manager of the Bureau of Reclamation's Nebraska-Kansas area office located in McCook, Nebraska. I think there's been a lot of good testimony before me so I'll try to keep my

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testimony brief and focus on Reclamation's issues or points of concern. Reclamation is the water right holder for storage in both Merritt and Box Butte Reservoirs, located in northwestern Nebraska, and is responsible for the overall management of these federal reservoirs. The use of water in the basin by Reclamation projects is based on the concept that Reclamation will store water in the federal reservoirs during the nonirrigation season, and supply irrigation districts with storage water to supplement natural flows. Reclamation has concerns that the proposed legislation may adversely affect Reclamation's storage rights and needs to better understand how the instream flow rights authorized by the legislation would be administered in the future relative to Reclamation's rights. After reviewing the River Flow Management Agreement between the Game and Parks Commission and the Niobrara Basin natural resources districts, Reclamation also has concerns that new uses may be created as a result of the proposed legislation. This concern is amplified because it remains unclear how a portion of the converted appropriations will be utilized by the basin NRDs in the future. In addition, Reclamation understands the proposed legislation provides that subordination agreements existing prior to the change of use of any hydropower appropriation to an instream basin management appropriation will be honored at no additional cost. The United States entered subordination agreements prior to the construction of the federal projects. Costs associated with these agreements were paid in full and upfront. Reclamation expects any new legislation that would allow for a transfer of water rights to recognize Reclamation's existing subordination agreements as perpetual agreements. In closing, Reclamation is supportive of the NRD's and Nebraska Game and Parks' efforts to acquire an instream flow appropriation for conservation and fish and wildlife. However, new legislation must ensure water supplies associated with the federal Mirage Flats and Ainsworth projects are not reduced. Additional time may be needed to fully understand how the basin NRDs will utilize the water rights in the future. Thank you. [LB1038]

SENATOR SCHILZ: Thank you, sir. Any questions? Questions? Seeing none, thank you very much. Further neutral testimony. Good afternoon. [LB1038]

ROD IMM: (Exhibit 37) Thank you, Senator Schilz and members of this committee. My name is Rod Imm, R-o-d I-m-m. I'm the manager of the Ainsworth Irrigation District. I'm speaking on behalf of the Board of Directors of the Ainsworth Irrigation District on LB1038 and AM1966. This testimony is in the neutral position to LB1038 and AM1966. The Ainsworth Irrigation District is under contract to the United States Bureau of Reclamation to deliver water from Merritt Reservoir in Cherry County to 35,000 acres of farmland in Brown and Rock Counties. The irrigation district holds the natural flow water right on the Snake River of 495 cubic feet per second with a 1953 priority date. The Bureau of Reclamation holds the storage right at Merritt Reservoir for approximately 76,000 acre-feet with a 1958 priority date. The Bureau of Reclamation and the Ainsworth Irrigation District have perpetual subordination agreements that were entered into and paid for with Nebraska Public Power District's predecessor Consumers Public Power District. These agreements were made when the projects were being built. Being

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directly involved in irrigated agriculture, we support the concept of allowing flexibility of some limited development for future water uses in the communities. Furthermore, we're not against the concept of preserving streamflows in the Niobrara Basin for fish, wildlife, and recreation. The Niobrara River Alliance and the Nebraska Game and Parks proposal submitted in LB1038 and AM1966, although amiable, leave us at the Ainsworth Irrigation District with many concerns. Nebraska state water law provides protection for surface water users through a prior appropriation system which is commonly called, first in time, first in right. Seniority is determined by the date of the water right application. If Nebraska Public Power District does not produce power, we who hold junior water rights move up and become senior. Since 2011, Merritt and Box Butte Reservoirs have had to release inflows during the irrigation season for the benefit of irrigation in the basin. The problem is, it was the Nebraska Public Power District putting the call on the river, not irrigation, even though the Bureau of Reclamation had storage subordination agreements in place. We spent two years right here with the Natural Resources Committee dealing with this issue. Even though we did receive some benefits of the call had to be downstream, we still to this day get called out on storage. Having a senior storage right would help to eliminate this problem. And that is according to Nebraska water law 46-2,119 instream applications. I'm just going to tell you what it says, is basically, you don't have to bypass storage flows for a junior instream flow. LB1038 and AM1966 allows the Niobrara River Basin and the Nebraska Game and Parks to purchase Spencer hydro's priority date for a completely different use and jump over the water users who would next be in line to be senior water holders on the Niobrara Basin. Many questions arise with this bill such as: Who will be putting the call on the river if the flows fall below target flows? When would the calls be put on the river? How long will the call be put on the river? How will the Department of Natural Resources administer if there is a call? Are there other alternatives to this proposal? And would a water right with a current date accomplish the same goal? What are the unintended consequences to the Niobrara and the other basins in the state? Finally the prior appropriation system has been the backbone of water law in the state of Nebraska from the beginning. Should we not delay action, take some time and have some input by all parties involved including the state and federal agencies and other stakeholders who are affected by this bill? This is a very important issue to the Ainsworth Irrigation and I want to thank you, this committee, for the opportunity to provide testimony today. [LB1038]

SENATOR SCHILZ: Thank you, sir. Any questions? Senator Friesen. [LB1038]

SENATOR FRIESEN: Chairman Schilz. Mr. Imm, one question I guess I have is, you mentioned about, you know, how long will the call be on the river, things like that. Well, currently NPPD...are you under call 24/7, 365 days a year? [LB1038]

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ROD IMM: Yes, we are, but they do go down for maintenance in the fall and usually they have over the past number of years worked with us somewhat to let us store water. So now, I don't... [LB1038]

SENATOR FRIESEN: So there couldn't have been any longer call on the river than there currently is? [LB1038]

ROD IMM: Excuse me. [LB1038]

SENATOR FRIESEN: There couldn't be any longer call based on that. [LB1038]

ROD IMM: Well, no, probably not. [LB1038]

SENATOR FRIESEN: Okay. Thanks. [LB1038]

ROD IMM: But we can't...I mean, we have had some dialogue with the current owners and they've been willing to work with us somewhat on this issue. [LB1038]

SENATOR FRIESEN: Okay. [LB1038]

ROD IMM: But if you're senior to this, you don't have the problem. [LB1038]

SENATOR FRIESEN: Thank you. [LB1038]

SENATOR SCHILZ: So, let me ask you just a couple of questions. Obviously, if NPPD would take this hydropower right and sell that right to another user that would use the hydro, then that would be no problem at all. Everything would work just like it does today, correct? There would be no opportunity, I mean... [LB1038]

ROD IMM: There wouldn't be any opportunity, no. [LB1038]

SENATOR SCHILZ: Nor would there be any problem because that's just... [LB1038]

ROD IMM: Well, that's state law. [LB1038]

SENATOR SCHILZ: It's the other operator who gets the same right. [LB1038]

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ROD IMM: Yes, right. Same right. [LB1038]

SENATOR SCHILZ: Okay. And then on the other side, has there been any discussions, and probably not, but do you see that if there were possibly excess flows, that there could be opportunities to grab some of that at times if...to store and do other things if...could there be opportunities to do that if everybody would want to work together? [LB1038]

ROD IMM: Well, I would hope so, yeah. I would hope that we could...if this...that we could sit down and maybe work something out and make this work. As I said in my testimony, we're not against it if we can... [LB1038]

SENATOR SCHILZ: Would the IMPs be a place to start on? [LB1038]

ROD IMM: Well, I don't know. I guess, possibly. Do we know? Do we know, I mean, how it will harm us before we find out what the IMPs say? [LB1038]

SENATOR SCHILZ: I was going to make a really bad joke there, but I won't. (Laughter) So we've got to pass it before we find out how...(Laughter) That's a bad joke. Joke. Just making sure. Okay. [LB1038]

ROD IMM: We're certainly willing to work with anyone on this. And I don't think it would be a large impasse here. [LB1038]

SENATOR SCHILZ: Okay. I very much appreciate it. Any other questions? Senator Schnoor. [LB1038]

SENATOR SCHNOOR: Thank you. Mr. Imm, you have testified in a neutral capacity and there's another gentleman from the...earlier today that is a...I guess he said he's a surface water user from your irrigation district that has testified in favor of this. [LB1038]

ROD IMM: Yes. [LB1038]

SENATOR SCHNOOR: Can you, I guess, explain your differences of opinion? [LB1038]

ROD IMM: Yes. I administer the water and he's the user. (Laughter) He's a very good friend of mine and always will be. [LB1038]

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SENATOR SCHNOOR: Okay. Good answer. All right, that's all. [LB1038]

ROD IMM: I'm the one that has to deal with administration of it or how it is administrated, so. [LB1038]

SENATOR SCHNOOR: Okay. All right. Thanks. [LB1038]

SENATOR SCHILZ: Thank you, Senator Schnoor. Senator Friesen, one more question. [LB1038]

SENATOR FRIESEN: Thank you, Chairman Schilz. When you talk about all the parties that are going to...if this would pass, everybody that's administering the river now, wouldn't it be in everyone's best interest to let you store as much water as possible? [LB1038]

ROD IMM: I would hope so, but we don't know that. That's the problem. We've been blindsided many times. [LB1038]

SENATOR FRIESEN: But I mean, it seems like all the parties now are kind of working towards the same thing as for the management of the river. [LB1038]

ROD IMM: I agree. [LB1038]

SENATOR FRIESEN: So, I mean, it would be in everyone's best interest to store as much whenever they could because there's no hydropower being generated so it's in the best interest if there's an opportunity. [LB1038]

ROD IMM: I would hope so. [LB1038]

SENATOR FRIESEN: Okay. [LB1038]

ROD IMM: I would hope we could come to that agreement. That's what we would like to see. [LB1038]

SENATOR FRIESEN: There was no reason not to. [LB1038]

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ROD IMM: Yeah, that's what we would...yes, sir, that's what we would like to see, but we don't know that for sure right now. [LB1038]

SENATOR SCHILZ: Thank you, Senator Friesen. Any further questions? Seeing none, Mr. Imm, thank you very much for your testimony. [LB1038]

ROD IMM: Thank you. [LB1038]

SENATOR SCHILZ: Further opposition...or neutral testimony. Excuse me. [LB1038]

ANN BLEED: My name is Ann Bleed, that's A-n-n B-l-e-e-d. And first thing I want to say today is that I really want to commend the people who have tried to work together on this MOA. I am the person who, in fact, said Spencer Dam had a valid water right and started administering the water rights for that right and, therefore, I could be accused, I expect, of creating this mess to begin with. However, I think that it's really an important step that people have come together to work out a very viable, I believe, potentially positive compromise. I do have concerns however. I think it's very important to take the time to do this right. I have heard many assurances today and in private from people who are part of the MOA that their intent is to make sure they protect all existing water uses. If that is an important part of this agreement, I would say it's important to make sure that any change in the transfer statutes reflects that concern. I was involved in negotiating the transfer statute, changes that came about as LB962, and I can tell you that protecting existing water appropriators was a very major concern as we worked on those statutes. So if that is important, make sure that that is in the law itself, not simply left up to the decision of an integrated management planning process. This management planning process, however, is going to be very important and therefore, I think it's very important to make sure that all the people with interests in the basin are involved in that process. And one way that could be done in the law is simply saying that a basin-wide plan with IMPs that conform to the basin-wide plan should be developed using the same kind of process that is in LB755, Section 2 through 5 now. That would go a long way, I think, toward making sure that people are involved in that integrated management planning process. There are many other suggestions that I hope you will consider that you heard today and again, just a quick plea to make sure you do this right. I like the idea of restricting it to basins that are...have a scenic river designation on the basin because as is often the case with, quote unquote, special legislation, and I know this technically isn't, but it's clear that it is developed for the Niobrara, that there are often unintended consequences that people don't think about if it applies to other basins. So I think trying to find a way to restrict it to the Niobrara Basin without becoming afoul of the law would be a good move. Thank you. If there are any questions, I'd be glad to try to answer. [LB1038]

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SENATOR SCHILZ: Thank you, Ms. Bleed. Any questions? Seeing none, very good. Thank you for your testimony. [LB1038]

ANN BLEED: Thank you. [LB1038]

SENATOR SCHILZ: Further neutral testimony. Good afternoon. [LB1038]

JAY REMPE: Good afternoon, Senator. Senator Schilz, members of the committee, my name is Jay Rempe, J-a-y R-e-m-p-e. I'm with Nebraska Farm Bureau here today in behalf of the organization in a neutral capacity. I'm going to echo a lot of the things that you've already heard, but let me maybe try make a couple of quick points. We, Nebraska Farm Bureau has the policy of dealing with transfers and we've always had a preference for temporary transfers. And the fears of the permanent transfers have been outlined before so I won't get into that now, but there's always been a little bit of concern about permanent transfers and this does represent a change in law in that right now, any kind of change in use to an instream flow, so to say, is a temporary in nature. It's got to be less than 30 years and this would be a permanent, so that causes a little heartburn for us, but I think we can work out some of these other issues. We're willing to take our Tums and accept that heartburn, because what they're trying to do in the Niobrara we think is a good thing in terms of what the goals they're trying to manage and for the basin management, some of the other things they're trying to do. So we're very supportive of that. We've had some questions in the course of this and we've reached out to the proponents of this and they've been very gracious to answer a lot of our questions. There are three things that we think could help the bill, and coming out of the meeting last night I think there's some things that in terms of an amendment or language that we think would be helpful. And a couple of them have already been mentioned. One is trying to tighten the language to make sure that we are only applying to Niobrara to avoid any unintended consequences. The other change that I heard touched on a little bit, but I want to go a little more in depth in is, it's my understanding that if this were to go forward, the coalition would have to apply to DNR for approval for this change in use. Then DNR would use Section 46-294 to look at whether to approve. One of the...part of that encompassed in LB294 is the no harm rule that you've heard, making sure that no existing users in the system is harmed. We've heard a lot of reference to the IMPs as being developed as a way to manage the basin into the future to assure that there is no harm. For me, there's a little bit of an issue on the timing of all this as to how the director would make a determination without knowing what the IMPs are. And so, to me I think that could be corrected or addressed by some tightening up of some language to make sure we're referencing back to those goals and that we make sure that they're all in line there. Lastly, deals with the subordination agreement. You heard about the junior users on the system and how they might be handled. I'm going to echo a little bit what Steve Smith said. This would be a change in that existing junior rights on the system now would be subject to calls for a quote, new right instream flow right that's developed or created under this transfer, this change in use. And so, to take advantage of the subordination agreements

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they would have to compensate the new coalition owners for the use of that right. And we're talking irrigation rights, but I will mention I think I saw some information from DNR that there's a couple, two or three or handful of domestic rights and they would be the same way. We would argue that we consider looking at those subordination agreements at no cost. Not no additional cost, but no cost whatsoever because we are changing the use. It's no longer hydropower use. We're going to an instream flow to protect recreation interests, fish, and wildlife interests, those kind of things. We're changing it so at no cost, because of that change...the other thing I thought of, if everybody said they're going to do the IMPs. Under our law right now, today, once an NRD does an IMP, they can levy an occupation tax on irrigated acres. I'm not saying that they're going to up there, I don't even know if they've even talked about it or thought about it, but you're subjecting those folks that have the junior rights to the occupation tax, plus potentially compensating the new created right that's developed. And we think it would be simpler to take care of it, just say, no cost at all. So with that, I will be quiet and I'd be happy to answer any questions. [LB1038]

SENATOR SCHILZ: Thank you, Mr. Rempe. Any questions for Mr. Rempe? Seeing none, thank you very much for your testimony. Further neutral testimony. Mr. Director, welcome. [LB1038]

GORDON FASSETT: Thank you, Mr. Chairman. I'm Gordon Fassett, G-o-r-d-o-n F-a-s-s-e-t-t. I am the Director of the Department of Natural Resources. Don't let the Gordon fool you. I'm the same guy as Jeff that you've seen before. (Laughter) I'm here to testify on this bill as well and in a capacity as neutral testimony to really express the concerns that the department has specific to this bill. And my comments are really limited to those aspects of the bill that really become our responsibility. At the end of the day, you're changing the water laws of the state of Nebraska, you're providing new direction, new authorities to my agency to implement and administer this law going forward. As the negotiations have involved, as Senator Schilz and members of the committee have expressed that AM1966 is really the recommended taking off point and I think for my comments, that's really where I'm starting today. It really is AM1966 that we're really focused on and what potential changes may be necessary. I've been included in all of the many, many meetings that have occurred since the MOU became public back in September, including with Senator Schilz and members of the committee. We've met with NPPD separately, with the Game and Parks several times. We've met with all five of the NRDs. We've met with the Farm Bureau. We've met the natural resources district association. We've met with the Alliances legal counsel, consulted with our own Attorney General, and met with a variety of the surface water irrigation districts that have testified today, and others that are in the basin that haven't come forth today. And we've done that in an effort to listen again directly of the concerns and the questions that have been raised from a broad swath of people about how this law is going to be implemented that you've been listening to so patiently for a number of hours today. And we wanted to listen to that as well from the department's perspective to make sure that we're properly informed as to what the goals and objectives and concerns are so that we make sure we

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can get in place the tools that we need to implement this law effectively and follow through on the Legislature's guidance should the bill pass and changes to the water laws occur. They've...I think as you've heard clearly today, many have expressed concerns about the bill, but I think while those concerns are fair, consistently everybody that I've visited with ever since this matter became more public, have clearly supported the general goals that the legislation is trying to achieve, and for protecting existing uses and the values that the Niobrara River Basin provides to the entire state of Nebraska. I've met with Senator Schilz, many of the proponents and opponents that have testified here today. I've been to the meetings that have occurred as recently as last night, yesterday afternoon with a group of attorneys, even this morning at breakfast with four or five different groups that we've heard with today. And I guess my conclusion is, I believe the AM1966 does need a little bit more work from my chair to make sure that we can implement it in a consistent and orderly manner, and that allows it to fit uniquely into the situation we have in the Niobrara River Basin without causing unintended consequences somewhere else. As a result of this sort of intense round of discussions and issues leading up to the hearing, while I don't have any particular things to present today, I did want to just briefly review the issues that we've been working on, the things that we think are important that we would like the opportunity to work with the committee on to enhance the desired role for the future water management that we've heard about and to make sure that the responsibilities that we will undertake with the passage of this bill are clear. First is, we think we do need to have a clearer statement than the current bill currently holds to properly define the beneficial uses that it intended. There's been confusion about instream basin management ever since that word first emerged. We have been working with the folks to try to clarify exactly what is intended, how the instream fish, wildlife, and recreation uses fit with potential future management under the Integrated Management Planning process. So we're working on that aspect. We think we need to also provide, as several have stated, to provide assurance that the applicability of all the existing authorities that we have now associated with changes and transfers under 46-290 through 294 are not somehow bypassed. I don't think that's the intent. Some have thought that that was part of the problem, but I think those existing authorities when properly applied by our department will go to addressing the issue of no harm, and those existing authorities give the department the authority to place conditions on a transfer or on a change of use that we think can address many of the no harm issues that have been raised. And so I think it just has to be clearer that those existing provisions are somehow not being bypassed, and I don't think that's the intent, but it's something that has been a concern that has been raised to the department that I think we want to make sure is clear going forward, and to make sure that protection of existing uses and the no harm review is part of any future permitting as well that may flow from an approved IMP. Future permitting on the surface water side by the department or future permitting on the groundwater side by the natural resources districts. That again, it properly is captured under the rules and regulations of existing law. The third item that we're working on is to again, as several have testified, to really capture the protection of existing uses that is so important and provide for the opportunity for improved future water management, we believe the IMP process is the way to go. That is the main element

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of conjunctive use management that flowed from LB962. While there's been lots of rough spots along the way since 2004, the state and the water users are getting used to that process and while there's still some frustration, it is the legal process that we have in place. So we think the formal required integrated management plans is what should be required by this law and whether it's triggered through a future fully appropriated determination that will likely occur this coming year, anyway, we think it's just easier, it seems to fit with the proponents' intent and we think that is the mechanism to provide as level a playing field as we can to bring the surface and groundwater users and all the stakeholders together and then to guide what future use, if any, may flow from that back to either my department or to the natural resources districts. I think as Ms. Bleed just commented, and others have commented, I think we do have to look carefully. I think this is a great locally developed solution to a complicated problem. I think it is uniquely a Niobrara River Basin problem. It fits the physical flows and existing water rights situation that is unique there and to address this historic on-river hydro operations, I think, is really is unique as has been discussed by a number of people. So, I've already heard a number of suggested ways that perhaps we can legally structure this to avoid some of the unintended consequences and that again is another issue that I'm giving some attention to. And then lastly, we think that this new water right, if it is to be approved, if it is authorized and ultimately granted, should be treated like any other appropriation in the state. It is a permanent change, but it nevertheless should be subject to periodic review so that there is a continued assurance that beneficial use of this new instream basin management is falling under the same tests that we do when we follow up and periodically review any other type of permanent water right in the state. We think that equal treatment will again, while it is a change of water law that several folks have brought to your attention today of a permanent change in use nature, we think with ongoing reviews that will provide some additional assurance that again the beneficial use, if properly defined, is then on an ongoing basis being properly monitored in the future. At that point, I'll close my comments. I think I've gone over my time and I'll be happy to take any questions, Mr. Chairman. [LB1038]

SENATOR SCHILZ: Thank you, Director Fassett. Any questions? I have a couple here and we heard from Mr. Rempe who talked about the statute. I think it's 46-294, and how that's in place and it says that conditions must be met before you can approve a permit application. And in subsection (d), the proposed change will not diminish the supply of water available for or otherwise adversely affect any other water appropriator. That, to me, says in order for you to approve this application, or any application, you'd have to make sure it won't harm any existing users or diminish their supply. Is that correct and can you tell me when they use the word "harm" here, what does that mean to you? [LB1038]

GORDON FASSETT: Sure. The way the bill has been structured, of course, we're talking about amendments that's in Section 290, but if you read the existing law language that's part of the bill, it is all connected back to 294...excuse me, 284...294, that is the proper section that you just quoted from. Again, I think that's proper authority. We think that's the authority and the process

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that should be used if and when the request to make this change in use comes forward. No harm is a no harm standard to existing water uses. That's what that means, and so that will be the test that we will have to analyze in considering and ultimately acting on a request of that nature. [LB1038]

SENATOR SCHILZ: I see. And then, I guess, the next question is, on something like this, how would you determine that if there would be a change in use, how would you determine any adverse impacts that may or could occur? A percentage of time, water is available, how does that work exactly? [LB1038]

GORDON FASSETT: Yeah. I don't have that answer. I mean, I think there's clearly some analytical presentations that are going to be required. We're obviously going to have to go through a process of soliciting input and comments across the board. We're going to have to look very carefully at some of the historic operations and historic administration and has been pointed out, there was a dramatic change in historic administration that occurred after post-2007. And so what part of the history do you want to be looking at. But I think that entire analysis is what any type of transfer would go through and I think the point that Mr. Rempe is making, if I was listening to him correctly, is that this change should just be held to the same standard as any other and under existing authorities. [LB1038]

SENATOR SCHILZ: And then my last question for you, and we've talked a lot and heard a lot of discussion on IMPs. As you look at this issue, and as you look at the way it seems to be coming around and beginning to be structured around this, do you think you could make a determination like this, asking what everyone is asking, without the IMPs in place to know what we're dealing with? [LB1038]

GORDON FASSETT: Well, that's a great question. Clearly, I think IMPs are going to have to be required for anything going forward. It's whether or not the IMP is required to actually make the initial threshold change. It then becomes incumbent on the IMP process to, when they're evaluating what future actions on either the surface water supply or groundwater supply may be allowable, how does that then, those new actions at that time, how does that affect other existing users. That's going to be the trick and the only way to have the groundwater activities considered, because the concern is no different than what we've seen in other basins, the concern is, will some future groundwater depletions affect surface water that is an unintended consequence without that being captured. IMP is the mechanism to capture those and anticipate those effects and then to see what management opportunities there are to address those effects. If they can't be addressed, then there may not be any new future uses, which as you've heard today, a number of the NRDs have already voluntarily established moratoriums in the near term to get an assessment as to where they are. So that's the complexity. That's why IMPs take a long time.

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They involve a lot of people, but at the end of the day, that document as we're reading it is going to be intended to be the controlling document that will guide future activities, whether it's permitting by the department or permitting by the natural resources districts, and how that permitting or the management of the basin can occur in the future. [LB1038]

SENATOR SCHILZ: Very good. Any other questions of Director Fassett? Thank you very much for your input and your testimony today. [LB1038]

GORDON FASSETT: You bet. Thank you. [LB1038]

SENATOR SCHILZ: (Exhibit 38) Further neutral testimony. Other neutral testimony? Seeing none, oh, yes, we have...as we've done a little bit today, we want to move back to supporter, letter from Patrick O'Brien, the general manager of the Upper Niobrara White Natural Resources District. And with that, we will turn it over to Senator Davis to close. And Senator Davis waives closing and with that, that will end the hearing today and I would like to thank everyone because this hearing was...it went very well, very smooth, and we got a lot of very good information. So I appreciate everyone here and we will...stay tuned, I'm sure there will be more conversations to come. Thank you very much, folks. [LB1038]