

BEFORE THE NEBRASKA DEPARTMENT OF NATURAL RESOURCES  
OF THE STATE OF NEBRASKA

\_\_\_\_\_  
In the matter of a Public Hearing )  
Relating to the Preliminary ) TRANSCRIPT  
Determination that the Missouri ) VOLUME I of II  
Tributary Basins, Blue River ) (Pages 1 to 61, incl.)  
Basins, Lower Platte River Basin )  
and a Portion of the Lower )  
Niobrara River Basin Are Not Fully )  
Appropriated. )  
\_\_\_\_\_ )

Nebraska State Capitol  
Room 1525  
Lincoln, Nebraska

Convened, pursuant to notice, at 9:00 a.m., on  
December 19, 2007,

BEFORE:

RONALD THEIS, Hearing Officer.

OTHERS PRESENT:

Ann Bleed, Director.

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I N D E X

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<u>EXHIBITS:</u>	<u>Marked</u>	<u>Ruled On</u>	<u>Found</u>
1 Notice of Public Hearing (2 pages)	6	9	Vol. II
2 Proof of Publications (47 pages)	6	9	Vol. II
3 CD-Rom Ecology and Management of Sturgeon in the Lower Platte River	11	11	Vol. II
4 CD-Rom	11	11	Vol. II
5 Draft Hydrologic Analysis of the Lower Platte River (151 pages)	11	11	Vol. II
6 Draft of Ecology and Management of Sturgeon in the Lower Platte River (207 pages)	11	11	Vol. II
7 Written Testimony by the U.S. Fish and Wildlife Service (3 pages)	15	15	Vol. II

<u>EXHIBITS:</u>	<u>Marked</u>	<u>Ruled On</u>	<u>Found</u>
8 Written Testimony of Lumir Jedlicka (2 pages)	18	18	Vol. II
9 Information from the Lower Platte Basin Coalition (1,180 pages)	18	18	Vol. II
10 Written Testimony of Jerry Heithoff (2 pages)	31	31	Vol. II
11 Written Testimony of Russell Callan (2 pages)	35	35	Vol. II
12 Written Testimony of Rod Zessin (2 pages)	36	36	Vol. II
13 Graph of Lower Elkhorn Natural Resources District Groundwater Levels (1 page)	36	36	Vol. II
14 Graph of Lower Elkhorn Natural Resources District Active Irrigation Wells (1 page)	36	36	Vol. II
15 Written Testimony on behalf of the Lower Elkhorn Natural Resources District (7 pages)	46	46	Vol. II
16 Written Testimony of John Turnbull (2 pages)	51	51	Vol. II
17 Correspondence from the Upper Big Blue Natural Resources District (37 pages)	51	51	Vol. II
18 Written Testimony on behalf of the Nebraska Farm Bureau Federation (3 pages)	56	56	Vol. II
19 Written Testimony of Bryce P. Neidig (1 page)	56	56	Vol. II
20 Written Testimony of Greg Walmer (1 page)	60	60	Vol. II

<u>EXHIBITS:</u>	<u>Marked</u>	<u>Ruled On</u>	<u>Found</u>
21 Written Testimony on behalf of the City of Fremont and the League of Nebraska Municipalities (2 pages)	60	60	Vol. II
22 Late-filed, Written Testimony on behalf of The Little Blue NRD (3 pages)	61	61	Vol. II
23 Late-filed, Written Testimony on behalf of the Nebraska Wildlife Federation (4 pages)	61	61	Vol. II
24 Late-filed, Written Testimony on behalf of Loup River Public Power District (4 pages)	61	61	Vol. II
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1 PROCEEDINGS:

2 (Exhibits 1 and 2 were marked for identification.)

3 THE HEARING OFFICER: Good morning. It is 9:00  
4 a.m., Central Standard Time, December 19<sup>th</sup>, 2007, and we're  
5 located in Room 1525 of the State Capitol, in Lincoln,  
6 Nebraska. My name is Ron Theis. I'm a legal counsel for  
7 the Department of Natural Resources and I'll be the hearing  
8 officer for this hearing.

9 With me today are Ann Bleed, Director of the  
10 Department of Natural Resources; Jesse Bradley, I think is  
11 still here, he's the Integrated Water Management Analyst;  
12 Pam Andersen is legal counsel for the Department; Tracy  
13 Zayac and Beth Eckles are still here. They do the hard work  
14 for the Department. Lori Sehnert is the court reporter, who  
15 will be making a verbatim record of this hearing.

16 The purpose of this hearing is to take testimony  
17 about the Department's previously announced preliminary  
18 determination that the Missouri Tributary Basins, Blue River  
19 Basins, Lower Platte River Basin, and a portion of the Lower  
20 Niobrara River Basin are not fully appropriated, pursuant to  
21 Nebraska Revised Statute 46-713.

22 For the record, we wanted to clarify, this hearing  
23 is not the same as a hearing on a preliminary determination  
24 that a river basin, sub-basin, or reach presently is fully  
25 appropriated without additional uses. After the hearing

1 today, and an examination of testimony and all relevant  
2 evidence, the Department will make a determination whether  
3 any of the subject basins of today's hearing are fully  
4 appropriated or not fully appropriated. If the Department  
5 makes a preliminary determination of full appropriation of  
6 any of the basins in the geographic area within which the  
7 surface water and groundwater are hydrologically connected,  
8 pursuant to Statute 46-748, after this hearing, another  
9 hearing will be held on that preliminary determination of  
10 full appropriation. I'm saying this in order to put this in  
11 context. For this context, the Department will be holding  
12 such hearing separate to this one on the preliminary  
13 determination that portions of the Niobrara should be fully  
14 appropriated later this week and next week. I'm hoping  
15 everyone's at the right hearing.

16 This is a public hearing, not an evidentiary  
17 hearing. Those testifying will not be required to be sworn  
18 in. If you haven't signed the sign-in sheet for the  
19 hearing -- and you probably haven't because it's located  
20 here where the speakers will speak, I'll request that you do  
21 so just before you speak. We have a separate sign-in sheet  
22 identifying those in attendance, as well. If you haven't  
23 signed that, please do so before you leave. We like to know  
24 who else comes.

25 As noted in the notice of this hearing, testimony

1        may be either oral or written. Those providing oral  
2        testimony will be allowed to speak for, preliminarily, I  
3        think -- I don't know. How many -- Raise your hands,  
4        please, if you're intending to speak during this hearing.

5                    (Audience raising hands.)

6                    I think we can go five minutes; that'll be  
7        sufficient, I think, and it won't take us too long. I'll  
8        give a warning signal when there's one minute left for the  
9        testimony. Written testimony will also be accepted.  
10       Written testimony may be submitted to the court reporter at  
11       this hearing or may be mailed to the Department by the close  
12       of business December 21<sup>st</sup>, 2007. Written testimony  
13       regarding the preliminary determination on the Niobrara will  
14       be accepted by the Department until the close of business  
15       December 28<sup>th</sup>, 2007.

16                    At this point, I'd like to submit for the record a  
17       copy of the Notice for this hearing entitled "Preliminary  
18       determination that the Missouri Tributary Basins, Blue River  
19       Basins, Lower Platte River Basin, and a portion of the Lower  
20       Niobrara River Basin are not fully appropriated." That is  
21       Exhibit 1. I'd also like to submit the Proof of Publication  
22       pursuant to Nebraska Statute 84-907, stating that  
23       publication of the Department of Natural Resources public  
24       hearing notice for this hearing occurred on three  
25       consecutive weeks in newspapers of statewide circulation and

1 in newspapers of circulation within the basins. There is a  
2 long list of them, probably 30 newspapers. I won't burden  
3 you with the -- reading the list, but I am submitting, for  
4 the record, a copy of all of the newspapers where this  
5 notice was published to the court reporter. And I  
6 am -- would like to submit a bundle of the Proofs of  
7 Publication from many, but not all, of those newspapers, the  
8 ones that we have -- the notices of publication that -- the  
9 Proofs of Publications that we have received at this time.  
10 We'll mark that as Exhibit 2. So, Exhibits 1 and 2 are  
11 received in the record.

12 (Exhibits 1 and 2 were received in evidence. See  
13 Index.)

14 And I'd like to take notice, for the record, of  
15 the Department's report for 2008, the annual evaluation of  
16 the availability of hydrologically connected water supplies.  
17 This is as published on the Department's website and  
18 segments were previously presented to you by Jesse at the  
19 eight o'clock information meeting. This is the material on  
20 the subject of this hearing, which hopefully speaks for  
21 itself.

22 I'd ask Director Bleed if she'd like to make any  
23 comments or not?

24 DIRECTOR BLEED: I have no comments.

25 THE HEARING OFFICER: Okay. We're -- Before

1 beginning the rest of the testimony, I want to explain how I  
2 want to proceed. In order to provide some organization and  
3 focus to the overall testimony that will be presented, I  
4 want to ask each person willing to speak -- wishing to speak  
5 to decide whether they are proponents, that is for the  
6 preliminary designation; opponents, against it; or neutral.  
7 And also, if your testimony is -- it's only in reference to  
8 a selected basin, those being considered at this hearing  
9 today, would you please state that at some point in your  
10 testimony for clarity.

11 I want to ask if there's some State agencies that,  
12 possibly, would like to testify, I'd like to get their  
13 testimony first. And then we'll go with the standard  
14 legislative hearing format, the proponents will go, then the  
15 opponents, and then the neutral testimony.

16 In order to give everyone who wishes to testify an  
17 opportunity, I'd remind you that I've asked each person to  
18 limit their testimony to five minutes. You may ask for  
19 additional time, if you need it. If you wish -- If you're  
20 testifying and you wish to introduce some written record  
21 into the -- written evidence into the record, please explain  
22 what that is and give it to the court reporter, and we'll  
23 identify it with an exhibit number.

24 We'll begin with the State agencies. Is there  
25 anyone from a State agency here who would like to testify?

1                   (Exhibits 3 through 6 were marked for  
2 identification and submitted into the record. See Index.)

3                   MR. NELSON: Good morning. My name is Kirk  
4 Nelson, spelled K-i-r-k N-e-l-s-o-n. For the record, I work  
5 for the Nebraska Game and Parks Commission as an assistant  
6 director. Our testimony this morning will concern the Lower  
7 Platte River Basin and we intend to be in a neutral  
8 capacity, providing information today.

9                   THE HEARING OFFICER: Thank you, Kirk.

10                  Before you begin, is there anyone from a federal  
11 agency here to testify? Okay, we'll get you, too.

12                  Go ahead, Kirk.

13                  MR. NELSON: I'm going to read our comments into  
14 the record and then provide them as a written document also.  
15 The Nebraska Game and Parks Commission is pleased to appear  
16 to provide information at this hearing on the Nebraska  
17 Department of Natural Resources Draft Report, dated October  
18 16<sup>th</sup>, 2007, regarding the Lower Platte River Basin.

19                  Commission staff has reviewed the report entitled  
20 2008 Annual Evaluation of Availability of Hydrologically  
21 Connected Water Supplies Determination of Fully  
22 Appropriated. The Commission has undertaken, funded, and  
23 participated with other agencies on a series of Platte River  
24 scientific research projects over the last 20-plus years,  
25 which have focused on habitat requirements, movement

1 activities, and population dynamics of a number of different  
2 species, including the Pallid Sturgeon, the Least Tern, and  
3 the Piping Plover. Most recently, the Commission joined a  
4 cooperative effort in late 1999 to acquire more data  
5 regarding the status of at-risk species in the Lower Platte  
6 River Basin. This effort included formation of a Pallid  
7 Sturgeon/Sturgeon Chub Task Force, and hiring consultants to  
8 produce studies of species' water needs.

9 The Commission respectfully provides two reports  
10 today and I've handed those to the recorder. Dr. Peters'  
11 and Dr. Parham's draft report of 2007, and Dr. Parham's  
12 report of 2007. And we provide those to the Department of  
13 Natural Resources to assist the Department in its analysis  
14 of the status of water supplies in the basin and the  
15 associated legal requirements. The depletion analysis  
16 provided by the Department in Table 1 of its draft report  
17 shows projected future declines in surface flows in the  
18 basin. The Commission stands ready to work with interested  
19 parties and particularly those with responsibility for  
20 management of groundwater and surface water supplies to  
21 address these issues.

22 That ends my formal comments. I wanted to be  
23 clear that the reports that we provided for you today do  
24 state on their covers that those are "draft reports". For  
25 the purposes of what we provide, we would like the

1 Department to consider those as really final products. I  
2 mean, that's the best science that we have as of today.  
3 Now, those reports are out for comment and so we'll be  
4 receiving comments until about the middle of January, and  
5 then we'll finalize those particular reports. But we, at  
6 this point, through the review process, feel that those  
7 reports are substantive enough that we would ask the  
8 Department to consider them in their entirety and not to  
9 worry about the fact that they are drafts. We do not  
10 foresee any major changes to anything at this time.

11 THE HEARING OFFICER: Kirk, I would like to ask,  
12 are those reports, since they are drafts, are they available  
13 to the public at this point?

14 MR. NELSON: They are. We, this week, Monday,  
15 mailed out copies to all of the partners in the Pallid  
16 Sturgeon Task Force and other folks that had indicated an  
17 interest in receiving copies. And so, yes, they are -- and  
18 they're available if anyone in the audience would like a  
19 copy, if they can get me a card and an address. We have  
20 them both in hard copy and in an electronic format.

21 THE HEARING OFFICER: Thank you, Kirk.

22 The gentleman who said he was from the federal  
23 agency, would you like to testify, please?

24 MR. LeVALLEY: Thank you. My name is Michael  
25 LeValley. I'm acting field supervisor for the Nebraska

1 Ecological Services Office of the U.S. Fish and Wildlife  
2 Service. I thank you for the opportunity today to present  
3 some information regarding the Service's perspective on  
4 Lower Platte River flows and future flow depletions.

5 I have some written information to submit, but  
6 I'll just briefly paraphrase that and not read my entire  
7 amount of information. Our position on this is neutral, for  
8 the record. The Lower Platte River, we believe, is crucial  
9 to recovery of one federally listed species, the Pallid  
10 Sturgeon. Adequate seasonal river flows are important to  
11 the survival and recovery of fish and wildlife in general  
12 and, specifically, federally listed species.

13 Section 7 of the Endangered Species Act requires  
14 federal agencies that fund, authorize, or carry out actions  
15 to ensure that those actions don't jeopardize the continued  
16 existence and recovery of federally listed species, or  
17 adversely modify or destroy critical habitat that may have  
18 been designated for them.

19 On past reviews, the Service has determined -- on  
20 Lower Platte River flow depletions, the Service has  
21 determined that there may be, or are, adverse effects to  
22 three listed species; Pallid Sturgeon, Least Tern, and  
23 Piping Plover.

24 I'd like to conclude by saying that the Act also  
25 requires federal agencies, including the Fish and Wildlife

1 Service, to work with and cooperate with state and local  
2 agencies to resolve water issues and conser- -- with  
3 conservation of federally listed species. And that would  
4 conclude my remarks.

5 THE HEARING OFFICER: Thank you, Michael. Did you  
6 say that you had a single document or --

7 MR. LeVALLEY: Yes, just some written testimony to  
8 submit.

9 (Exhibit No. 7 was marked for identification and  
10 submitted into the record. See Index.)

11 THE HEARING OFFICER: And do we have an exhibit  
12 number for that?

13 THE REPORTER: Number 7.

14 THE HEARING OFFICER: Number 7, okay.

15 MR. LeVALLEY: And I need to sign this?

16 THE HEARING OFFICER: Please.

17 Any other persons from state or federal agencies  
18 present who wish to testify?

19 (No response.)

20 Seeing none, we'll go with -- we'll begin to hear  
21 from proponents of the preliminary determination.

22 MR. JEDLICKA: I'm from the NRD Lower Platte  
23 North.

24 THE HEARING OFFICER: Will you state your name and  
25 spell it for the record, please.

1 MR. JEDLICKA: Okay. My name is Lumir Jedlicka.  
2 The first name, L-u-m-i-r. Last name is J-e-d-l-i-c-k-a.

3 We are an opponent for the not fully  
4 appropriated --

5 THE HEARING OFFICER: And you're representing a  
6 particular NRD --

7 MR. JEDLICKA: Yes, Lower Platte North NRD.

8 THE HEARING OFFICER: Thank you.

9 MR. JEDLICKA: My statement, I'll read it and then  
10 I'll hand it in. Director Ann Bleed, my name is Lumir  
11 Jedlicka. I am a diversified farmer in the Schuyler area.  
12 I'm diversified in the fact that I have one-third dry land  
13 and two-thirds irrigated, and it's from groundwater that  
14 it's irrigated. I'm also the chair of the Lower Platte  
15 North and a member of the Water Policy Task Force for the  
16 Governor.

17 You and I have spent hundreds of hours it seems,  
18 you know, pushing and pulling and compromising over the  
19 water issues. But to -- that was to create this 962  
20 framework and that law is the backbone of how we manage our  
21 vast waters for Nebraska. A key component of the law tasks  
22 you with the best science -- using the best science and  
23 information available to actually determine if the river  
24 basins are fully appropriated or not.

25 We have reviewed the document used to make the

1 preliminary determination for the Lower Platte Basin and are  
2 in agreement with you on this conclusion for this year. We  
3 have -- This year, we had 66 new high-capacity wells put in  
4 the Lower Platte North in 2007. This is a small increase  
5 considering we have over 5,000 high-capacity wells that are  
6 currently permitted in our area. However, our directors  
7 understand that we must keep our groundwater sustainable.  
8 Some of the actions our Board has implemented to further  
9 sustainability in our district include a temporary well  
10 moratorium for a portion of the district that is close to  
11 David City; working on an update to current groundwater  
12 management plan.

13           And the studies, that I'll mention now, we are  
14 involved in: Eastern Nebraska Water Resources Assessment,  
15 and that was talked about earlier, mapping water resources  
16 in the glacial areas of Nebraska by six NRDs and other  
17 agencies; Elkhorn Loup Model, which is in the Loup and  
18 Elkhorn Basins, which include Shell Creek, which is our  
19 largest watershed basin; and the Sub-Basin Delineation Study  
20 identifies and sets boundaries for connected aquifers with  
21 the Lower Platte North so that it can be managed that way  
22 separately; Streambed Conductance Study, to assist us with  
23 identifying and quantifying stream reaches which gain or  
24 lose water so we can manage each segment individually.

25           Our goal is to properly manage each aquifer so

1 overdevelopment does not occur. If it is necessary to stop  
2 development in one of these aquifers, our NRD has shown we  
3 are willing to make that step. We also realize that, at  
4 some future time, the Lower Platte Basin may be fully  
5 appropriated. Again, our NRD will do what's necessary to  
6 manage the water resources at that time.

7 We are very concerned about the Nebraska Game and  
8 Parks Commission's position that the Lower Platte Basin must  
9 be designated differently, solely to benefit listed species.  
10 To avoid redundancy, I will say that we are a member of the  
11 Lower Platte Basin Coalition and the comments presented  
12 today by the Coalition reflect the opinion of the Lower  
13 Platte North.

14 In closing, our NRD commends you and your staff  
15 for the leadership given in support of keeping our water  
16 resources sustainable. We also feel you have made the  
17 correct decision by not changing the designation of the  
18 Lower Platte River Basin, which is not fully appropriated.  
19 Thank you. I've already signed in.

20 (Exhibit No. 8 was marked for identification and  
21 submitted into the record. See Index.)

22 THE HEARING OFFICER: Thank you, Lumir.

23 Next proponent.

24 (Exhibit No. 9 was marked for identification and  
25 submitted into the record. See Index.)

1           MR. BROMM: Good morning. My name is Jaron Bromm,  
2 J-a-r-o-n B-r-o-m-m, and I'm here on behalf of the Lower  
3 Platte Basin Coalition, which is a coalition of several  
4 natural resources districts in the Lower Platte River Basin.  
5 The Coalition rises in support of DNR's preliminary  
6 determination that the Lower Platte River Basin is not fully  
7 appropriated. Before providing a few substantive comments,  
8 I wish to briefly explain the stack of papers that I left  
9 with the court reporter for inclusion in the record. First,  
10 I have a letter, dated today, to you, Dr. Bleed, from the  
11 Coalition, explaining the interplay between the Groundwater  
12 Management and Protection Act and the Nebraska Non-Gaming  
13 Endangered Species Act, dealing with the consultation  
14 requirement, as well as the taking prohibition.

15           Attached to the letter are various materials  
16 relating to a study on the -- conducted by the Pallid  
17 Sturgeon Task Force, which we ask be included in the record  
18 for informational purposes only, pursuant to Nebraska  
19 Revised Statute Section 46-713(1)(c). The reason we've  
20 included these materials is, we believe that one of the  
21 reports submitted by Game and Parks this morning,  
22 specifically the Peters' Draft 2007 report, is, in effect, a  
23 Game and Parks' version of the Task Force Report that was  
24 released in 2006 by the Pallid Sturgeon Task Force. Some of  
25 the information contained in the latest version of the

1 Peters' report may have been included in a previous draft of  
2 the Task Force Report and was excluded due to serious  
3 statistical and hydrologic concerns raised by independent  
4 peer reviewers. We included those peer reviewer comments to  
5 shed some light for the Department on why the Task Force  
6 chose not to include that information in their final report.  
7 I would say, also, that I'm glad to hear that the Commission  
8 is going to subject the 2007 draft reports to peer review  
9 and I would encourage the Department to take a look at the  
10 peer review comments that we've submitted and suggest that  
11 that may rise some caution in treating those draft reports  
12 as final at this time.

13 Substantively, the Coalition wishes to emphasize  
14 that it fully supports the efforts of Game and Parks to  
15 protect and recover endangered and threatened fish and  
16 wildlife in Nebraska, but those efforts must be made within  
17 the bounds of the regulatory structure established by the  
18 legislature.

19 Under the Groundwater Management Act, unless there  
20 is an issue of compliance by Nebraska of a state or federal  
21 law, the flow needs of listed species is not a factor to be  
22 considered in an annual determination of whether surface  
23 water flows are sufficient to meet current and future  
24 surface water appropriations and groundwater use dependent  
25 on recharge from service water flows. Without an

1       appropriation tied to those flows claimed are necessary for  
2 listed species, the flow needs can only be included in the  
3 report for informational purposes.

4               As for compliance with state and federal laws, DNR  
5 states in the 2008 Fab Report that the only applicable state  
6 or federal law is the taking prohibition in the Nebraska and  
7 Federal Endangered Species Acts. The Coalition has  
8 addressed this issue extensively in the written materials  
9 and, in particular, in my letter to you, Dr. Bleed. The  
10 Coalition, suffice it to say for purposes here, that DNR's  
11 annual determination is intended to be a scientific report  
12 on the current hydrologic status of the basin. It does not  
13 modify river flows or otherwise have any direct or indirect  
14 effects on individual members of listed species. To be  
15 clear, however, DNR's determination that the Lower Platte  
16 Basin is not fully appropriated does not mean that water use  
17 goes unchecked in the Lower Platte River Basin, and the  
18 needs of protected species are forgotten or ignored.  
19 Indeed, DNR must consult with Game and Parks on a  
20 case-by-case basis in issuing new surface water  
21 appropriations to ensure that granting that permit will not  
22 cause jeopardy to the listed species.

23               The Coalition members look forward to our further  
24 efforts in the future to work through these complex issues  
25 with DNR, as well as with Game and Parks, to ensure sound

1 management of the water resources in the Lower Platte River  
2 Basin. Thank you very much. And I would ask that the  
3 materials we submitted be given an exhibit number and  
4 included in the record.

5 THE HEARING OFFICER: Thank you. And we really  
6 appreciate you not reading all of that.

7 Lori, what exhibit number is that?

8 THE REPORTER: Number nine.

9 THE HEARING OFFICER: Thank you.

10 MR. ADAMS: Good morning. My name is Don Adams,  
11 A-d-a-m-s. I'm executive director of Nebraskans First, a  
12 statewide coalition of groundwater irrigators.

13 First of all, we're a little curious of why this  
14 hearing is even taking place today. The DNR has made a  
15 preliminary determination that the Lower Platte River Basin  
16 is not fully appropriated and the hearing requirement, as  
17 contained in 46-714(4), rises when a basin has been  
18 designated as fully or overappropriated.

19 The eight-year drought is weakening and both  
20 surface water and groundwater levels are rising in most of  
21 the state, and certainly in the eastern half of the state.  
22 U.S.G.S. and UNL data and maps show the groundwater levels  
23 in the Lower Platte River Basin are stable and even  
24 increasing in much of the basin. It is not a basin in any  
25 sort of water supply or usage crisis. This is great news

1 for most, but not the Game and Parks Commission, which,  
2 without concocting a new crisis, they're stuck with playing  
3 by the rules of 962 and sound science, which clearly now  
4 militates against further restrictions on groundwater  
5 irrigation.

6 DNR has determined that the Lower Platte River  
7 Basin is not fully appropriated, but then adds that if legal  
8 constraints are not immediately imposed on groundwater and  
9 surface water use, the Lower Platte River Basin will be  
10 declared fully appropriated. This warning is, no doubt,  
11 designed to coerce the NRDs that have not imposed new well  
12 moratoriums to do so ASAP. This threat violates the spirit  
13 of LB962 and the purported independence of NRDs runs counter  
14 to the principle that regulatory decisions by the DNR be  
15 based on sound science. Why not evaluate the science at the  
16 end of 2008 and then decide if the basin warrants a fully  
17 appropriated designation?

18 Back in 2003, the Water Policy Task Force issued a  
19 public promise to irrigators that a statewide moratorium and  
20 new wells would not be imposed under the Task Force  
21 proposal. The Task Force chairman said then, quote, "The  
22 Task Force believes that local control of groundwater,  
23 through the NRDs, needs to remain and should not be changed"  
24 end quote. When we testified against LB962 at the public  
25 hearing in January of '04, we said that LB962 was all about

1 moratoriums on new development. We said that moratoriums  
2 are a direct assault by the government on the private  
3 property rights of Nebraska groundwater irrigators and that  
4 moratoriums snuff out the opportunity for new and future  
5 farmers to use and develop their land to its full economic  
6 potential. It is now clear that our prediction on how LB962  
7 would play out was accurate. If the Lower Platte River  
8 Basin NRDs all succumb to the DNR's threat, virtually the  
9 entire state, then, will be under moratoriums and no new  
10 development will be allowed.

11 Nebraska irrigated agriculture, the producers of  
12 the state, took it big time on the chin for threatening  
13 endangered species when the governor, about a year ago,  
14 signed onto the Platte River Cooperative Agreement Program.  
15 U.S. Fish and Wildlife Service now has control of the Platte  
16 River from Grand Island, west. In the years to come,  
17 hundreds of thousands of highly productive irrigated farm  
18 land will be retired for the alleged benefit of whooping  
19 cranes, Least Terns, Piping Plovers, and Pallid Sturgeon.  
20 The hit to Central Platte Valley economies of the program  
21 will be upward of \$500,000,000 annually. Irrigated  
22 agriculture has given more than its pound in flesh for birds  
23 and fish. The pendulum, which Game and Parks now seeks to  
24 swing more to the left, has gone far enough in that  
25 direction. It is time now for the Nebraska policymakers to

1 re-establish a commitment to our agricultural-based economy  
2 before any more harm is done.

3           Regarding the Pallid Sturgeon, according to the  
4 U.S. Fish and Wildlife Service, quote, "The range of the  
5 Pallid Sturgeon is primarily the Missouri River and the  
6 Mississippi River, downstream of the junction with the  
7 Missouri River," end quote. The National Research Council  
8 of the Academy of Science says, quote, "Current habitat  
9 conditions on the Lower Platte River do not adversely affect  
10 the likelihood of survival and recovery of the Pallid  
11 Sturgeon."

12           Regarding the Piping Plover, Fish and Wildlife  
13 Service attempted in 2003 to expand the Piping Plover  
14 critical habitat to encompass all of the Lower Platte and  
15 Loup River, as well as much of the Niobrara. This  
16 designation was overturned in 2005 by a Nebraska U.S.  
17 District Court judge, who wrote that the targeted area,  
18 quote, "was not within the geographical area occupied by the  
19 species and essential to the conservation of the species,"  
20 end quote.

21           Regarding the Least Tern, this species has already  
22 reached the national recovery goal of 7,000 birds in 1995.  
23 Right now, about 12,000 currently exist, according to Fish  
24 and Wildlife Service records. I assure you that, if the  
25 Fish and Wildlife Service could show that the Lower Platte

1 River Basin was, in fact, critical habitat and essential for  
2 the conservation of the sturgeon, plover, and tern, it would  
3 do so.

4 What seems to be happening here, is that the Fish  
5 and Wildlife Service's smaller alter-ego, the Game and Parks  
6 Commission, is attempting to step in to gain control over an  
7 area that the big dog could not bite off using the  
8 Endangered Species Act. The fact remains that the Lower  
9 Platte Loup Elkhorn River Basins are not critical habitat  
10 for plovers, terns, and sturgeon.

11 Furthermore, the legal route the Game and Parks  
12 Commission could take would be to seek an instream flow  
13 appropriation for the species' benefit. This legal avenue  
14 is not as easy as merely convincing DNR to buy their theory  
15 and to act to stop new development by a decree of fully  
16 appropriated status. But under the law, this ploy is not  
17 legal or authorized because the DNR's requirement to  
18 annually evaluate basins is not a State agency action  
19 requiring consultation with Game and Parks under the State's  
20 Non-Gaming Endangered Species Act.

21 Finally, the future of irrigated agriculture in  
22 its continuing ability to generate billions of dollars for  
23 our state's economy could be in serious jeopardy if the DNR  
24 continues to shut down development and deny Nebraska  
25 producers the ability to do what they do better than anyone

1 else in the world. This concludes my testimony. Thank you.

2 THE HEARING OFFICER: Thank you, Don.

3 Next proponent. I'd like to remind you, at this  
4 time, to please limit your comments to five minutes. We're  
5 doing a great job so far.

6 MR. CZAPLEWSKI: Thank you, Dr. Bleed and Mr.  
7 Theis. My name is Mark Czaplewski, M-a-r-k  
8 C-z-a-p-l-e-w-s-k-i. I'm a biologist with the Central  
9 Platte Natural Resources District headquartered in Grand  
10 Island, and Central Platte NRD is also a member of the Lower  
11 Platte Basin Coalition. I'm here to speak with regard to  
12 the Lower Platte.

13 I'm here today to relay to the Department a word  
14 of caution as you consider the reports just provided to you  
15 by the Nebraska Game and Parks Commission, the 2007 Draft  
16 Reports by Dr. Peters and Parham. I believe there are -- I  
17 believe there may be reason to question some of the science  
18 included in those reports. I have obviously not read those  
19 reports, but understand they were developed from data and  
20 analysis previously contained in a draft report these  
21 individuals produced for the Pallid Sturgeon/Sturgeon Chub  
22 Task Force.

23 The Task Force contracted with Drs. Peters and  
24 Parham to complete the report of their study in 2006  
25 entitled "Pallid Sturgeon and Sturgeon Chub in the Lower

1 Platte River, 2000 to 2004." A May 25<sup>th</sup>, 2005, draft of the  
2 Task Force Report was subjected to extensive review by a  
3 team of independent peer reviewers, including leading  
4 federal and university scientists, primarily biologists,  
5 statisticians, and hydrologists. Several of those reviewers  
6 noticed significant concerns over the scientific methodology  
7 and assumptions of the study. Consequently, sections of the  
8 Task Force Report were removed or significantly revised.  
9 These scientific issues included the reviewers finding the  
10 studies' recommendations were not supported by the data,  
11 while others noted conclusions could not be endorsed or  
12 refuted due to insufficient analysis and flawed assumptions.  
13 Serious statistical and hydrologic issues were identified.  
14 It now appears that some of this same flawed material and  
15 these problematic technical issues may be resurfacing in  
16 these new draft reports.

17 I'd like to summarize just a few of the specific  
18 concerns raised by some of these experts. Dr. Kenneth Gerow  
19 and Dr. Timothy Robinson, statisticians with the University  
20 of Wyoming: "In many instances, the analysis violates basic  
21 assumptions required for accurate inference. Due to a  
22 magni- -- a multitude of problems in analysis, the reports  
23 recommendations can either be endorsed or refuted."

24 Dr. Richard Engeman, statistician with the  
25 Colorado State University: "Statistical tests were

1       incorrectly applied and assumptions were not well  
2       documented. In some cases, too little data exists to make  
3       the inferences reported.”

4               Dr. Gary Lewis, hydrologist with Parsons  
5       Engineering Sciences, and Lee Becker, hydrologist, with EA  
6       Engineering Science and Technology: “Standard statistical  
7       tests of validity are not provided. Statistical analysis  
8       should not be adopted without collaboration by equally  
9       rigorous analysis of physical processes. The report is  
10      sufficiently deficient in explaining data and procedures to  
11      draw any conclusions about the validity of the equations and  
12      implications for management.”

13              One last one, Dr. Robert Jacobson, hydrologist  
14      with the USGS: “The study period is never compared to  
15      long-term hydro-climatic to address how representative it  
16      is. Recommendations about habitat-forming flows do not  
17      follow from the data and analysis presented in the report.”

18              I want to emphasize support for the Commission's  
19      efforts to protect and recover endangered and threatened  
20      fish and wildlife in Nebraska, but based on such peer review  
21      comments and my presumption that some of that science relied  
22      on by the Commission has not addressed all of these critical  
23      comments. We continue to have serious concerns with regard  
24      to the soundness of science contained in those Peters and  
25      Parham reports, and any related position taken regarding

1 flow needs for Pallid Sturgeon. I appreciate the  
2 opportunity to provide comments here and look forward to  
3 continue working with Game and Parks Commission on this  
4 information.

5 THE HEARING OFFICER: Thank you, Mark.

6 Did you sign --

7 MR. CZAPLEWSKI: Not yet, but I will.

8 THE HEARING OFFICER: Thank you.

9 Next proponent, please.

10 MR. JOHANNES: Good morning. My name is Clint  
11 Johannes, C-l-i-n-t J-o-h-a-n-n-e-s. I'm a member of the  
12 Lower Platte North Board of Directors, a member of the Water  
13 Policy Task Force, representing power, here to agree with  
14 the preliminary finding. I think that it follows the intent  
15 of the Task Force, as we discussed it, which led, of course,  
16 to LB962 and the rulemaking process, and I think what was  
17 done followed those processes from a high level.

18 The basic intent that the Task Force was trying to  
19 accomplish was to have a basin never reach the point that it  
20 couldn't be sustainable, that when you considered instream  
21 flows, you considered groundwater uses, surface water uses,  
22 that those levels could be sustained forever, so to speak,  
23 and that we'd never get to the point where they couldn't be  
24 sustained.

25 In discussing how that should be accomplished or

1 could be accomplished, there was a lot of debate -- and I'm  
2 sure you remember about how you include the socioeconomic  
3 impacts and whether they should be a part of the  
4 calculation, whether you include environmental concerns, and  
5 impacts, whether they should be included. And as the Task  
6 Force concluded, which led to LB962 and then the current  
7 State statutes, it was determined that those were important  
8 factors -- socioeconomic factors, environmental factors, but  
9 that they should be reviewed and included in the report for  
10 informational purposes only. And as I understand, that the  
11 intent at this point and I think that would follow, as we  
12 see it, the intent of the Task Force and the State statutes,  
13 and the resulting rulemaking that followed, and thank you  
14 for doing that. And thanks for the opportunity to testify.

15 THE HEARING OFFICER: Thank you, Clint.

16 Next proponent, please.

17 (Exhibit No. 10 was marked for identification and  
18 submitted into the record. See Index.)

19 MR. HEITHOFF: Good morning. I'm Jerry Heithoff,  
20 Chairman of the Upper Elkhorn NRD. It's -- Last name's  
21 H-e-i-t-h-o-f-f. I'm here to agree with the preliminary  
22 determination.

23 It is apparent that no one should get too  
24 comfortable in how the process worked for the previous two  
25 years as it relates to the designation status of a basin.

1 I'm making this statement due to the fact that the last two  
2 years, there were no hearings held for the not fully  
3 appropriated basins.

4 This new approach by DNR to hold a hearing for not  
5 fully appropriated basins has caused uncertainty for  
6 municipalities, industrial manufacturers, and agricultural  
7 decisions that requires a need for groundwater or surface  
8 water. There have been instances in the past two years that  
9 the business decisions involving groundwater or surface  
10 water were not made available -- were not made until DNR's  
11 preliminary determination of the basin was made in October.  
12 If the area was preliminary (sic) determined not fully  
13 appropriated in October, the transaction moved forward  
14 without the fear that the preliminary designation would  
15 change prior to January 1<sup>st</sup>. The district was confused why  
16 the Department felt it necessary to hold this hearing since  
17 it is not required by any State -- Nebraska statute.

18 We hope the Department does not make any  
19 hasty -- or even consider changing their preliminary  
20 decision because of the Lower Platte River Basin alone. It  
21 would have an impact on 32% of Nebraska's total acres. I am  
22 sure there have been many numerous financial decisions made  
23 that require the hydrologically-connected water in the Lower  
24 Platte River Basin and other basins that have moved forward  
25 due to the Department's preliminary determination of not

1 fully appropriated.

2 Director Bleed, if any additional information is  
3 to be presented and considered today that would change the  
4 Department's preliminary determination to fully appropriate,  
5 then we do not feel that this one public hearing is adequate  
6 or centrally located for the impacted area. The Upper  
7 Elkhorn NRD is aware that the Nebraska Game and Parks may or  
8 will be submitting reports at this hearing or in the near  
9 future by Peters, E.J., and Parham, J.E., and a biological  
10 opinion. It is anticipated that within these reports, it  
11 will try to document the importance of the Lower Platte to  
12 the Piping Plover, Least Tern, and Pallid Sturgeon. Without  
13 reiterating what was included in the Lower Platte River  
14 Coalition testimony, which we are a member, the Upper  
15 Elkhorn NRD supports that testimony.

16 To better understand the hydrologic connectivity  
17 of the Niobrara, Loup, Elkhorn, and Platte Rivers, the Upper  
18 Elkhorn has partnered with other NRDs, USGS, and the DNR to  
19 form the Elkhorn-Loup Modeling Group. The purpose of this  
20 group is to collect data and create a model that will help  
21 the parties involved make better decisions locally and at  
22 the State level relating to the hydrologically-connected  
23 water. As the project moves forward, it will definitely  
24 assist the DNR in their annual evaluation for the river  
25 basins involved.

1           In closing, the Upper Elkhorn NRD agrees with the  
2 Department's 2008 preliminary conclusion that the Lower  
3 Platte River Basin is not fully appropriated. Thank you for  
4 your time.

5           THE HEARING OFFICER: Thank you, Jerry.

6           Next proponent, please. Why don't you go ahead.

7           MR. CALLAN: Okay. I'll submit this when I'm done  
8 with it. Director Bleed and the Department of Natural  
9 Resources staff, I am Russell Callan, Assistant General  
10 Manager of the Lower Loup NRD.

11          THE HEARING OFFICER: Spell your name, please,  
12 Russ.

13          MR. CALLAN: R-u-s-s-e-l-l C-a-l-l-a-n.

14          I'm here today to support DNR's determination that  
15 the Lower Platte River Basin is not fully appropriated. The  
16 Lower Loup NRD has been very active with the Water Policy  
17 Task Force and with DNR staff on the annual evaluation.

18          The first annual report that was released in 2006  
19 indicated that the Lower -- that the Loup River Basin was  
20 only 5.3 days of diversion away from becoming fully  
21 appropriated. After that report, the Lower Loup NRD Board  
22 of Directors felt it was necessary to place a suspension on  
23 issuing new irrigation well permits.

24          In 2006, the Lower Loup NRD, along with the Upper  
25 Loup, Upper Elkhorn, Lower Elkhorn, Middle Niobrara, Lower

1 Niobrara, Lewis and Clark NRDs, and their partners, USGS,  
2 UNL Conservation Survey, and the Nebraska Department of  
3 Natural Resources, came together to develop the Elkhorn Loup  
4 Modeling Study. The Elkhorn -- excuse me. The ELM Group  
5 felt that the regional groundwater model was necessary to  
6 simulate the effects of groundwater and surface water within  
7 the study area.

8 In the 2007 annual evaluation, it was reported  
9 that the North Bend gage was close to triggering the Loup  
10 Basin fully appropriated. The Lower Loup NRD Board of  
11 Directors again started discussing options to prevent the  
12 Loup Basin from being declared fully appropriated.

13 In September, 2007, the Lower Loup NRD Board of  
14 Directors passed rules and regulations to prevent the  
15 expansion of irrigated acres.

16 My point here today is that the Water Policy Task  
17 Force created the annual evaluation to provide a proactive  
18 tool to the Natural Resources Districts and the Department  
19 of Natural Resources in managing the state's water. In my  
20 past comments, I stated several actions that have been a  
21 result of the annual evaluation. I would hope that the  
22 Department continues to update its annual evaluation using  
23 good science and not being swayed in its decision by  
24 politics.

25 (Exhibit No. 11 was marked for identification and

1 submitted into the record. See Index.)

2 THE HEARING OFFICER: Thank you, Russ.

3 I'd like to have a show of hands, how many more  
4 proponents do we have.

5 Next proponent, please.

6 (Exhibits 12 through 14 were marked for  
7 identification.)

8 MR. ZESSIN: Good morning. My name is Rod Zessin  
9 and I'm a proponent of the status of the Lower Platte River  
10 Basin not being fully appropriated. I have submitted both  
11 my written statements this morning, as well as two charts  
12 for the record.

13 Again, my name is Rod Zessin, spelled R-o-d, last  
14 name Z-e-s-s-i-n. I'm a farmer from Madison County and also  
15 serve as a director for the Lower Elkhorn Natural Resources  
16 District. I recognize the concerns of the Game and Parks  
17 Commission regarding their cause for the protection of  
18 endangered species, in particular, the Pallid Sturgeon, the  
19 Least Tern, and the Piping Plover. I'd also like to  
20 recognize that farmers and irrigators are good stewards of  
21 our natural resources, in particular, water. It is the wish  
22 of all of us, as irrigators and non-irrigators, that we  
23 extend the use and availability of water well into the  
24 future, just as any other resident of the state of Nebraska.

25 As I stated earlier, I live in Madison County and

1 farm under both dry land and irrigated conditions. I live  
2 in and irrigate in areas that are both under the 10/50 area  
3 and irrigate outside of that 10/50 area. Of particular  
4 interest to me today is a well on the farm where I live,  
5 which is inside the 10/50 area. This particular well was  
6 drilled in December of 1956 and put into use for the summer  
7 of 1957. And for the purpose of this discussion that I'm  
8 engaging in, I have one of the charts as an exhibit from our  
9 NRD. Again, it was put into use for the summer of 1957.

10 At the time it was drilled, it had a static water  
11 table of 91 feet, and this was determined from the well  
12 registration off of the DNR website. I've submitted a table  
13 regarding active irrigation wells in our NRD as I previously  
14 told you.

15 At the time this well was drilled, or about the  
16 end of 1956, there were 313 known wells, again, off of that  
17 chart that I submitted. Three hundred thirteen known wells  
18 in this NRD, give or take a few. That's the data that we  
19 have. This well currently is still being used to irrigate.  
20 It has a pumping rate of 850 to 900 gallons per minute,  
21 depending on the elevation of the pivot in which it serves.  
22 This well was tested under a pivot renozzling program. We  
23 had to get a determination of the rate of flow in February  
24 of 2006. And again, there's been a significant amount of  
25 precipitation in our area of the state since February of

1 2006, but that event probably occurred after  
2 200- -- February of 2006.

3 At this time, it was noted that the static water  
4 level of this well was 84 feet. This is seven feet higher  
5 than when the well was drilled some 50 years prior. Up  
6 until the early 1970s, this well served many hand-move  
7 irrigation lines on 320 acres. Since 1972, it has been used  
8 for center pivot irrigation and, for many years, being the  
9 only well serving two pivots, so there has been a  
10 significant amount of water that has been pulled out of this  
11 well.

12 This data suggest that with our NRD now having  
13 over 5,000-plus wells, and after pumping water from this  
14 well for 50 years, that the water supply is above or where  
15 it was 50 years ago. Although this is just but one well, I  
16 would suggest to you that the water in our entire district  
17 exhibits similar characteristics. This can be seen by the  
18 data taken every spring and fall by the staff of our Lower  
19 Elkhorn NRD. Our recent data taken this last spring would  
20 indicate that we have little trouble with a decline in water  
21 tables -- Again, I've submitted information regarding the  
22 data that I'm about to present to you. Our recent data  
23 taken this last spring would indicate that we have little  
24 trouble with a decline in water tables. As shown by the  
25 table, it can be noted that of the 165 wells on the table, a

1 majority of the wells are in the middle of the chart.

2 Again, that would be where the levels are zero, or slightly  
3 above, or slightly below. These wells show little trouble  
4 maintaining water levels based on predevelopment levels.

5 In relation to the chart, the well of my  
6 particular interest on my farm is showing a seven-foot gain  
7 to predevelopment. This would put it on the right-hand side  
8 of the chart and, based on the time when that well was  
9 drilled, little irrigation had occurred in this NRD at that  
10 time.

11 I would also like to note the advances that we are  
12 making as a Natural Resources District in helping manage our  
13 water resource. As of August, 2007, we have made it a  
14 requirement that all high capacity wells will be equipped  
15 with flowmeters. We will cost share these meters at a 50%  
16 rate. This is to help us not only determine the quantity of  
17 water that is pumped by irrigators, but also to allow our  
18 producers a tool to help them more effectively manage the  
19 water that they are pumping.

20 We also have a program that would compensate a  
21 producer for 90% of the costs of a flowmeter. This is  
22 promoted at a rate of one meter per township in order to  
23 spread them evenly out around our entire district, again,  
24 for the same purposes as discussed earlier.

25 We also are a leader in the promotion of no-till

1 farming in Nebraska and in the United States. It is a -- It  
2 is promoted by our no-till incentive program, where we  
3 compensate producers on a per acre basis to adopt a  
4 continuous no-till system. No-till provides a great way to  
5 save soil and water, and allows the farmer to use less  
6 irrigation water and more efficiently use the water that is  
7 given to us naturally by rainfall. In many areas of our  
8 district, we have more than a 50% implementation of a  
9 continuous no-till system. It is a proven way to save  
10 water, proven by the University of Nebraska, and has been  
11 widely adapted in the Lower Elkhorn NRD.

12 In conclusion, I would suggest to you that we are  
13 concerned about how we use our water, but by the quantity of  
14 water as well. Just as citizens of the Game and Parks are  
15 concerned about water quantity for the furtherance of the  
16 species previously mentioned, we are also concerned about  
17 the same, and given my testimony, have given you some  
18 realization that we are good source -- good stewards of this  
19 vast resource, which we all enjoy.

20 My evidence would prove that, based on pumping  
21 water from my well on my farm for the last 50 years, we have  
22 maintained our water resource. The data proves that we have  
23 an equivalent or more amount of water at this location than  
24 we had prior to any sort of irrigation development. And  
25 based on the location of this well in the 10/50 area, it

1 makes the water there connected to the surface water, thus  
2 available to the Platte River and the Pallid Sturgeon.

3 I would suggest to you, as an irrigator, director  
4 of the Lower Elkhorn NRD, and a farmer, that our water  
5 resource is being managed effectively to further its  
6 abundance for many generations to come. Thank you.

7 THE HEARING OFFICER: Thank you, Rod.

8 Lori, do you have a number for Rod's exhibits?

9 THE REPORTER: Exhibits 12 through 14.

10 THE HEARING OFFICER: Thank you.

11 Next proponent, please.

12 MR. NELLOR: I wish to offer testimony this  
13 morning to the Nebraska Department of Natural Resources and  
14 to its Director, Ann Bleed. Good morning, Ann.

15 My name is Lloyd Nellor. I am a farmer and a  
16 member of the Lower Elkhorn Natural Resource District Board  
17 of Directors for 25, going on 26 years, I might add. I'm  
18 also a member of the Governor's Water Policy Task Force and  
19 I represent the Lower Elkhorn Basin as an irrigator on that  
20 Board.

21 My wife and I farm north of Beemer, in Cuming  
22 County. I am both a groundwater irrigator and a surface  
23 water irrigator. I own -- We own farmland on both sides of  
24 the Elkhorn River, so I see the river flowing through my  
25 property and I saw the high waters for about three weeks in

1 the summer or the early start of this fall.

2 As an irrigator for most of my life, I fully  
3 understand the necessity of keeping water in our streams,  
4 but I also understand the great importance of protecting our  
5 groundwater. I returned from the Army in 1955 and I began  
6 to farm, and I survived extremely dry years in 1955 and '56.  
7 And probably a little bit of thanks has to go to the local  
8 hardware store that gave me a job for a while after we dried  
9 out in '56.

10 We added some farmland to our operation in 1969  
11 along the Elkhorn River. We drilled our first irrigation  
12 wells in the early 1970s. And in the early 1990s, we added  
13 a water permit to pump from the Elkhorn River. This permit  
14 was needed to supplement a low-yielding irrigation well. I  
15 have one well that puts out about 350 gallons per minute  
16 and, at that time, I was having a considerable problem with  
17 it pumping air. In an attempt to protect ourselves and our  
18 future, I requested this surface water appropriation.

19 My wells along the river are shallow and they  
20 bottom out at approximately 45 feet. These wells were a  
21 major investment that we made to guarantee a crop for our  
22 livestock feeding operation. Without irrigation, I probably  
23 would not be farming today. And hopefully, some day, I'll  
24 be able to pass this operation along to my son.

25 My -- Today, I wish to present testimony in

1 support of DNR's preliminary determination that the Lower  
2 Platte is not fully appropriated. There are many, many  
3 concerns that I have, but I'm going to try to sum them up in  
4 basically two of them -- or cover two of them today. I want  
5 to talk about the Lower Elkhorn NRD's flood control  
6 projects. And since I have served on this Board, we have  
7 constructed several flood control dikes to protect towns  
8 from the heavy rains that occur in northeast Nebraska. We  
9 have built flood levies for Pender, Scribner, Howells, I  
10 might add after a man's life was lost down there, and  
11 Wakefield, and we just finished a levy around Winslow.

12 We have also built some 72 road structures since  
13 1972, and these are to replace old, unsafe bridges. These  
14 dams control flooding downstream and conserve surface water.  
15 Most recently, the citizens of Battlecreek asked our NRD  
16 Board to help protect the city of Battlecreek from the  
17 flooding that occurred in May, I believe it was the 31<sup>st</sup>,  
18 this year, and there was a repeat on a smaller scale again  
19 in August. This flood was not considered to be a 100-year  
20 event, but it did -- the storm did dump between four and six  
21 inches of water in the watershed that feeds into  
22 Battlecreek, and it came in a very short period of time. It  
23 caused considerable damage to both public and private  
24 property, with at least 400 of the 600 homes in the town of  
25 Battlecreek receiving some type of damage. The flood waters

1 came within a foot of the door of the new Battlecreek High  
2 School. To add insult to injury, the sewage treatment plant  
3 backed up and some of the homes ended up with sewage water  
4 in their basements.

5 At our Board meeting last night, we approved a  
6 contract with JEO Engineers to evaluate possible flood  
7 control solutions. These solutions we expect to include the  
8 cleanout of the road ditches and the culverts to help drain  
9 the flood water from the town, but that really doesn't fix  
10 the problem. In a large flood dike is at least partially  
11 around -- To put a large flood dike partially around the  
12 town may be an answer, but it is becoming more difficult to  
13 build dikes and to get funds for the dikes. And I would  
14 assume your department is aware of that. Last night, we  
15 were informed there are three of our dikes that we  
16 are -- two of our dikes that we are going to have to get an  
17 engineer to look at, to make sure they meet the new  
18 standards that FEMA has come out with.

19 Another possibility --

20 THE HEARING OFFICER: Lloyd, you've used your five  
21 minutes. Can you wrap it up maybe in a minute or so?

22 MR. NELLOR: I think so. I'll try.

23 THE HEARING OFFICER: Great. Thanks.

24 MR. NELLOR: Maybe I'll do a little less  
25 ad-libbing and more sticking to my notes. Another

1 possibility is to build some dams in the area. We're  
2 looking at some small dams, although a large dam would be a  
3 possibility. But we need storage permits if these are going  
4 to work. And if the district is fully appropriated, that  
5 isn't a possibility. We also are planning to start  
6 construction on the Leigh Dam in 2008. We've left  
7 contracts -- and this dam is a flood control project to  
8 protect the lower part of the south edge of Leigh and the  
9 Maple Creek bridges and the roads downstream. The Board of  
10 Directors has worked with the Leigh Dam project for almost  
11 eight years. These are good projects and it's our job, as  
12 local government, to protect the human life. And if we  
13 don't do it, who will?

14 Another thing that we have a concern about are our  
15 rural water systems. That's another responsibility that  
16 we've had and have had very good success with it. We  
17 provide rural customers in small towns with high quality  
18 waters and this is a high priority of our Board. We spent a  
19 great deal of time and funds locating this -- these  
20 groundwater wells that will provide the best supply for  
21 these systems. We drilled something like 14 test wells  
22 before we located the three supply wells three miles  
23 east -- west of Oakland that serve the Logan East rural  
24 water system. Today, that system serves over 1200 customers  
25 in three counties. And right now, we are also investigating

1 a possibility of a new rural regional watery supply system  
2 for eight communities in the northern area of our district.  
3 I don't imagine we'll be able to get all of these eight  
4 communities to stick together long enough, but we do  
5 anticipate a system of some sort going in up there.

6 These towns include Belden, Magnet, McLean, Wausa,  
7 Osmond, Randolph, Laurel, and Coleridge, as well as several  
8 rural customers. These projects are necessary because the  
9 water quality is very poor and I am concerned that, if we  
10 are fully appropriated, there'll be restrictions placed that  
11 will prevent the district from providing this much needed  
12 water for human consumption, and this is just not  
13 acceptable.

14 The Lower Elkhorn Board of Directors agrees with  
15 DNR's preliminary conclusion that the Lower Platte River  
16 Basin is not fully appropriated and request that DNR confirm  
17 that finding in its final determination. Thank you for the  
18 opportunity and I'm sorry I ran over.

19 THE HEARING OFFICER: Thank you, Lloyd.

20 How many more proponents do we have? Three.

21 (Exhibit No. 15 was marked for identification and  
22 submitted into the record. See Index.)

23 MR. STAAB: Good morning. I am providing -- My  
24 name is Stan Staab. I'm the general manager for the Lower  
25 Elkhorn Natural Resources District in Norfolk. I am

1 providing testimony today regarding the status of the Lower  
2 Platte River Basin as related to these issues. I do speak  
3 on behalf of the entire Board of Directors. Last night, we  
4 were given the blessing to do that and, of course, to have  
5 the position to support Dr. Bleed's October decision of not  
6 being fully appropriated.

7 I do have a handout for you for exhibit. I will  
8 be brief -- try to brief with some of these points as I go  
9 through. Two of my directors before me hit some of the  
10 major issues we wanted to talk about, but I do want to also  
11 mention a couple of things that they didn't mention,  
12 especially the 10/50 area in our district. I do have a map  
13 included in this testimony.

14 The groundwater in our district will be very  
15 difficult to manage if we are fully appropriated. We are  
16 essentially carved up with the 10/50 area. The certain  
17 areas are defined by hydrologic connection, which  
18 essentially does this to our district following the major  
19 streams, such as the Elkhorn and Logan Creek.

20 Our district is very unique in the fact that our  
21 sense that our geology is very complex in the eastern  
22 portion of the district due to glaciated regions, and the  
23 western counties of Pierce and Madison are more similar to  
24 the great Ogallala formations of the central or western  
25 parts of the state. Our rainfall will average 26 to the

1 western side of the district and 30 to the east; that's  
2 abundant rainfall. It supplements our irrigation. We are  
3 able to raise bountiful crops in northeast Nebraska, for  
4 example, this year, precipitation approaching 40 inches in  
5 the Norfolk area. We have reports of 170 bushel of dry land  
6 corn on no-till are not uncommon. So this climate and  
7 rainfall transition region will most certainly create  
8 boundary disputes defined by our 10/50 area. We fully  
9 expect landowner/NRD conflict and possibly lawsuits between  
10 DNR, LENRD, and those who feel the boundaries run fairly  
11 established. And I would respectfully ask you to look at  
12 the map.

13 Our registered wells -- I want to refer to a graph  
14 that I have. We have about 5- -- We have 5,150 active  
15 irrigation wells today in the district. About half of those  
16 are in the 10/50 area. The graph shows we have steady  
17 improvement or, I should say, development of our wells over  
18 the years with a spike coming -- in the mid-1970s with the  
19 coming on of the pivot systems, and it was also dry in the  
20 mid-70s, and it spiked again in the last three or four  
21 years. As rumors of moratoriums were circulated and them  
22 submitted -- substantiated, excuse me, landowners began  
23 installing more irrigation wells. As the news of the  
24 12 -- 962 spread, well drilling moratoriums in western  
25 Nebraska were established. A debate about statewide

1 moratoriums emerged and the perception or the notion that  
2 landowners needed to establish a history of irrigating their  
3 land before they would lose their ability to do so in the  
4 future became a very powerful incentive for our farmers.

5 Although possibly unintended, LB962 and any other  
6 talk of moratoriums has resulted in the hastening -- hastening  
7 of decisions of farmers to irrigate new land. We had a call  
8 yesterday from a guy that's in a panic. He's, in fact, very  
9 angry about having to put a well down at this point. He's  
10 not ready to do that, but he feels he'll never get another  
11 chance.

12 So our district groundwater levels remain  
13 constant, as Director Zessin talked about. Our surface  
14 water permits have declined. I would mention this, as a  
15 basic fact, pumping and irrigating with surface water in our  
16 area is labor intensive, as it is across the state. The  
17 risk of losing tractors and pumps, and so on, during flood  
18 events would inspire farmers to replace their surface water  
19 permits with groundwater wells. This is a trend that is  
20 increasing in our district and certainly statewide. We now  
21 have 574 individual water rights in the entire Elkhorn River  
22 Basin. In addition, we calculated 48,818 acres have been  
23 canceled by DNR from 1978 to '02. What does this mean?  
24 There's a reduction of acres irrigated by surface water  
25 permits. Most likely, many of those acres are now irrigated

1 with groundwater wells.

2 We have tile drains in our district. Several  
3 years ago, a major contractor estimated we have over half a  
4 million miles of tile drains alone in the Lower Elkhorn  
5 because we have abundant water.

6 The last thing I would talk about is our USGS  
7 Instream Flow Report. It's not completed yet, but we are  
8 cooperating with the Upper Elkhorn NRD and the U.S.  
9 Geological Survey to study stream -- trends in stream flow  
10 in the Elkhorn River Basin. This report will not be  
11 published until sometime next year. The preliminary  
12 analyses show that, generally speaking, there is a  
13 statistically positive trend in flow at the Elkhorn River  
14 gages east of Norfolk, as well as the Platte River in  
15 Louisville. That report will be available to the public  
16 hopefully by February 1<sup>st</sup>.

17 Also, from Norfolk west, there are, generally  
18 speaking, no statistically significant trends in flow. This  
19 does mean the flows in the Elkhorn River Basin, as well as  
20 the Platte River near Louisville are stable and they're not  
21 being depleted. We lament that DNR does not take this vital  
22 information into account when making a determination of our  
23 basin to be fully appropriated or not. Our water  
24 lev- -- groundwater levels are stable and flows in the  
25 Elkhorn are actually increasing over time, providing a very

1 positive outlook for our area.

2 I would also like to basically thank everybody  
3 involved with the ELM and ENWRA studies. Realistically,  
4 these studies would not be occurring without the influence  
5 of LB962. I feel that's a very positive thing.

6 With that, I would sum up by saying thank you for  
7 giving me the opportunity. I would encourage you to read  
8 our testimony on behalf of our directors. Thank you.

9 THE HEARING OFFICER: Thank you, Stan. Stan,  
10 would you spell your name for the record?

11 MR. STAAB: Staab, S-t-a-a-b.

12 THE HEARING OFFICER: Thank you.

13 Next proponent, please.

14 (Exhibits 16 and 17 were marked for identification  
15 and submitted into the record. See Index.)

16 MR. TURNBULL: Good morning. I am John C.  
17 Turnbull. That's J-o-h-n T-u-r-n-b-u-l-l. I'm the general  
18 manager of the Upper Big Blue Natural Resource District.  
19 I'm here today to testify about the Department's recent  
20 preliminary determination, and the recorder has a copy of  
21 this testimony.

22 We agree with the preliminary determination that  
23 the Blue River Basins are not fully appropriated. We also  
24 agree with the preliminary determination that the Lower  
25 Platte River Basin is not fully appropriated. However, the

1 District does request that, if the Department determines the  
2 Lower Platte Basin, or any of its tributary basins, to be  
3 fully appropriated, that the hydrologically-connected area  
4 along the south side of the Platte River be confined within  
5 the Platte River Basin, and the 10%, 50-year line, as shown  
6 on Figure 4, of the Upper Big Blue NRD September 2005  
7 Groundwater Model Report, which has a rather lengthy  
8 title -- and I've introduced -- given that to the recorder  
9 for evidence for you. This District report is referenced  
10 in, and appended to, the Department's 2006, 2007, and 2008  
11 "Annual Evaluation of Availability of Hydrologically  
12 Connected Water Supplies."

13 Based on the District's September 2005 report, the  
14 Department determined that the only portion of the Upper Big  
15 Blue District that lies within the 10/50 hydrologically  
16 connected area of the Platte River Basin is located in  
17 Hamilton County. This area is delineated on Figures 4 and 5  
18 of that particular report.

19 The District objects to any of the Blue River  
20 Basin being included in any fully appropriated determination  
21 of any other river basin. We contend that the Nebraska  
22 Groundwater Management Protection Act only authorizes that  
23 fully appropriated determinations include the geographic  
24 area in the river basin, sub-basin, or reach being  
25 evaluated, and does not authorize the inclusion of any

1 geographic area outside the river basin, sub-basin, or  
2 reach. As you know, this matter, in fact, is the subject of  
3 a current court appeal by the Upper Big Blue NRD because of  
4 the 2005 determination of the Upper Platte Basin. Thanks  
5 for listening.

6 THE HEARING OFFICER: Thank you, John.

7 And if I'm not mistaken, this is the last  
8 proponent.

9 How many opponents do we have? Can we see a show  
10 of hands? Thank you.

11 MR. OLSEN: Good morning. I am Keith Olsen,  
12 K-e-i-t-h O-l-s-e-n. This morning, I am submitting two  
13 letters. The first letter comes from a long-time irrigator  
14 in Madison County, Bryce Neidig, stating that he is in full  
15 agreement of the preliminary determination that the Lower  
16 Platte Basin is not fully appropriated.

17 The second letter is from me as President of the  
18 Nebraska Farm Bureau Federation. Farm Bureau Federation  
19 supports the preliminary finding that the Lower Platte River  
20 Basin is not fully appropriated and we request that the  
21 Department stands with its original preliminary finding.

22 Water is the lifeblood of agriculture in Nebraska.  
23 We, at the organization, supported the passage of LB962,  
24 which established a proactive process that we are now  
25 involved in. We also participated in the negotiated

1 rulemaking process used to develop the rules and regulations  
2 under which the DNR conducts its analysis.

3 We support sound management decisions in regard to  
4 our water resources. At the same time, unnecessary  
5 restrictions on the use of water do come with economic  
6 costs. A report that was done by the Nebraska Policy  
7 Institute in 2005 indicated that, in 2003, irrigation  
8 contributed 4.5 billion dollars to the economy of Nebraska.  
9 And with increasing prices today, that figure would be  
10 substantially higher.

11 Another study released in October this year,  
12 conducted by Colorado State University and the University of  
13 Michigan talked about the value of irrigation in rural areas  
14 versus areas without irrigation.

15 Irrigation is a risk management tool that's very  
16 important to many producers in our state. Reducing risk  
17 improves producers' revenue stability and profitability.  
18 And given what is at stake, it is imperative for the DNR to  
19 be absolutely certain a fully appropriated determination is  
20 warranted.

21 The analysis undertaken by DNR, if anything, errs  
22 on the side of caution. For example, the regulations  
23 consider any area within the 10/50-year line to be  
24 hydrologically connected, which we feel is a very  
25 far-reaching standard. Also, the lag effects to stream

1 flows from existing groundwater uses are estimated at 25  
2 years into the future. Given the extreme complex  
3 relationship between groundwater use and the impact to  
4 stream flows, providing the 10/50-year standard and  
5 extending lag effect over a 25-year period, provides plenty  
6 of caution -- cushion. We have full confidence in the DNR's  
7 preliminary finding that the Lower Platte River Basin is not  
8 fully appropriated.

9 Finally, we understand that there are -- we have  
10 heard and seen today a number of reports submitted on  
11 various studies being done on the Lower Platte Basin. We  
12 are concerned of the necessity by the Nebraska Game and  
13 Parks Commission to interject endangered species' needs into  
14 the DNR report, placing endangered species' needs above  
15 economic opportunities and security for our state farms,  
16 ranches, and communities. Nebraska Farm Bureau believes the  
17 information from the Game and Parks Commission should not  
18 have a bearing on the final determination for several  
19 reasons, and many of them have been already covered today by  
20 other presenters and are covered in our letter.

21 We support, again, the preliminary finding of the  
22 DNR that the Lower Platte Basin is not fully appropriated  
23 and we ask that they concur with our comments. We thank you  
24 for the opportunity to present this testimony.

25 THE HEARING OFFICER: Thank you, Keith.

1           (Exhibits 18 and 19 were marked for identification  
2 and submitted into the record. See Index.)

3           We have a gentleman -- You said that you're an  
4 opponent. Do we have any neutral testimony? I'm trying to  
5 determine whether we need to take a break after an  
6 hour-and-15-minutes.

7           Sir, would you please step up, tell us who you  
8 are, and spell your name.

9           MR. KNAPP: My name is John Knapp, J-o-h-n  
10 K-n-a-p-p. I'm a -- And I'm also representing myself and a  
11 group called SAVE, Schramm Association for a Viable  
12 Environment, which is primarily small farmers in southwest  
13 Sarpy County that are trying to preserve the area.

14           I would urge the Department of Natural Resources  
15 to classify the Lower Platte Basin as fully appropriated.  
16 We need to be more proactive than reactive. I believe that  
17 previous testimony has been lacking in the consideration of  
18 future uses of water in the area.

19           I worked with -- for the NDEQ from 1972 to 1980 in  
20 the water quality section. From 1974 to 1980, I lived in  
21 North Platte and generally the area west of Kearney was my  
22 territory. Part of my job was to collect monthly and/or  
23 quarterly data and water samples from the various streams  
24 and by area, and send them in for analysis. Water usage has  
25 made a dramatic change in the conditions of streams like

1 Wild Horse Creek, Nine-mile Creek, Tub Springs, in the North  
2 Platte Basin. The Republican Basin and Lodgepole Creek have  
3 seem similar changes. I do not believe that these changes  
4 have been mutually advantageous for all the adjacent  
5 landowners or fisheries.

6 At a meeting concerning impacts of groundwater  
7 irrigation in the 1970s, an attorney for one of the NRDs  
8 stated that there was no connection between surface and  
9 groundwater. He may have been referring to a legal  
10 connection, but in the real world, that is not the case and  
11 most of us knew it. And that, I think is -- In the western  
12 part of the state, it seems like we've been reactive, rather  
13 than proactive in dealing with the water issues.

14 The Sarpy County Planning Commission Planning  
15 Department in Sarpy -- and Sarpy County Commissioners all  
16 state that they do not have the power to control  
17 developments based on water issues. They believe that the  
18 various state agencies are responsible for regulating  
19 developments that will have an impact on water issues. They  
20 recently approved about 50 acreages in an area that  
21 historically has problems finding water. My neighbor's well  
22 is about 1,000 feet from his house. In the past, they have  
23 pumped their well dry and had to make changes to their  
24 lifestyle to maintain their water supply. The new  
25 development placed a well on the other side of the fence.

1 The well driller testified that the well produced 30 gallons  
2 per minute. He left out some important facts. He never  
3 mentioned draw down at what level or -- draw down, or at  
4 what level aquifer stabilized, if it did. I have a  
5 1200-gallon tank on the back of my truck that will give you  
6 1,000 gallons per minute, but the draw down and recovery  
7 rate will cut you down pretty quickly.

8 The County said that he could sue if someone  
9 deprived him of his water. He called several state agencies  
10 wanting to find out how and what he could -- would need to  
11 do if his well is pumped dry to document for his -- for a  
12 lawsuit. Not one agency gave him any help.

13 Regarding future uses, Omaha's MUD's new well  
14 field has a capacity of around 100,000,000 gallons per day,  
15 and that's going to go into effect, I believe, in the summer  
16 of 2008. Lincoln has over 1,000 acres in Sarpy County that  
17 they intend on developing future wells on. And the -- When  
18 they need the water is when the irrigators need the water,  
19 and is when any fisheries would need the water also. I  
20 think poor planning and poor regulations have cost the  
21 taxpayers of the state of Nebraska millions of dollars in  
22 expenses and will cost us millions more. We should take  
23 action before individuals spend large amounts of capital on  
24 their projects, only to find out that they have spent these  
25 funds chasing the last drop of water. Then they're told

1 they will not be able to realize their dreams. And Sarpy  
2 County has also projected their growth in the next 50 years  
3 to reach \$350,000 -- 350,000 people, so that is going to put  
4 an extra demand on water.

5 Our Papio NRD has told us that they do not have  
6 the authority to regulate individual developments and  
7 only -- can only comment when asked by other authorities to  
8 do so. And again, I think bad planning has been evident in  
9 some of the other testimony given about cities being  
10 flooded. You should be locating your new developments  
11 outside of the flood plain and not spending taxpayers' money  
12 to protect these areas.

13 Old New Orleans was high and dry. I seen a recent  
14 report on what happens if global warming takes effect and  
15 they were showing what the future cities would look like if  
16 the ocean rises. Old Charleston will be high and dry. It  
17 appears that we have lost some of the ability to plan  
18 properly. Thank you.

19 THE HEARING OFFICER: Thank you, John.

20 Any other opponents to the preliminary  
21 determination?

22 (No response.)

23 Any neutral testimony on the preliminary  
24 determination?

25 (No response.)

1 I would like to, at this point, submit for the  
2 record two letters that we've gotten prior to this hearing;  
3 one from Greg Walmer and one from Donald Blankenau. I'll  
4 submit those for the record.

5 (Exhibits 20 and 21 were marked for identification  
6 and submitted into the record. See Index.)

7 Anybody else in the audience wanting to provide  
8 any testimony? If not, it is now 10:25, December 19<sup>th</sup>, and  
9 I want to close the hearing. But I want to point out that I  
10 want to keep the record open through the close of business  
11 December 27<sup>th</sup>. I think I previously said December 21<sup>st</sup>, but  
12 I'm going to keep the record open until December 27<sup>th</sup> for  
13 the receipt of any additional written testimony, which  
14 should be mailed to the Department and identified as  
15 testimony for this hearing.

16 Once the record is closed, the Director of the  
17 Department will consider the testimony and the exhibits  
18 presented in this hearing. Prior to making her final  
19 determination on whether to go forward with the preliminary  
20 determination that all of the basins are not fully  
21 appropriated, or reconsider the preliminary determination,  
22 at that point, if that's the case, a different preliminary  
23 determination would be issued and a further hearing would be  
24 scheduled. Thank you all for coming today. Good-bye.

25 (Whereupon, the hearing was concluded at 10:25

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a.m., on December 19, 2007.)

(Late-filed Exhibits 22 through 24 were marked for identification and submitted into the record. See Index.)

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BEFORE THE NEBRASKA DEPARTMENT OF NATURAL RESOURCES  
OF THE STATE OF NEBRASKA

\_\_\_\_\_  
In the matter of a Public Hearing )  
Relating to the Preliminary ) TRANSCRIPT  
Determination that the Missouri ) VOLUME II of II  
Tributary Basins, Blue River ) EXHIBITS 1-24  
Basins, Lower Platte River Basin )  
and a Portion of the Lower )  
Niobrara River Basin Are Not Fully )  
Appropriated. )  
\_\_\_\_\_ )

I, Lori J. Sehnert, hereby certify that this volume contains Exhibits 1 through 24 offered in evidence in the above-referenced proceedings, heard December 19, 2007, before Ronald Theis, and the same are made a part of the transcript prepared in said case.

Dated this \_\_\_\_\_ day of January, 2008.

\_\_\_\_\_  
Reporter