

BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
STATE OF NEBRASKA

IN THE MATTER RELATING TO THE )  
PRELIMINARY DETERMINATION )  
THAT THE LOWER NIOBRARA RIVER )  
BASIN IS FULLY APPROPRIATED )

City Hall  
311 N. Oak  
Gordon, Nebraska

Convened, pursuant to notice at 2:00 p.m. on  
December 27, 2007

BEFORE:

RON THEIS, Hearing Officer.

- - -

OTHERS PRESENT:

ANN BLEED, Director, Department of Natural Resources

JESSE BRADLEY, Integrated Water Management Analyst

- - -

Kelly S. Horsley  
ACE Reporting, NE  
(402) 416-4882

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## REPORTER'S CERTIFICATE:

STATE OF NEBRASKA            )  
  )        ss:  
LANCASTER COUNTY            )

I, KELLY S. HORSLEY, certified reporter for ACE Reporting, NE, certify that I reported the proceedings in this matter; that the transcript of testimony is a true, accurate and complete extension of the recording made of those proceedings; and further, that the disposition of the exhibits is referenced in the index hereto.

IN TESTIMONY WHEREOF, I have hereunto set my hand at Lincoln, Nebraska, this \_\_\_\_\_ day of January, 2008.

Kelly S. Horsley, CERT-ER

1 PROCEEDINGS:

2 THE HEARING OFFICER: Good afternoon. It's 3:04  
3 p.m. Mountain Standard Time, December 27th, 2007. We are  
4 located at the City Hall Community Building in Gordon,  
5 Nebraska. My name is Ron Theis, I'm one of the legal  
6 counsel for the Department of Natural Resources and I'll  
7 be the Hearing Officer for this hearing.

8 With me today are Ann Bleed, Director of the  
9 Department of Natural Resources; Jesse Bradley, Integrated  
10 Water Management Analyst; and Kelly Horsley is the court  
11 reporter who will be making a verbatim record of this  
12 hearing.

13 If you have not done so already, please turn off  
14 your cell phone ringers for the duration of this hearing.  
15 And if you have difficulty hearing me or any of the -- any  
16 person who is speaking in this hearing, please let us  
17 know. There is no PA system and we want you to be able to  
18 hear what's going on.

19 The purpose of this hearing is to take testimony  
20 on the Department's previously released Preliminary  
21 Determination that the Lower Niobrara River Basin is Fully  
22 Appropriated. After the hearing today, the other hearings  
23 on this preliminary determination and an examination of

1 testimony and all relevant evidence, the Department will  
2 make a determination whether the portion of the Niobrara  
3 River Basin, including the surface water shed of the  
4 Niobrara River and its tributaries from the Mirage Flats  
5 Diversion Dam to the Spencer Hydropower Dam and the  
6 groundwater aquifers considered to be hydrologically  
7 connected to that portion of the Niobrara River and their  
8 tributary is fully appropriated. The authorities for  
9 these hearings and the decisions are enumerated in Neb.  
10 Rev. Stat. 46-748.

11           This is a public hearing, not an evidentiary  
12 hearing. Those testifying will not be required to be  
13 sworn in. If you haven't signed the sign-in sheet for  
14 this hearing, recording your presence, I request that you  
15 do so. Who hasn't signed it? Please raise your hand.  
16 Pass it around to these people.

17           We have a separate sign-in sheet identifying  
18 those persons wishing to testify, and it's located on this  
19 table over here by the microphone. You don't have to sign  
20 it in advance. If you want to speak, we will ask that you  
21 step forward to this chair, and these other chairs will be  
22 the on-deck area. You can sign it just immediately before  
23 you speak. As noted in the notice of the hearing,

1 testimony may be either oral or written. Those providing  
2 oral testimony will be allowed to speak for a limited  
3 amount of time. I will give a warning signal -- this I  
4 the warning signal -- when there is one minute left for  
5 testimony. That's why I have the speakers facing me.

6           Written testimony regarding the preliminary  
7 determination of the Niobrara may be submitted to the  
8 court reporter at this hearing or may be mailed to the  
9 Department. It will be accepted by the Department for  
10 inclusion into the record if received by the close of  
11 business January 3rd, 2008. If you want to send something  
12 in, please state that it's for this hearing in Gordon, and  
13 that you would -- somewhere in your copy -- that you would  
14 like it included into the record.

15           At this point I would like to submit for the  
16 record a copy of the notice for this hearing, entitled  
17 Preliminary Determination that the Lower Niobrara River  
18 Basin is Fully Appropriated. That will be marked as  
19 Exhibit 1.

20           (Exhibit 1 was marked and offered into the  
21 record. See Index.)

22           I'd also like to submit the Proof of Publication  
23 pursuant to Neb. Rev. Stat. 84-907, stating the

1 publication of the Department of Natural Resources' Public  
2 Hearing Notice for this hearing occurred on three  
3 consecutive weeks in newspapers in statewide circulation  
4 and in newspapers of circulation within the basins. Those  
5 newspapers are the Spencer Advocate, Ainsworth Star-  
6 Journal, Valentine Midland News, Springview Herald, Gordon  
7 Journal, Omaha World-Herald, O'Neill Holt County  
8 Independent, and the Bassett Rock County Leader.

9 A bundle of proofs of publications from those  
10 newspapers will be presented into the record as Exhibit 2.

11 (Exhibit 2 was marked and offered into evidence.  
12 See Index.)

13 Both these Exhibits 1 and 2 are now received in  
14 the record.

15 (Exhibits 1 and 2 were received in evidence.  
16 See Index.)

17 I'm noting for the record the Department's  
18 Report for 2008, The Annual Evaluation of the Availability  
19 of Hydrologically Connected Water Supplies, as published  
20 on the Department's web site. This is the material on the  
21 subject of this hearing which speaks for itself.

22 Before beginning the testimony, I want to  
23 explain how I wish to proceed. In order to provide some

1 organization and focus to the overall testimony that will  
2 be presented, I ask that each person wishing to speak  
3 decide whether you are a proponent, that is, for the  
4 preliminary determination; an opponent, as against the  
5 preliminary determination; or you are neutral on the  
6 preliminary determination. The order will be the  
7 proponents will go first, the opponents second, and  
8 neutral testimony third. This is typical legislative way  
9 of doing.

10           Can I have a show of hands on the number of  
11 people who want to testify today? Thank you. In order to  
12 give everyone who wishes to testify an opportunity to do  
13 so, I'll ask then that you limit your testimony to five  
14 minutes. You may ask for additional time, if you need it.  
15 However, if your additional testimony appears to be  
16 repetitive, I'll ask you to wrap up your testimony.

17           We will begin with the proponents. At this  
18 time, I would like to invite the persons testifying in  
19 favor of the preliminary determination to come forward,  
20 take a seat over here. And I've described the on-deck  
21 area, so don't be shy.

22           Are there any proponents, anyone wishing to  
23 speak in favor?

1           We're asking for the persons wanting to testify  
2 in favor of the preliminary determination to come forward.

3           AUDIENCE: Could you turn up your microphone?  
4 We're having trouble hearing you.

5           THE HEARING OFFICER: We don't have any  
6 microphones, it's just my voice. Thanks for letting me  
7 know; I'll try to project.

8           If there are no proponents, we'll next go with  
9 opponents to the preliminary determination. Would you  
10 please step forward?

11           Are there any opponents? Thank you. Please  
12 state your name, for the record, and spell it for the  
13 court reporter, and tell who, if anybody, you're  
14 representing. And if you want to present a written  
15 exhibit, let us know and we'll give you an exhibit number.

16           MR. DAVIS: Okay. I'm Al Davis, a rancher from  
17 Hyannis, Nebraska, representing myself.

18           THE REPORTER: D-a-v-i-s?

19           MR. DAVIS: D-a-v-i-s. I will present this in  
20 oral fashion, then I'll turn in my written testimony. So  
21 I'm Al Davis, a rancher who resides in the Upper Loup NRD.  
22 A significant portion of my ranch lies within the area  
23 that the Nebraska Department of Natural Resources

1 considers to be a part of the Niobrara River watershed.

2           I have come here today because I believe that  
3 the preliminary boundaries of the Niobrara watershed set  
4 by the Nebraska Department of Natural Resources are in  
5 error. A layman's opinion on water and groundwater would  
6 indicate that groundwater would naturally flow in the same  
7 general direction as surface water, unless barriers exist  
8 underground which divert this flow. In large part, most  
9 of the water in the Sandhills is saturated in the sand and  
10 permeable sandstone which underlies much of the area.  
11 Accordingly, it is impossible for me to understand why DNR  
12 has ignored natural watershed barriers in making their  
13 preliminary geographical determination.

14           While I am not an expert on groundwater, it is  
15 impossible for me to believe that the areas that lie  
16 between the North Fork of the Middle Loup River and the  
17 North Loup River could possibly have any effect on the  
18 Niobrara River. Portions of my property and that of my  
19 neighbors that lie only 2.5 miles north of the Middle  
20 Prong of the Middle Loup are claimed as tributary to the  
21 Niobrara by the Nebraska Department of Natural Resources.

22           This particular area is 9 miles south and a few miles  
23 west of the North Loup River.

1           Using 15-minute USGS topographical maps as my  
2 guide in studying this proposal, I find a number of large  
3 valleys which obviously drain into the Loup River system,  
4 but are claimed as Niobrara tributaries by the DNR. I am  
5 most familiar with the area north of Hyannis, so will  
6 address my remarks to this particular area. Survey Valley  
7 lies approximately 25 miles north of Hyannis, NE. Survey  
8 Valley is over 25 miles long and was given its name  
9 because a rail line was plotted through the area and was  
10 surveyed for that purpose. Variations exist between the  
11 areas north and south of Survey Valley, including soil  
12 types, vegetation and topography. Survey Valley is  
13 characterized by high hills on both north and south sides  
14 of the valley itself, and drainage from the valley itself  
15 flows into the North Loup River. I cannot believe that  
16 any property which lies to the south of Survey Valley  
17 could have an effect on the Niobrara River.

18           There are other aspects of the designated area  
19 which do not make sense to me. My neighbor, Gary Hoyt,  
20 lives in Section 18, Township 28 north, Range 37 west.  
21 His ranch headquarters are in the fully appropriated area,  
22 but a study of the 15 minute maps shows that all water  
23 draining from west of his ranch flows east into the Loup

1 River system. In fact, the boundary between the two areas  
2 which DNR established is only one-half mile east of his  
3 ranch, yet live water runs through that area most of the  
4 summer. DNR also claims the same fully appropriated  
5 status in areas where the North Loup River is actually  
6 flowing, specifically on my neighbor Eric Storer's ranch.  
7 Waters south of the North Loup River cannot have an effect  
8 on the Niobrara. Further east, DNR has made the same  
9 determination on Goose Creek, another Loup River  
10 tributary.

11 Overall, I am skeptical that DNR's determination  
12 on the Niobrara is actually based on science, but is being  
13 influenced by environmental forces who do not understand  
14 the science of the Sandhills, but have a bias against  
15 development of any kind. Stream flows from the Sandhills  
16 have consistently been the most constant in the nation.  
17 Eight years of severe drought have not produced a  
18 significant drop in water levels in the area's rivers.

19 DNR's decision will strictly limit the property  
20 rights of individuals who reside in the fully appropriated  
21 area. It is extremely important that thorough and  
22 exhaustive efforts be made to be sure that this step is  
23 necessary. Restrictions on water usage will affect

1 property values. The spillover from the reduction in  
2 property values is higher taxes and lower net incomes for  
3 ranching families and struggling rural communities.

4 I would ask that DNR give thoughtful  
5 consideration to the ramifications of this decision before  
6 moving ahead with it. Communication with landowners,  
7 resource districts, and governmental bodies has been poor  
8 to non-existent.

9 As a final comment, I would ask, again, that DNR  
10 do actual field studies on the portions of the Upper Loup  
11 NRD which they feel impact the Niobrara river system.  
12 Working with the landowners who have intimate knowledge of  
13 their land and the land in their areas will go a long way  
14 in developing trust and understanding between the parties  
15 affected. I do not wish to forfeit my property rights to  
16 DNR without a complete and thorough study of the area.  
17 Thank you.

18 THE HEARING OFFICER: Thank you, Al.

19 That will be marked as Exhibit 3, and Exhibit 3  
20 is entered into the record.

21 (Exhibit 3 was marked and received in evidence.  
22 See Index.)

23 Next opponent, please? If we have persons

1 wanting to testify after this gentleman, would you please  
2 come up and take the on-deck chair? Thank you.

3 MR. ADAMSON: Jerry Adamson, J-e-r-r-y A-d-a-m-  
4 s-o-n. Is this thing working?

5 THE REPORTER: No, it goes into my --

6 MR. ADAMSON: Oh, that goes into your --

7 THE REPORTER: Right. It doesn't amplify.

8 MR. ADAMSON: Okay.

9 THE REPORTER: But we still need it in front of  
10 you so that I can get you on the record. Thank you.

11 MR. ADAMSON: I'm Jerry Adamson, Cherry County  
12 Commissioner. I would like to preface my remarks today by  
13 saying I'm not terribly concerned about being politically  
14 correct, or stepping on somebody's toes. In other words,  
15 if the shoe fits, wear it.

16 The first thing for everybody in attendance at  
17 our meeting this afternoon to realize is that is that most  
18 hearings like this are generally formality, something to  
19 make everybody feel good, and go home believing we  
20 actually had vital input on the issue at hand, water.  
21 When in reality, the decisions have already been made.  
22 It's sad, but true. I hope this hearing will be an  
23 exception to the rule.

1           My county, Cherry, consists of nearly 4,000,000  
2 acres, of which only three percent are now under  
3 irrigation. And possibly, just possibly, in time we might  
4 figure out a way to irrigate another three percent.  
5 Bottom line, in time, we could have six percent of our  
6 county under irrigation.

7           Then along comes the Nebraska Department of  
8 Natural Resources with limited facts to base any decision  
9 on, and they start using the phrase "fully appropriated".  
10 Nothing could be farther from the real truth. This fully  
11 appropriated status we're debating today has to rank as  
12 one of the most reckless, irresponsible decisions ever  
13 handed down by any State agency.

14           For the last ten years, the hot button topic in  
15 Nebraska, especially rural Nebraska, from the governor  
16 down, has been rural economic development. Millions of  
17 dollars have been spent, grants have been written, and  
18 lots of lip service has been given to keeping rural  
19 Nebraska alive and viable. I don't believe the answer to  
20 enhancing rural economic development in Nebraska is to cap  
21 water usage. How anti-productive.

22           I heard some of our water experts trying to  
23 compare the Niobrara River Basin to the Republican River

1 Basin. One is basically runoff from the mountains, and  
2 the other, the Niobrara River Basin, is mostly spring-fed.  
3 How do you make a comparison there?

4 I've heard other water experts use the silted-  
5 in, outdated, Spencer-Naper Hydroelectric Plant as an  
6 excuse for this fully appropriation status we're now under  
7 preliminarily. We heard it again today. Do you know that  
8 two, two, of today's modern wind turbines can generate  
9 approximately the same amount of electricity as the  
10 Spencer-Naper hydroelectric plant? Now what's the trade-  
11 off there, you know? Maybe the State needs to buy the  
12 hydroelectric plant so we can go ahead and go ahead with  
13 our rural economic development plan. It wouldn't be a bad  
14 trade-off. I don't know what kind of a price they have on  
15 it, but I'm sure it's not -- couldn't coincide with the  
16 millions of dollars that we're spending on rural economic  
17 development in this state.

18 The real reason for the fully appropriated  
19 designation that we are debating is they, the Nebraska  
20 Department of Natural Resources, want control of our  
21 water, both ground and surface. And I'll repeat, they  
22 want control, as Al has mentioned a little bit ago. They  
23 went out of our NRD district to the tune of about 400,000

1 acres on the south, where those waters go to the North  
2 Loup or the Calamus. And we heard at Valentine that the  
3 only reason that -- excuse they would give us is that,  
4 well, sometimes the ground water and surface water go  
5 different directions. Some computer model tells us that.  
6 It's not that at all. It's control of the headwaters of  
7 two more rivers.

8           The time has come to start using common sense  
9 and collect more sound and unbiased data before decisions  
10 are made like the fully appropriated status that brings us  
11 all together today.

12           Better yet, maybe we should pay attention to  
13 data that is already at our disposal. I'm holding a copy  
14 of the Cooperative Hydrology Study, commonly referred to  
15 as COHYST. I guess "CO" is for cooperative, "HY" is for  
16 hydrology, and "ST" is for study. The COHYST study. The  
17 final draft of this document is dated September 21<sup>st</sup> of  
18 '04. The funding was provided by the Nebraska  
19 Environmental Trust. Have you heard a word about the  
20 COHYST study today? I haven't. There's some pretty good  
21 stuff in here, and it was, I assume, a lot of research.  
22 But it's like some other things I've been associated with;  
23 the results didn't come out to suit the Nebraska

1 Department of Natural Resources, so we don't hear much  
2 about this study.

3 I'm also holding a copy of an article from the  
4 Journal-Star dated October 31<sup>st</sup> of '07, written by two NRD  
5 general managers. Their names are Kent Miller, who is the  
6 manager of Twin Valley NRD, and Ron Bishop, general  
7 manager of the Central Valley NRD. I'd like to quote a  
8 little bit from the article --

9 THE HEARING OFFICER: Jerry?

10 MR. ADAMSON: Yeah?

11 THE HEARING OFFICER: Your time is up. Would  
12 you like to continue?

13 MR. ADAMSON: I would, sir, if possible.

14 THE HEARING OFFICER: Could you wrap it up,  
15 then?

16 MR. ADAMSON: I'll hurry as fast as I can.

17 THE HEARING OFFICER: Thanks.

18 MR. ADAMSON: "Our goal as Nebraska's National  
19 Resource Districts is to protect our groundwater. The  
20 COHYST has provided the best information to date regarding  
21 the effect of groundwater on surface water. The COHYST  
22 study prepared the study to provide a basis for  
23 responsible decisions on using our water resources.

1 Ignoring the information in the COHYST study because it  
2 doesn't confirm with the Central Nebraska Public Power and  
3 Irrigation District strategy of blaming groundwater users  
4 tells us that some people are ignoring the best data  
5 available. The fact is that surface water shortages  
6 throughout the state have been primarily caused by  
7 drought. Protecting our water resources is a critical  
8 issue for all Nebraskans. Our policy makers must make the  
9 best decisions based on facts and not falsehoods and  
10 accusations. Groundwater use has been a convenient  
11 scapegoat on which to blame our water problems. However,  
12 the facts clearly show the recent drought that made man-  
13 made water diversions from the river play a much larger  
14 part than has been claimed."

15           So I guess that's basically what I had to say.  
16 I've got some other stuff here that can wait. I will turn  
17 this written in to you folks. And something is truly  
18 wrong with this picture. Thank you.

19           THE HEARING OFFICER: Thank you, Jerry. Your  
20 material will be Exhibit 4 entered into the record.

21           Jerry, are you going to give her something?

22           MR. ADAMSON: Yeah, I will.

23           (Exhibit 4 was marked and received in evidence.)

1 See Index.)

2 THE HEARING OFFICER: Go ahead, please.

3 MR. STORER: My name is Eric Storer, E-r-i-c S-  
4 t-o-r-e-r. I am a board member of the North Loup NRD, and  
5 we would like to thank you for the opportunity and time  
6 you have taken to hold these public hearings.

7 At this regular -- At its regular December board  
8 meeting on December 13<sup>th</sup>, the board met and extensively  
9 reviewed lands in our district which would be affected by  
10 the DNR ruling of fully appropriation of the Niobrara. At  
11 that meeting, the board of directors of the Upper Loup  
12 Natural Resource District appointed a committee to compile  
13 testimony and evaluate the preliminary hydrological  
14 boundaries which the DNR set forth in its October 27<sup>th</sup>,  
15 2007 memo.

16 I am the chairman of that committee. The  
17 preliminary hydrological boundaries of the Niobrara water  
18 shed, which the DNR established, encompasses over 415,000  
19 acres of land under our jurisdiction; most of the land  
20 which directly affects the Loup River system. The Upper  
21 Loup NRD is currently involved with the USGS and  
22 neighboring NRD's in an ELM study of the river's basins as  
23 a tool to evaluate the effects of the irrigation on in-

1 stream flow.

2           The Board of Directors of the Upper Loup NRD  
3 propose that if the Department of Natural Resources  
4 determines that the Niobrara River system is fully  
5 appropriated, it is vital that the boundary of that area  
6 be accurate as possible. The starting point for this  
7 boundary cannot be arbitrarily politically sub-divisioned,  
8 but must be hydrologically-based. As of now, the boundary  
9 between the Upper Loup NRD and the Middle Niobrara NRD is  
10 defined by a township line, versus the hydrologic boundary  
11 between the two river systems.

12           Constituents and board members of the Upper Loup  
13 NRD have reviewed USGS quad maps, GIS maps, and  
14 hydrological unit maps, and believe that the vast areas  
15 located in the Upper Loup NRD do not belong in the area to  
16 be determined fully appropriated. This includes the head  
17 waters of the north fork of the North Loup River, the head  
18 waters of the Middle Loup River, the head waters of the  
19 Goose Creek, and the head waters of the Calamus River.  
20 The sources of creeks and rivers and the groundwater and  
21 not surface water runoff make it highly unlikely that they  
22 have any affect on the Niobrara River.

23           We feel that to maximize the accuracy of the

1 fully appropriated boundary map, field reconnaissance is  
2 needed to define the hydrological unit boundary between  
3 the Loup River basin and the Niobrara River basin. Much  
4 of this area has been extensively ditched and many of the  
5 natural drainage altered, making the accuracy of many of  
6 the maps suspect.

7           Natural drainage exists in several portions of  
8 the district. The one which stands out is near  
9 Cottonwood-Steverson Recreation Area and Round Lake.  
10 Ditching in Section 5, Township 29 North, Range 35 West,  
11 diverted water from going into the Mud Lake and sent the  
12 water north and east into Betsy Creek. This area is  
13 approximately 40,000 and outlined on the map which we put  
14 on the wall that the Upper Loup NRD is providing as part  
15 of our testimony.

16           The Board of Directors of the Upper Loup NRD  
17 would like to review the boundaries as proposed, and feel  
18 that changes are imperative to accurately reflect boundary  
19 lines between the Niobrara River system and the Loup River  
20 system. We also feel that the current boundary lines are  
21 a direct threat to our constituent's property and  
22 irrigation rights and the Upper Loup NRD's local control  
23 of the groundwater within our district. Thank you.

1 THE HEARING OFFICER: Thank you, Eric. Would  
2 you -- Do you have some written --

3 MR. STORER: Yes, I do.

4 THE HEARING OFFICER: You would be -- Your  
5 material would be admitted to the record here as Exhibit  
6 No. 5.

7 (Exhibit 5 was marked and received in evidence.  
8 See Index.)

9 Next objector, please?

10 MS. BLEED: Would the person who is going to  
11 follow come up and sign the sheet? It would save some  
12 time.

13 MR. SIMMONS: Robert Simmons.

14 THE REPORTER: Spell your last name.

15 MR. SIMMONS: Simmons, S-i-m-m-o-n-s.

16 THE REPORTER: Thank you.

17 MR. SIMMONS: At the present time, the Spencer-  
18 Naper Hydro Dam is the only appropriation which is not  
19 being met. The DNR seems intent on moving forward with a  
20 determination that the Lower Niobrara River Basin is fully  
21 appropriated. This would be a tragic mistake. Such a  
22 declaration would deal a heavy blow to the future ag-based  
23 economy of this area.

1           We have seen data from gauging stations that  
2 show that the river was at its third lowest level in 2007,  
3 since records have been kept. DNR would have people  
4 believe that lower flows are caused by pumping irrigation  
5 wells. Rather than panic and make faulty conclusions  
6 which are followed by faulty decisions and disastrous  
7 long-term results, DNR needs to gather more information.

8           Many questions remain unanswered. Are the lower  
9 river flows a result of diversion, irrigation wells, or  
10 drought? Flows from drainage districts can vary greatly  
11 from wet to dry years. My opinion is that drought in  
12 western Nebraska is the major reason for the lower flows.

13           I have not seen data that shows how much water  
14 is pumped from irrigation wells. I have not seen data  
15 that shows how much water is being diverted. The instream  
16 flow study by Nebraska Game and Parks has not been  
17 completed. At the Valentine meeting, a man showed a graph  
18 of diversion permits applied for. The number of permits  
19 applied for is much different than the amount of water  
20 actually being diverted.

21           I have been told by a DNR person that it is  
22 unlawful to plug a drainage ditch and flood irrigate  
23 without a diversion permit. It seems that the rules have

1 changed without the public being informed. Sub-irrigated  
2 meadows have been drained or flooded as the owners saw fit  
3 for many generations. Plugging a ditch in the spring  
4 during high rainfall and releasing the water later would  
5 result in a more even flow of the river; a desirable  
6 situation, in my opinion.

7 Middle Niobrara NRD's water level monitoring has  
8 shown on average a steady or rising water level. DNR has  
9 no explanation for rising water levels, and has chosen to  
10 ignore this fact. More data is needed to determine what  
11 area is hydrologically connected to the Lower Niobrara  
12 River Basin before a final determination can be made.

13 THE HEARING OFFICER: Thank you, Robert.

14 Next objector, please?

15 Robert, your written information is entered into  
16 the record as Exhibit No. 6.

17 (Exhibit 6 was marked and received into  
18 evidence. See Index.)

19 MS. SCHNEIDER: My name is Carolyn Schneider,  
20 spelled S-c-h-n-e-i-d-e-r.

21 THE HEARING OFFICER: Could you spell your first  
22 name, please, Carolyn?

23 MS. SCHNEIDER: C-a-r-o-l-y-n. My husband Lloyd

1 and I farm and ranch in Cherry County, south of Cody,  
2 Nebraska. We have lived there since the spring of 1963,  
3 and Lloyd grew up on the home place where we live now. We  
4 wish to be on the record as being opposed to the  
5 preliminary designation that the Niobrara River from  
6 Mirage Flats to Spencer Dam be fully appropriated.

7           We find the timing of this designation to be  
8 very detrimental to the farming and ranching community.  
9 We have been in a severe drought -- actually, an extreme  
10 drought for the past several years, and I feel that the  
11 data presented by the Department of Natural Resources does  
12 not take that fact into consideration. The Middle  
13 Niobrara NRD in Cherry County has data from the last ten  
14 years that indicates the groundwater levels have risen  
15 during those years.

16           I attended rural school in Cherry County during  
17 my grade school years. I lived on the north side of the  
18 river, and the school was on the south side of the river.  
19 We rode horseback to school and we forded the Niobrara  
20 every day. There were days when you better raise your  
21 feet out of the stirrups or you were going to have wet  
22 feet, and there was days when it wasn't a concern. So  
23 maybe a rain upstream or the snow and ice melt, or for

1 whatever reason, the flow in the river fluctuated. That  
2 is still true today. That flow is never constant.

3           Irrigation has been a part of our farming  
4 enterprise since we began operating the family farm. My  
5 husband's father had the foresight to check out this thing  
6 called irrigation, and he drilled the first well on our  
7 farm and ranch in 1952. It wasn't a center pivot as we  
8 know about today, it was hand-moved pipe and six boys. We  
9 now have third and fourth generations of our families  
10 involved in the operation. His decision to irrigate  
11 enabled him to stay on the farm and raise his family  
12 there, and we would like to think that our children and  
13 grandchildren could also be a part and stay on the farm  
14 and stay in this rural area.

15           In summary, we believe this designation as a  
16 fully appropriated Niobrara Basin from Mirage Flats to  
17 Spencer Dam would have a very negative impact on the  
18 economy of a large part of western Nebraska, which is  
19 primarily an agricultural area. We feel this designation  
20 is irresponsible, and would ask the Department of Natural  
21 Resources to further study data and the testimony from  
22 these hearings before making a final decision on this  
23 designation in January of 2008. Thank you for allowing me

1 to testify.

2 THE HEARING OFFICER: Thank you, Carolyn.

3 Next objector, please?

4 MR. JACOBSON: My name is Michael Jacobson. I  
5 am a fourth-generation farmer and rancher from Gordon,  
6 Nebraska.

7 THE HEARING OFFICER: Would you spell your name,  
8 please, Michael?

9 MR. JACOBSON: First or last, or both? M-i-c-h-  
10 a-e-l J-a-c-o-b-s-o-n.

11 THE HEARING OFFICER: Thank you.

12 MR. JACOBSON: And I lobbied personally against  
13 the LB108, which was the water consumptive law, and LB962,  
14 which was the law that essentially took the local control  
15 from the NRD boards and put it in your hands.

16 I -- We knew back when you were trying to pass  
17 the -- when they got LB108 passed that -- the conjunctive  
18 water part was the part that was going to give us some  
19 problems down the road. And so I went back and I tried to  
20 get a handle on, you know, some of the history. 46-636,  
21 Neb. Stat. says "Pumping for irrigation purposes,  
22 legislative findings." Well, the legislature finds the  
23 pumping of water for irrigation purposes from water wells

1 located within 15 feet of the bank of a channel of any  
2 natural stream may have a direct effect on surface flow of  
3 such stream. Now this was passed in 1963. I pulled up  
4 the legislative history, and at that time they were trying  
5 to get it passed -- they were trying to get 75 feet, and  
6 then it was 50 feet. I think this statute takes  
7 precedence over 47-703, which is the hydrologically  
8 connected water and surface water may need to be managed  
9 differently from unconnected groundwater and surface water  
10 in order to permit quality among water users.

11           Now, when I was down in Lincoln, I went to your  
12 office and I was asking -- I was trying to get some of the  
13 information at how you arrived at how the conjunctive  
14 water law worked. And they gave me number four here,  
15 methodology, and the analysis of how they do it. And  
16 you've got a formula here that I had to go this morning to  
17 talk to some of my college professors -- I have a degree  
18 in chemistry. I spent a hell of a lot of time working on  
19 this kind of math and formulas and whatnot, and it's just  
20 complicated as hell. But anyway, they make reference to  
21 this here computation of rate and volume of stream  
22 depletion by wells. And they make reference to it in the  
23 back of your own material here. And it says right here on

1 the first page, "When field conditions approach certain  
2 assumed conditions, the depletion and flow of a nearby  
3 stream caused by pumping can be calculated readily by  
4 using dimension curves and tables." It says "nearby".  
5 Then it goes on to clarify, "The assumptions made for this  
6 analysis are 'T' in the formula does not change with time.  
7 Thus, for a water table aquifer drawdown is considered to  
8 be negligible when compared to the saturated thickness.  
9 The temperature of the stream is assumed to be constant  
10 and to be the same as the water in the aquifer." And this  
11 is the important one, "The aquifer is isotropic," that  
12 means that it's flowing in the same direction -- has to be  
13 flowing in the same direction. Whatever is supposed to be  
14 feeding it has got to be coming in together "at homogenous  
15 and semi-infident in a real extent. The stream that forms  
16 a boundary is straight and fully penetrates the aquifer.  
17 Water is released instantaneously from storage. The well  
18 is opened to the full saturated thickness of the aquifer."

19 So anyway, I think that you're making  
20 assumptions here that are just not there.

21 THE HEARING OFFICER: You have one minute left,  
22 Michael.

23 MR. JACOBSON: Okay. Can I submit some of this

1 stuff in writing that I don't get through here?

2 THE HEARING OFFICER: Yes.

3 MR. JACOBSON: I would like to go through some  
4 of the stuff here why I figure it's not your water, it's  
5 my water.

6 My grandfather came out here in the 1800's and  
7 filed a homestead. They dug the first wells by hand. The  
8 homestead certificate was signed by Benjamin Harrison;  
9 it's recorded at the county courthouse. The certificate  
10 says "An act of Congress approves secure homesteads to  
11 actual settlers on the public domain. The land was  
12 clearly granted by the United States to plaintiff's  
13 grandfather and his heirs and assigns forever. They  
14 immediately had to have water in this semi-arid land for  
15 personal livestock survival, as well as survival of the  
16 trees. They began to irrigate from their water captured  
17 and controlled underground. From the United States  
18 government, plaintiff's ancestors acquired a vested,  
19 private property right to water captured under their land  
20 if needed, in addition to by prescription. Plaintiff has  
21 unconverted, constitutional private-property right in the  
22 underground water as a corporal hereditaryment (sic)  
23 belonging to the soil. As an heir, plaintiff and his

1 predecessors, in the interest as homestead entry men of  
2 vacant public in the United States, each continually  
3 enjoyed and exercise ownership over underground water  
4 since the 1800's. We are entitled to full, free and  
5 natural state of all waters which are naturally captured  
6 and underneath the control beneath said ground for use in  
7 domestic irrigation used in interstate commerce in the  
8 production of all agricultural products produced for  
9 interstate commerce and the private, vested property  
10 rights in the underground water of plaintiff thereto are  
11 prior and superior to any alleged right or claim by the  
12 State, including any and all entities of the State, State  
13 of Colorado --

14 THE HEARING OFFICER: Michael, you've used all  
15 of your time. Could you wrap it up, please?

16 MR. JACOBSON: How much time --

17 THE HEARING OFFICER: I'm looking at all of that  
18 stuff you've underlined there and I'm getting scared.

19 MR. JACOBSON: Well, I've got -- Anyway, the  
20 bottom line here is that the Interstate -- the impact is  
21 going to be on the Interstate Commerce. And already,  
22 because we have been declared an over-appropriated area,  
23 according to Dr. Johnson at the University of Nebraska,

1 our land values have went down \$156 per acre. I've got an  
2 affidavit here that will swear that I helped my father  
3 when he began -- I began helping him re-leather livestock  
4 wells in 1953 --

5 THE HEARING OFFICER: Michael, are you going to  
6 present the written information?

7 MR. JACOBSON: Yeah. Anyway, during the process  
8 of re-leathering the stock wells, you become intimately  
9 familiar with the depth of the water. And it's the same  
10 now as it was in 1953. It's eleven feet down there. And  
11 so anyway, I -- what's happened here is that you're taking  
12 the water away from us, and you're going to give it to the  
13 cities.

14 LB1226 was passed, and that said that you do not  
15 have any control over the amount of water the cities take.

16 THE HEARING OFFICER: Michael -- Michael, you've  
17 used twice your time allotted.

18 MR. JACOBSON: Okay. Anyway, it says no  
19 integrated management plan, rule or order shall limit the  
20 use of groundwater by a municipality within an area  
21 determined by the Department of Natural Resources to be  
22 fully appropriated pursuant to 46-714 or designated as  
23 over-appropriated pursuant to 46-713.

1           So anyway, you're going to take the water away  
2 from us and give it to the cities. That's all I have.

3           THE HEARING OFFICER: Thank you for your  
4 presentation, Michael. Do you have a packet of papers  
5 to --

6           MR. JACOBSEN: Yeah. Just let me get it all  
7 together and I'll bring it back up.

8           THE HEARING OFFICER: Okay. We'll give you an  
9 exhibit number when you give it to us.

10          Next objector, please?

11          MR. RAVENSCROFT: My name is John Ravenscroft,  
12 R-a-v-e-n-s-c-r-o-f-t.

13          THE REPORTER: John is spelled --

14          MR. RAVENSCROFT: J-o-h-n. I live in the center  
15 of Cherry County. I've got several points I'd like to  
16 bring out. I think we're all interested in protecting our  
17 water in the State of Nebraska here, and I just wonder if  
18 Spencer-Naper Dam -- I don't believe it's ever had it's  
19 full appropriation of water since they first had it in the  
20 months of July and August. And I just wonder if even if  
21 you stopped all the users of the water and all the  
22 irrigation, I just question if even then they would have  
23 their full appropriation during the months of July and

1 August.

2           The Niobrara River is -- a lot of the water,  
3 say, from South Dakota and Cherry County comes into the  
4 river from springs and water falls, and I feel the river,  
5 instead of having a lot of the water -- instead of coming  
6 from runoff comes from these springs that comes out of the  
7 Sandhills.

8           I think it's essential that the DNR work with  
9 our local NRD's, and when they get the integrated study  
10 done, that they can make adjustments as needed. And I  
11 think it's important that we make sure our residents of  
12 this area are able to make a living off the land for them  
13 and their families.

14           THE HEARING OFFICER: Thank you, John.

15           MR. RAVENSCROFT: You're welcome.

16           THE HEARING OFFICER: Do we have any other  
17 objectors that want to testify, please? Anyone wanting to  
18 testify in the neutral capacity?

19           Step forward, please. And if you have others,  
20 the on-deck chairs are open.

21           MR. VOGT: My name is Lyndon Vogt. I am the  
22 general manager of the Upper Niobrara White Natural  
23 Resources District in Chadron, and I'm testifying on

1 behalf of the Natural Resource District. And I'd like to  
2 make it clear before I begin that I am testifying for  
3 Upper Niobrara White, not for the Middle Niobrara or the  
4 Lower Niobrara NRD. I do think there's a lot of  
5 differences in the Niobrara River from west to east, and I  
6 think you will recognize them probably in the testimonies  
7 of the three NRD's in the basin.

8           The Upper Niobrara White Natural Resource  
9 District is testifying in a neutral position. And my  
10 testimony is probably not going to make a lot of sense to  
11 a lot of people in this room, because they don't live  
12 within our NRD. There's a lot of people in Cherry County  
13 here that -- I'm going to talk a little bit about our  
14 management areas that I know they're unaware of. I did  
15 give a map to the court reporter, so --

16           We do recognize the need to address declining  
17 water resources in the Upper Niobrara White. We also  
18 recognize the Department of Natural Resources is charged  
19 by law with making an annual evaluation of each river  
20 basin in the state to determine if there's unappropriated  
21 water available for new uses.

22           The Upper Niobrara White has had a stay on the  
23 issuance of permits for high capacity wells since March

1 20<sup>th</sup> of 2003 in our entire NRD. This is prior to the 2004  
2 fully appropriated designation by DNR of the western two-  
3 thirds of our district. At the request of the NRD, the  
4 Department of Natural Resources placed a temporary stay on  
5 the issuance of surface water natural flow appropriations  
6 for irrigation in the non-fully appropriated area of the  
7 district on July 6<sup>th</sup> of 2007.

8           The only management changes, as a result of the  
9 fully appropriated designation, require the District to  
10 offset any new uses and to place a stay on the expansion  
11 of irrigated acres. The NRD has certified approximately  
12 95 percent of the ground water irrigated acres in the  
13 district over the past twelve months, which is also  
14 required within a fully appropriated designation. The  
15 only irrigated acres yet to be quantified are the surface  
16 water irrigated acres because of inaccuracies in what is  
17 actually being irrigated by surface water.

18           Effective March 1<sup>st</sup> of 2007, an allocation was  
19 implemented in sub areas 4 and 6 because of groundwater  
20 declines that triggered a Phase III of our district's  
21 Ground Water Management Plan. As a result, both of these  
22 sub areas are currently managed more restrictive than  
23 required by the fully appropriated status.

1           Sub area 2 will likely trigger a Phase II  
2 designation within the next year and the NRD will  
3 implement higher management standards in a larger portion  
4 of the area that is being considered as fully appropriated  
5 today. Again, you can see that on the attached map that I  
6 gave you.

7           The fully appropriated designation will mainly  
8 affect new economic growth and economic development that  
9 requires offset for additional consumptive use of our  
10 water resources, and that's where our concerns mainly lie.  
11 With that, I am done. Thank you.

12           THE HEARING OFFICER: Thank you, Lyndon. Your  
13 written material is entered into the record as Exhibit 7.

14           (Exhibit 7 was marked and received in evidence.  
15 See Index.)

16           Any other neutral testifiers?

17           MR. SANDERS: Steve Sanders.

18           THE REPORTER: Spell your last name?

19           MR. SANDERS: S-a-n-d-e-r-s. I'm testifying  
20 neutrally because I would hate to see the Niobrara pumped  
21 dry, like I read in the Omaha paper a few months ago a  
22 fellow said he might do; probably in jest. But at the  
23 same time, I would like to be able to, if I ever get

1 enough mortgages paid off, maybe to put down a well. And  
2 I'm not sure, from what I've heard, if that would be  
3 possible if this deal goes through.

4 THE HEARING OFFICER: Thank you, Steve.

5 Are there any other persons who wish to testify?

6 Is there any other written testimony to be  
7 presented to us prior to the close of the hearing?

8 The Department has already received nine pieces  
9 of written testimony prior to the beginning of this  
10 hearing. They are from the Niobrara River Outfitters,  
11 Mary Mercure, The Ainsworth Irrigation District, Jack  
12 Reiman, Larry Kornock, Brian Rentschler, Nebraska Farm  
13 Bureau, the United States Department of Interior Bureau of  
14 Reclamation, and Nebraska Public Power District.

15 Those testimonies will be entered into the  
16 record in sequence, Exhibits 8 through 16.

17 (Exhibit 8 through 16 were marked and received  
18 in evidence. See Index.)

19 It is now 3:55 Mountain Standard Time, and the  
20 hearing is closed. However, the record will be held open  
21 through the close of business January 3<sup>rd</sup>, 2008 for receipt  
22 of any additional written testimony, which should be  
23 mailed to the Department and identified as testimony for

1 this hearing. Once the record is closed, the Director of  
2 the Department will consider the testimony and exhibits  
3 presented at this hearing prior to making her final  
4 determination on whether to go forward with the  
5 preliminary determination. Thank you for attending.

6 (Exhibits 17 through 26 were marked for  
7 identification after the proceedings. See Index.)

8 (Concluded at 3:55 p.m. on December 27, 2007.)

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