



Nebraska's Natural Resources Districts

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TO: NARD Board, NRD Managers and Conservation Partners
FROM: Dean E. Edson, NARD Executive Director
RE: January 15 NARD Update

New Bills -- Introduction of legislative bills occurs in the first ten working days of the session. The following are bills of interest for the NRDs, introduced in through Day 10. For more information on introduced legislation, visit the Nebraska Unicameral web-site at www.nebraskalegislature.gov/.

LB 993 – Change use of the Water Resources Cash Fund. Carlson. The bill adds enhancing stream flows or groundwater recharge to the uses of the Water Resources Cash Fund.

LB1010 -- Provide procedures and limitations on the use of eminent domain by natural resources districts for recreational trails. Pankonin. The bill outlines procedures for the use of eminent domain by a natural resources district to take private real property for a recreational trail or a connecting trail.

At a public meeting, the NRD must consider:

1. The proposed route for the trail, including maps and illustrations, and the mode of travel to be permitted;
2. The areas adjacent to such route to be utilized for scenic, historic, natural, cultural, or developmental purposes;
3. The characteristics that make the proposed route suitable as a recreational trail or a connecting trail;
4. The current status of the real property ownership, current and potential use of the real property in and along the proposed route;
5. The estimated cost of acquisition of the real property, or an interest therein, needed for the proposed route;
6. The circumstances under which eminent domain is anticipated to be used to establish the proposed trail;
7. The plans for developing and maintaining the proposed trail; and
8. Any anticipated problems enforcing the proper use of the proposed trail or hazards to private real property adjacent to such trail.

If the district decides to establish the trail after following the procedure, the district may acquire private real property or an interest therein, to develop and maintain the trail by:

1. Negotiated agreements with the consent of the private real property owners affected by the trail before establishing or allowing the establishment of such trail. The consent from a private real property owner shall be willing consent, not coerced in any manner by the district or any other party, and shall be in writing, shall meet the requirements of Section 6 of this act (limited liability provisions – See below), and shall be signed by the private real property owner and the district; or
2. If all reasonable efforts to acquire private real property or an interest therein, by negotiated agreement have failed, the district board may, by resolution adopted by a supermajority of the district board at a public meeting, elect to conduct a proceeding to determine whether to use the power of eminent domain to acquire such property. Such proceeding shall be at public hearing with general notice to the public and specific notice by registered mail to all private real property owners whose property would be subject to condemnation by eminent domain. The public hearing shall be held no sooner than forty five days after the date the resolution is adopted. At the public hearing, the district board shall receive evidence on the question of whether to acquire private property by eminent domain for the purpose of constructing the trail.
3. The district board may, by vote of a supermajority of its members (75%), elect to proceed with eminent domain to acquire such property if the district board finds, by clear and convincing evidence received at the public hearing, that all of the following criteria are met:

(a) The trail has been publicized at a public hearing held in accordance with the eight items a district must consider where trail is planned and reasonable notice of the hearing was provided to affected private real property owners;

(b) Good faith attempts to negotiate agreements meeting the requirements of Section 6 of this act with the affected private real property owners have been made and have failed for some or all of the private real property that is determined by the district board to be necessary for the trail to be developed;

(c) All other trail route alternatives which would not require the exercise of eminent domain are not viable due to circumstances beyond the district's control;

(d) The trail route selected is the most reasonable, direct, and safe alternative and is the least intrusive to private real property owners as possible;

(e) The trail route selected minimizes the adverse effects on adjacent private real property owners or persons utilizing such property;

(f) Good faith attempts have been made to address the concerns of affected private real property owners' concerns regarding trail design, privacy, land protection, management, and maintenance; and

(g) Any development and management of the trail is designed to harmonize with and complement any established forest or agricultural plan for the affected private real property.

If eminent domain is approved to establish a proposed trail, it shall be conducted in the manner and subject to the limitations provided in sections 25-2501 to 25-2506 and 76-701 to 76-726.

The bill further outlines that a private real property owner, lessee, or occupant does not owe a duty of care to a user of a trail that crosses real property or is on real property owned or formerly owned by the real property owner. Such private real property owner, lessee, or occupant of real property affected by such a trail has no responsibility for, does not incur liability for, and is not liable for any injury to the person or property of a user of a trail. This subsection does not apply to intentional torts committed by the real property owner, lessee, or occupant.

A negotiated written agreement between a district and a private real property owner regarding the acquisition of real property, or an interest therein, by the district to establish and maintain a trail shall contain a limitation of liability clause as provided in subsection (1) of this section and shall clearly express both parties' rights and obligations, including the obligation of the district to maintain the trail and the liability of the district for property damage or personal injury, or both, to users of the trail. **(Section 6)**

An affected private real property owner may appeal the decision of the district board to use eminent domain under these sections by petition in error to the district court of the county where the affected private real property is located. No petition to condemn private real property affected by the proposed trail shall be filed in county court until any error proceeding under this section is final.

LB 1011 -- Limit the eminent domain power of natural resources districts to exclude certain recreational trails. Pankonin. The bill prohibits the use of eminent domain for the development or management of recreational trails or corridors unless associated with a flood control structure.

LB 1016 -- Adopts the Nebraska Statewide Water Planning Commission Act. Christensen. The bill creates the Nebraska Statewide Water Planning Commission, which consists of 7 members appointed by the governor. The commission shall exercise the powers and perform the duties carried out by the Division of Planning and Assistance of the Department of Natural Resources.

The duties of the commission include, but are not limited to: (1) Developing a statewide plan for the future use of water in the state; (2) Maintaining and maximizing the use of water in this state; (3) Creating a plan to manage the state's water resources to encourage economic health and prosperity; and (4) Make recommendations to the Governor and the Legislature for achieving the goals set forth in the plan developed pursuant to subdivision (1) of this section.

The bill allows for an executive director position for the new commission and allows him/her to be assisted in the state water planning and review process by the Department of Natural Resources, the Game and Parks Commission, the Department of Agriculture, the Governor's Policy Research Office, the Department of Health and Human

Services, the Department of Environmental Quality, the Water Center of the University of Nebraska, and the Conservation and Survey Division of the University of Nebraska. In addition, the executive director may obtain assistance from any private individual, organization, political subdivision, or agency of the state or federal government.

Funding for the commission would come from appropriations from the legislature and a transfer of any unexpended and unobligated funds allocated to the Division of Planning and Assistance of the Department of Natural Resources for the 2009-11 biennium to the Nebraska Statewide Water Planning Commission Fund and any of the unexpended and unobligated balance of the Water Policy Task Force Cash Fund.

LB 1019 -- Creates the trails dispute boards to decide disputes concerning recreational trails between county boards and NRD boards. Haar. The bill outlines a procedure to follow to resolve disputes between counties and NRDs regarding recreational trails. The bill authorized a county to create a trails dispute board where a natural resources district is proposing to develop a recreational trail and a majority of the county board of such county has a dispute regarding the alignment or right-of-way acquisition of such recreational trail. The county board would be required to notify the NRD and Governor.

The trails dispute board, when appointed and convened, shall continue in existence only until it has resolved a dispute referred to it pursuant to this section unless it is reconvened under subsection (5) of this Section. A person is not eligible for membership on the trails dispute board if a decision to be made by the board would or could cause financial benefit or detriment to the person, a member of his or her immediate family, or a business with which the person is associated, unless such benefit or detriment is distinguishable from the effects of such action on the public generally or a broad segment of the public. The trails dispute board shall be subject to the Open Meetings Act.

Within forty five days after the Governor and the Natural Resources District are notified by the county board of the creation of a trails dispute board: (i) The natural resources district board shall appoint two of its members to serve on the trails dispute board; (ii) The county board shall appoint two of its members to serve on the trails dispute board; and (iii) The Governor shall appoint three members to serve on the trails dispute board who do not reside in the affected county, selected from a list of persons willing and able to serve provided to the Governor by the State Highway Commission.

The trails dispute board shall convene within fifty days after the notice. Action may be taken by affirmative vote of four of the board's members. Within fifteen days after being convened, the trails dispute board shall select a mediator. The four members of the trails dispute board representing the natural resources district board and the county board shall meet with the mediator selected and have forty-five days after the first meeting within which to mediate the dispute. If mediation is successful, the agreement shall be implemented by the natural resources district board and the county board.

If mediation is unsuccessful, the county board shall present its dispute and the natural resources district board shall present its plan regarding the proposed recreational trail to the trails dispute board. The county board and the natural resources district board may provide the trails dispute board with comments regarding the plan or dispute of the other within fourteen days after the presentations to the trails dispute board. The trails dispute board shall have forty five days after the presentations to develop a solution to the dispute regarding the proposed recreational trail. The trails dispute board shall convene at least one public hearing to take testimony on the proposed solution within the forty five day period. Notice of the hearing or hearings shall be published in a newspaper or newspapers of general circulation within the affected area. The cost of publishing the notice shall be shared by the county board and the natural resources district board. All interested persons may appear at the hearings and present testimony or provide other evidence relevant to the issues being considered.

The solution of the trails dispute board to the trail dispute shall be one of the following:

- (i) Allow the natural resources district board to go forward with its plan regarding the proposed recreational trail;
- (ii) Choose an alternate route selected by the trails dispute board; or
- (iii) Prohibit the natural resources district board from using eminent domain on part or the entire proposed recreational trail route.

After the forty five day period, the trails dispute board has fifteen days to render a final written decision. If problems or unexpected situations arise in implementing the trails dispute board's plan, the trails dispute board may be reconvened to address the situation by affirmative vote of the natural resources district board or the county board. The trails dispute board may address the situation by vote of the trails dispute board or, upon the affirmative vote of three members, shall repeat the procedure provided beginning with mediation.

All expenses incurred by the trails dispute board, including the cost of hiring a mediator, shall be shared jointly by the county board and the natural resources district board.

For this new Act, recreational trail means a trail developed for recreational purposes that is not constructed in conjunction with a water project of a natural resources district.

LB 1025 – Allows for an instream flow right in fully appropriated areas. Avery. The bill allows the Department of Natural Resources to accept and act on an application for an instream flow water use, or another surface water use that involves no consumptive use, if such appropriation will not harm the senior surface water appropriators on such river or stream or the groundwater users whose water wells are dependent on recharge from the river or stream involved and such groundwater uses were in place on or before the date the river basin, subbasin, or reach was designated as overappropriated or was preliminarily determined to be fully appropriated.

LB 1031 – Eliminate the sunset date on NRD levy. Dierks. The bill eliminates the 2012 sunset date for the NRD 3-cent levy in fully and over-appropriated areas.

LB 1032 -- Change the fully appropriated levy. Dierks. Allows NRDs that have been preliminarily determined to be fully appropriated, but later reversed, to have access to the 3 cent levy to administer and implement ground water management activities, and integrated management activities under the Nebraska Groundwater Management and Protection Act.

LB 1052 -- Adopt the Agricultural Production and Economic Stability and Assistance Act. Christensen. The bill creates the Agricultural Production and Economic Stability and Assistance Act to assist NRDs with financing the management of water resources and the augmentation of water supplies for the economic stabilization of agricultural production in river basins where state responsibility for interstate compacts, agreements, and decrees exist.

For oversight where projects are considered, a board is proposed with members consisting of:

1. Director of Natural Resources;
2. State Treasurer;
3. Chair of the Nebraska Investment Council;
4. Chair of the Nebraska State Board of Public Accountancy;
5. NRD manager from a district that contains a fully appropriated river basin;
6. NRD manager from a district that contains an overappropriated river basin;
7. A mayor of a city in a fully appropriated or overappropriated river basin; and
8. A professor of agricultural economics on the faculty of a state educational institution

A district, joint entity or joint public agency can submit a project for consideration. If approved by the board, the district, joint entity, or joint public agency to be an eligible district and will receive state assistance. Also on approval, all eligible districts in the same river basin shall develop a plan to coordinate eligible projects in the river basin.

The state funding would be used to assist the district, joint entity or joint agency in financing the project, including repayment of locally issued bonds (LB 701). The state source of funds would come from a refund of a portion of the sales tax collected by retailers doing business within the rapid response area of two and one-half miles on either side of the river, stream, or tributary within the eligible district.

LB 1054 -- Adopt the correlative rights doctrine relating to the use of groundwater. Carlson. The bill adopts the correlative rights doctrine as it applies to groundwater in the state. The doctrine shall apply with regard to the

use of groundwater within a river basin when the Department of Natural Resources or a district determines it is necessary to comply with state or federal agreements or compacts.

Correlative rights is defined as the co-equal right of each landowner over a common aquifer to extract his, her, or its share of water from the aquifer without (a) unreasonably harming other landowners over the common aquifer through lowering of the water table, (b) directly and substantially affecting a watercourse, or (c) reducing artesian pressure.

If the department or district determines that correlative rights should apply, allocations of ground water in the basin for irrigation purposes may be reduced by the district or the department so that each landowner shares equally in the shortfall. If the allocations are reduced to zero, the state would have to provide just and fair compensation to the landowner for such reduction.

LB 1056 – Provide for measurement of aquifer depletion and limitations on irrigation. Carlson. The bill sets up required metering and allocations when depletions of groundwater occur. The Department of Natural Resources would be required to measure aquifer and groundwater changes across each river basin each year and report such measurement to the Legislature on December 31, 2010, and on December 31 of each year thereafter. Change would be determined based upon a comparison to saturation thickness of the aquifer in the base year of 1963.

The Department shall determine the percentage of change in the aquifer or ground water in relation to the base year and the area within each river basin in which such change has taken place.

When the change in aquifer or groundwater results in depletion to an area of the aquifer greater than ten percent but not greater than twenty percent of the base year, meters shall be placed on all irrigation wells in the depletion area of the river basin to measure water usage, and groundwater allocations for irrigation purposes shall be imposed on all landowners in the depletion area.

When the change in aquifer or groundwater results in depletion to the aquifer greater than twenty percent but not greater than thirty percent of the base year, no landowner in the depletion area may use more than fifty percent of the annual allocation of groundwater. However, all or any portion of the unused allocation may be transferred outside the groundwater depletion area.

When the change in aquifer or groundwater results in depletion to the aquifer greater than 30 percent of the base year saturation thickness, no landowner in the depletion area may use any portion of the annual allocation of groundwater. However, all or any portion of the unused allocation may be transferred outside the aquifer or groundwater depletion area.

If recharge has occurred since the previous annual measurement in a depletion area such that aquifer depletion is no longer greater than 30 percent of the base year saturation thickness, use of groundwater allocations for irrigation purposes in such area may resume as provided as provided in the proposal.

LB 1057 -- Creates the Republican River Basin Water Sustainability Task Force. Carlson. The bill creates the Republican River Basin Water Sustainability Task Force to ensure sustainable water use within the basin, maintain compliance with the interstate compacts to which the basin is subject, and avoid water-short years. The task force would be required to present a preliminary report to the Governor and the Legislature on or before May 15, 2011, and a final report before May 15, 2012.

The Governor shall appoint the following members of the task force:

1. Eight representatives from the four natural resource districts in the basin;
2. Four representatives from the irrigation districts in the basin;
3. Two representatives from the Department of Natural Resources;
4. Two members the University of Nebraska;
5. Two members from school districts in the basin;
6. Two members from cities in the basin;
7. Two members from counties in the basin;

8. Two members from associated agricultural businesses;
9. One representative from the Game and Parks Commission;
10. One representative from public power districts; and
11. One representative from the Department of Agriculture.

The chairperson of the Executive Board of the Legislative Council shall appoint three representatives from the Legislature, two of whom are residents of the basin. The chairperson of the Natural Resources Committee of the Legislature shall also be a member of the task force. In addition to such members, any member of the Legislature may serve as a member of the task force at his or her option.

The task force would terminate on June 30, 2012.

LB 1076 - Change provisions relating to evaluation of river basins, sub-basins, and reaches. Schilz. The bill allows river basins that have been determined to be over-appropriated, to be re-evaluated. The bill also allows any river basin that the department has declared a moratorium on surface water appropriations prior to July 16, 2004 to be evaluated for over-appropriated status.

The following are bills of interest up for hearings next week. All hearings begin at 1:30 p.m.

January 25th

- **LB 740** – Eliminates transfer provisions from certain agriculture funds. Agriculture Committee. – Appropriations Committee.
- **LB793** - Prohibit cash fund transfers without authorization. Dubas. Appropriations Committee.
- **LB 884** -- Require employers to provide employees with wage and deduction information. McGill. Business & Labor Committee.

January 26th

- **LB 935** – Deficit appropriation bill. Hearings begin with the Appropriation Committee on 1/26

January 27th - Revenue Committee

- **LB 806** - Change provisions relating to agricultural land valuation. Campbell.

January 28th

- **LB 815** – Change requirements for the Taxpayer Transparency Act. Haar. Government Committee.
- **LB 893** - Provide refund procedures for unconstitutional taxes and assessments. Christensen. Revenue Committee.
- **LB 895** -- Change procedures for filling vacancies on a natural resources district board. Janssen. Natural Resources Committee
- **LR 276 CA** - Constitutional amendment to permit exemption from taxation of real property which is donated to the state or a governmental subdivision. Pirsch. Revenue Committee.

January 29th - Natural Resources Committee

- **LB 689** -- Change Water Resources Cash Fund, Ethanol Production Incentive Cash Fund, and ethanol excise tax provisions. Langemeier.