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TO: NARD Board, NRD Managers and Conservation Partners
FROM: Dean E. Edson, NARD Executive Director
RE: March 19 NARD Update

Occupation tax constitutional – This week the Lancaster County District Court ruled the occupation tax on irrigated land meets constitutional standards. The court case is important to LB 862 in several areas, primarily that the tax is constitutional and it is a valuable tool to manage water resources to keep Nebraska in compliance with compacts, decrees and agreements.

Also important to note in the case are the Court references made as to how the occupation tax protects taxpayers and provides an important tool to manage water, not just groundwater, in the basin. This sets an important foundation for funding water programs in fully and over-appropriated areas

While the decision was supportive of the NRDs, it will be appealed to the Supreme Court and the districts could remain without funds for another year or two. With the water-short year controls being proposed by the state in the Republican River Basin Integrated Management Plans this year, NRDs must start implementing programs this next fiscal year, which gives rise to the importance of LB 862. With the authorization, the local NRDs can develop programs in the basin to protect the local economies both short-term and long-term.

The NRDs would prefer to provide local funding for water use reduction programs from all irrigators to provide solutions to the issues rather than mandating regulation without compensation. On page three of this update is a chart on potential irrigated acres in each district that could go without water and without compensation if LB 862 is not passed. Loss of these acres without compensation would be devastating to local economies, funding for school districts, and subsequently to the taxpayers of the area.

The plaintiffs brought this suit seeking a declaratory judgment that the occupation tax authorized by Nebraska Revised Statute 2-3226.05 is unconstitutional, seeking a permanent injunction to enjoin the imposition and collection of that tax, and a mandatory injunction ordering a refund of the occupation taxes already paid by the plaintiffs. The plaintiffs claim that the challenged portions of LB 701 constitute special legislation in violation of Nebraska Constitution Article III, Section 18; results in a commutation of taxes in violation of Nebraska Constitution Article VIII, Section 4; and constitutes a property tax for state purposes in violation of Nebraska Constitution, Article VIII, Section 1A.

The Court ruled in favor of the State of Nebraska on all three questions raised. The following are the Court's answers to each question.

Question I. Is the Occupation Tax Levy a violation of Nebraska Constitution, Article VIII, Section 1A?

“The occupation tax is a flat tax levied “upon the activity of irrigation,” Neb. Rev. Stat. Section 2-3226.05(1), and allows the landowners who chose not to irrigate to exempt themselves from the tax. Accordingly, the court concludes that the occupation tax levy is an excise tax, and not a property tax, and thus the provision of Neb. Const. art. VIII, Section 1A are inapplicable

Question II. Does the Occupation Tax Levy Result in a Commutation of Taxes in Violation of Nebraska Constitution, Article VIII, Section 4?

On page 10 of the case, the court outlined its response:

“The court finds that any funds which may be raised by the NRDs decisions to impose the occupation tax levy authorized by LB701 will benefit the taxpayers of the defendant NRDs. As such, the occupation tax levy does not “divert taxes raised by one taxing district to the sole use and benefit of another district,” Swanson, 249 Neb. At 471, 544 N.W. 2d at 337, and is not, therefore, violative of Neb. Const. art. VIII, Section 4.”

Question III. Does the Occupation Tax Levy Constitute Special Legislation in Violation of Nebraska Constitution, Article. III, Section 18?

“The court has considered the legislative history of LB 701, the relevant statutory and case law, and the District Court Order in Garey, and agrees with the defendants that the record in the present case is insufficient to overcome the presumption of constitutionality of the occupation tax levy passed by the legislature. The Haman Court examined a “highly improbable set of events” and determined the legislation at issue was unconstitutional. The plaintiff has the burden of “clearly demonstrating” the statute is unconstitutional and has not convinced this court that the future prospects of adding to the LB 701 class is similarly “highly improbable”. While there may be some reasonable doubts about whether LB 701 establishes a closed class those reasonable doubts must be and hereby are resolved in favor of the constitutionality of the statute.

Accordingly, the court finds that the classification in Neb. Rev. Stat. Section 2-3226.01(1) of districts with authority to levy the occupation tax in Neb. Rev. Stat. Section 2-3226.05 is open and does not constitute special legislation in contravention of Article III, Section 18.”

Floor Action Next Week

Occupation Tax – Next week, the Legislature will debate **LB 862** with the committee amendment **AM 2004**. The bill makes several changes to the occupation tax on irrigated acres. The bill is sponsored by Senator Mark Christensen and is one of the Natural Resources Committee Priority Bills. The bill makes two important changes: 1) Expands the definition so the Republican Basin portion of Tri-Basin NRD is eligible to participate in water management programs, and 2) allows the proceeds of the tax to be used to pay for the costs of projects without issuing bonds.

Surface water irrigation districts have announced they are opposing the bill until they get an exemption from the bill as they feel their direct diversions from the river have no impact to water quantity issues in Nebraska and should not have to contribute toward water reduction programs.

Current law allows districts that contain a river subject to an interstate compact among at least three states and at least one irrigation district within the compact to be able to issue river-flow enhancement bonds. The committee amendment deletes the original bill and replaces that language with the following criteria:

- It has jurisdiction that is part of a river basin for which the district has adopted an integrated management plan (IMP);
- The IMP is in accordance with 46-715;
- The IMP refers to 2-3226.04; and
- The IMP explicitly states the district’s intent to utilize qualified projects described in 2-3226.04.

Nebraska Revised Statute **2-3226.04** outlines that the funds shall only be used to pay or refinance the costs of (1) acquisition by purchase or lease of ground water or surface water rights; (2) purchase or lease or the administration and management, pursuant to mutual agreement, of canals and other works, including reservoirs, constructed for irrigation from a river or any of its tributaries; (3) vegetation management,

including, but not limited to, the removal of invasive species in or near a river or any of its tributaries; and (4) the augmentation of river flows consistent with the authority granted under Chapter 2, Article 32. These projects benefit both surface and ground water users

The committee amendment also allows the funds to be used to pay all of or any part of the costs and expenses of one or more qualified projects rather than issuing bonds.

Finally the amendment addresses that for districts that have more than one river basin within its jurisdiction, the occupation tax is to be confined to the geographic area affected by an IMP.

An important factor in defining eligible districts is that the four Republican Basin NRDs are in the process of modifying their IMPs to incorporate plans for water short years. Up to 190,000 acres in the Republican Basin could have irrigation curtailed with out compensation if the bill does not move forward. The districts have the opportunity to incorporate the language from LB 862 in the revised IMPs. The Platte Basin NRDs have completed their IMPs and they do not include such reference, so they are ineligible unless the State of Nebraska, through DNR, and the NRDs jointly agree to modify the IMPs as such.

What is important to the change in LB 862 is the Republican portion of Tri-Basin NRD. Currently they are not eligible to use the occupation tax, but yet now face the possibility of 9,600 irrigated acres that could be shut down without compensation in water short years. This could cause significant economic damage to the area and funding for schools. The change in LB 862 would allow the Tri-Basin NRD to participate in programs authorized under 2-3226.04 and compensate producers and/or develop programs to avoid water short years.

The following table shows irrigated acres by NRD that would be subject to irrigation curtailment in water-short years.

<u>NRD</u>	*Acres Subject to Dry Year <u>Regulation</u>	Percent of Irrigated Acres <u>in the District</u>
Lower Rep.	76,900	40.5%
Middle Rep.	59,100	31.1%
Tri-Basin	9,600	5.0%
<u>Upper Rep.</u>	<u>44,500</u>	<u>23.4%</u>
Total	190,100	**17.0%

*These do not include surface water acres that would be curtailed by DNR.

** Percent of irrigated acres in the Republican River Basin

Budget Action

Appropriations bills advance – Senators advanced the deficit appropriations bill (**LB 935**) on earlier this week to Select File on a 45-0-4 vote. Included in the package is AM 2117 to LB 935, which is the deficit appropriations bill. On Thursday, Senators advanced the bill to Final Reading by voice vote.

Since the bill was introduced in January, revenue forecasts have been lowered prompting the committee to respond with spending cuts and funds transfers that were not included in the original versions. The committee proposal (**AM 2117**) was incorporated to the bill prior to advancement and includes a 2% across the board cut applied to the same operations and aid programs to which the 5% cut was applied in the 2009 Special Session for the FY 10-11 years. No cuts are proposed for NRD related programs in the current fiscal year.

The problem looming in the future is the projected deficit of \$670 million for FY's 11-12 & 12-13. This deficit projection is based upon a 7.2% growth in revenue for the next two years, which is probably un-attainable. If the revenue growth is not met, the deficit for the next biennium could be \$1 billion.

Certain state appropriations were exempted from across the board reductions including TEEOSA school aid, Special Education, Medicaid, Kids Connection, Homestead Exemption, Behavioral Health Aid, Developmental Disability Aid, Health Aid, Aid to Aging Programs, Health and Human Services care and treatment facilities, State Patrol, Corrections, Juvenile Services Aid, HHS protection and safety, and the State Emergency Fund, and Public Safety Communications.

The across the board reductions were also not applied to higher education which includes the University of Nebraska, state colleges and community colleges due to maintenance of effort requirements attached to Nebraska's use of Stabilization funds received under the American Recovery and Reinvestment Act (ARRA). These priority and entitlement programs that were excluded amount to 89.3% of the budget meaning that the across the board cut is applied to only 10.7% of the total budget.

For natural resources programs, adjustments include the following:

Natural Resources Program Type	FY2010-11 GF Appropriation (2009 Spec Session)	FY2010-11 Across the Board Cut	FY 2010-11 Revised
NDNR operations	9,494,300	(189,886)	9,304,414
Soil & Water Conservation Fund	2,365,343	(47,307)	2,318,018
Resources Development Fund	3,204,413	(64,088)	3,140,325
Interrelated Water Management Plan Program	2,197,211	(43,944)	2,153,267
NRD State Aid	1,465,377	(29,308)	1,436,069

A complete listing of the programs and the amount of across the board cuts is included in a report from the appropriations committee which is available online at:

<http://www.nebraskalegislature.gov/pdf/reports/fiscal/2010committee.pdf>.

General File Action

Recreational Trails – Senators advanced **LB 1010** this week to Select File on a 41-0-8 vote after adopting Committee Amendment **AM 2029**. The bill establishes a procedure for natural resources districts to use when eminent domain is involved for developing a recreational trail. Several changes to the original bill were made.

Originally the bill called for a 75% board vote in favor of the trail, which is reduced to 67% (2/3rds) by the committee amendment. The amendment also clarifies that private lands included in the bill do not include property under management of the Board of Educational Lands and Funds. The amendment also requires the district to have clear and convincing evidence that the procedures were followed and all of the criteria are met. To proceed, the board would need to find that all of the following criteria have been met:

- public notice and mailed notice have been provided to landowners with affected property;
- good faith attempts to negotiate agreements with property owners have been made and have failed for some or all of the property necessary for the trail to be developed;
- route alternatives have been considered;
- the selected trail route took into consideration the directness of the route, trail design and costs, and safety to users, vehicle operators and adjacent landowners;
- good faith attempts have been made to address the concerns of landowners regarding trail design, privacy, land protection, management and maintenance; and
- any development and management of the trail is designed to harmonize with and complement any established forest or agricultural plan for the affected land.
- Landowners who disagree with the district's decision could appeal to the district court in the county where the land is located. The bill would prohibit the use of eminent domain before the court's final decision.

The amended bill also would provide some liability protection for affected landowners and require formal

agreements between districts and landowners that outline each party's rights and obligations regarding the use of the trail.

Senator Pankonin has filed an amendment to the bill (**AM 2249**) for Select File consideration that adds two components to the bill. First the amendment would require reasonable access across the trail for private property that is divided by the trail at a location mutually agreed upon by the NRD and landowner. Secondly, the amendment would add the benefits to communities and adjacent public facilities as a benefits when considering the trail route.

The bill is Senator Pankonin's Priority Bill for the session.

Select File Action

Settlement claims bill advances – Senators advanced **LB 742** to Final Reading this week on a voice vote. On General File, Senators adopting the committee amendment (**AM 1967**), which strikes the original version. The original language of the bill required that a public entity which enters into or is otherwise a party to a settlement regarding a claim or potential claim will execute a settlement agreement concerning the claim and such settlement agreement will be a public record.

The committee amendment strikes the original provisions of the bill and inserts the following new language:

- A public entity or a private insurance company or public agency providing coverage to a public entity, public official or public employee will maintain a public record of all settled claims.
- The record for claims settled in the amount of \$50,000 or more, or one percent of the total annual budget of the public entity, whichever is less, will include a written settlement agreement.
- The settlement agreement will contain a brief description of the claim, the amount of financial compensation, and the party or parties released.
- Any claim or settlement agreement involving a public entity will be a public record but, to the extent permitted by other statutes, specific portions may be withheld from the public.
- A private insurance company or public agency providing coverage to a public entity will provide a copy of the claim or settlement agreement to the public entity to be maintained as a public record.
- Except for settlement agreements involving the state, any settlement agreements with an amount of \$50,000 or more, or one percent of the total annual budget of the public entity, whichever is less, will be included as an agenda item at the next meeting of the public agency or public entity.
- Confidentiality or nondisclosure clauses contained in a settlement agreement will neither cause nor permit a settlement agreement or claim or any other public record to be withheld from the public.

Senator Avery was successful in adopting an amendment (**AM 2105**) on General File that would clarify that this bill does not apply to claims made in connection with insured or self-insured health insurance contracts.

Finally, nothing in the bill requires a public official or employee or any party to the settlement agreement to comment on the agreement.

Governor Action

Governor Dave Heineman signed the following bills into law this week:

Eliminate dedicated water fund source – The bill eliminates dedicated funding sources for the Water Resources Cash Fund. The legislature gave final approval to **LB 689** last week on a 41-1-7 vote.

Voluntary NRD IMPs – Senators gave final approval to **LB 764** on a 46-0-3 vote last week which allows a natural resources district encompassing a river basin, sub-basin, or reach that has not been designated as fully or over-appropriated to, jointly with the department, develop an integrated management plan for such river basin, sub-basin, or reach located within the district.