



# NEBRASKA ASSOCIATION OF RESOURCES DISTRICTS

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**TO: NARD Board, NRD Managers and Conservation Partners**  
**FROM: Dean E. Edson, NARD Executive Director**  
**RE: April 4 NARD Update**

**Federal Court rules against mandatory ESA consultation** – Last week the Federal District Court in Arizona ruled that federal agencies that provide cost share are not required to consult under Section 7 of the Endangered Species Act. The federal agencies involved in the case (HUD, Veterans Affairs, and the Small Business Administration) provide financial assistance in the form of loan repayment guarantees to individuals and small businesses. The Center for Biological Diversity (CBD) - one of the most litigious environmental groups in the country - commenced a law suit against the federal agencies for failing to consult under Section 7 on impacts to endangered species resulting from the financial assistance. CBD argued the financial assistance allows more residential and commercial development and thus more domestic ground water pumping to occur in the Sierra Vista, Arizona area, affecting certain listed species.

The Federal District Court of Arizona rejected CBD's arguments on two grounds. First, the federal agencies lack discretion to take actions to benefit the listed species. Each agency is required to provide the assistance, if the applicant meets certain threshold criteria, leaving the agency without authority to deny the financial assistance to protect the listed species. Second, the court found no causal link between the financial assistance and the development affecting the listed species.

Both of these holdings are consistent with prior federal case law, and reinforce the arguments made to the Nebraska Department of Natural Resources by NRDs and others regarding the annual fully appropriation determination for the Lower Platte River Basin. In that situation, the Nebraska Game and Parks Commission attempted to use a biological opinion that any action that allows more development would lead to jeopardy to endangered species on the Lower Platte River, thus by default the basin fully appropriated. At the urging of several NRDs and other parties, DNR decided against the recommendation of the NGPC.

In addition, these holdings provide further support against the theory that farm program payments are subject to Section 7 consultation (i.e., similar to HUD's authority, if the applicant to USDA for farm payments meets the criteria, USDA lacks the authority to withhold the farm payments to protect listed species). The requisite causal link discussion between the agency activity and ground water pumping may be helpful in future discussions. (Jaron Bromm contributed to this summary).

**Upper Big Blue NRD Preliminary Water Use Reports** – The Upper Big Blue NRD has preliminary results from their 2007 ground water use reports from all irrigators in this NRD. Those reports are for estimated and metered water use on 1,074,415 irrigated acres. The average is 4.95 inches. 40% of the acres used less than 4 inches. 89% of the acres used less than 8 inches. 97% of the acres used less than 12 inches. One small tract used 39.1 inches, which is just above the 36-inch diversion amount permitted by Nebraska Statutes for a surface water irrigator. The educational efforts of the NRD and other entities have lead to the producers using less water to grow crops. Incorporating irrigation technology and use of pivots has also lead to reduced water use.

**Review of the Department of Natural Resources** – The Natural Resources Committee introduced LR 377 to examine issues relating to the Department of Natural Resources. The study shall include a review of the structure and responsibilities of the department. The study shall also consider the authorities and qualifications of the Director of Natural Resources and other staff and explore the processes by which decisions that affect the state's water and other natural resources are made. The study shall identify funding and resource needs consistent with the responsibilities and mission of the department.

**Republican Basin irrigator payment approved** --- Gov. Dave Heineman signed **LB1094** on Tuesday that will loan \$9 million from its cash reserve to the Republican Basin NRDs to pay irrigators for water leased in 2007. On Monday, the Legislature gave final approval to the bill on a 46-0 vote.

Because of a pending lawsuit, the Republican Basin NRDs could not issue the bonds allowed under LB 701 to pay the irrigators who leased water to the NRDs. The lawsuit alleges a new state law (LB 701) that allows property taxes to be collected for the purchase of water is unconstitutional. The case is still pending in Lancaster County District Court.

If the state loses the lawsuit and the property taxes are ruled unconstitutional, the \$9 million could be paid back to the state through a current tax on irrigated acres or through some other mechanism approved by the Legislature.

The State of Nebraska should be 29-44,000 acre feet in the black for 2007 primarily due to the efforts of the NRDs through groundwater regulation and surface water leases.

**Other bills included in LB 1094** -- State senators included a couple of other bills in **LB1094** in initial stages of debate, which now become law.

- On Select File, a revised version of **LB 975** was incorporated, which changes the criteria on groundwater use on acres that have leased surface water. The amendment changes the criteria on groundwater use on acres that have leased surface water. The amendment would eliminate the existing language and replace it with a requirement in that the agreement for the lease or purchase identify a) the method of payment, b) the distribution of funds by the party or parties receiving payment, c) the water use or rights subject to the agreement, and d) the water use or rights allowed by the agreement. Additional language was added to require that if any irrigation district is party to the agreement, the irrigation district shall allocate funds received under such agreement among its users or members in a reasonable manner, giving consideration to the benefits received and the value of the rights surrendered. Senator Christensen was successful in adopting **Floor Amendment 198** which clarified that the conditions placed on the landowners for the water leases would only apply to the specific contract period of the lease.
- A second amendment, **AM 2325**, offered by Senator Christensen, incorporates provisions of the committee amendment (**AM 1895**) to **LB 1131**. This amendment clarifies that occupation taxes imposed under LB 701 for the water leases shall be collected and delinquent in the same manner as property taxes. This committee amendment also allows the county treasurer shall publish and post a list of delinquent occupation taxes with the list of real property subject to sale for delinquent property taxes. The list would also be provided to the natural resources districts which levied the taxes. Finally, this amendment clarifies that the county treasurer shall receive the one percent fee provided for collection of general natural resources district money.

**Flood Control Funding** — The Legislature debated **LB 880** for about two hours this week before a bracket motion was adopted on a 25-8-16 vote. The bracket motion, offered by Senator Chambers, postpones any further debate on the bill until April 17, 2008, the last day of the session, effectively ending discussion on the issue until next year. The bracket motion ended the filibuster on behalf of Washington County residents which included a dozen amendments to the bill. The legislation proposed a way to finance design, rights-of-way acquisition, and construction of multipurpose projects, flood control structures and practices for storm water management.

The rejection of the bill leaves the Omaha metropolitan area without an important tool to address flood control and storm water runoff. The Omaha area is under a federal mandate to deal with its storm water. The issue is pressing as more land is developed in Washington, Douglas and Sarpy Counties. The bill would have allowed the Papio-Missouri River NRD to issue bonds to be paid back within the existing levy authority to finance the projects.

The Papio-Missouri River NRD is a member of the Papillion Creek Watershed Partnership, which was formed to address the watershed's critical water quality and flood prevention needs. The watershed connects and joins communities in the area, encompassing 402 square miles and more than one-third of Nebraska's population.

The Partnership is comprised of 11 local governments that are wholly or partially in the Papillion Creek Watershed. Bellevue, Girls and Boys Town, Gretna, La Vista, Omaha, Papillion, Ralston, Douglas County, Sarpy County and the Papio-Missouri River Natural Resources District have an inter-local cooperative agreement to work together to resolve the water quality and flood prevention needs. The northern part of the watershed is in Washington County, a jurisdiction that chose not to participate in the Partnership.

The guiding principles of the Partnership are cooperation, community participation and comprehensive watershed planning. The Partnership works through an open process of looking at the communities' needs and building consensus for solutions. Open meetings have and will continue to be held to gather public input. The 11 government bodies each decide independently to adopt common policies.

The Natural Resources Committee added an amendment (AM 1787) that makes three additional changes to address the concerns raised by the Washington County residents, known as the Papio Valley Preservation Association (PVPA), as follows: 1) Bond proceeds could not be used for structures holding more than 500 acres of a permanent pool of water which would eliminate the establishment of large dams in Washington County; 2) Specific language prohibiting the use of eminent domain for the purposes of enhancing private developers; and 3) Public access would be required on any structure created under this program that is greater than 20 acre pool.

After adding the language to address the concerns they raised, the PVPA changed their minds and decided to still oppose Senator Kopplin's Priority Bill. The group has asked several senators to file amendments to filibuster the bill. **Senator Hudkins filed AM 2476**, which would require that any dam would not have a permanent pool. **Senator Dubas filed AM 2471**, which would prohibit cooperation and agreements between the NRD and anyone who is directly or indirectly involved in analyzing the feasibility of a water project. This amendment does not specify whether the party is opposed to or supportive of the project, rather it just prohibits cooperation.

Some of the language in other amendments include: 1) Prohibiting all NRDs from entering into agreements with consultants to work on any water projects, 2) eliminate the NRD eminent domain authorities; 3) prohibit private land ownership next to water structures, 4) mandate all cities and other zoning authorities prohibit residential or commercial development in a 100-year flood plain, and 5) mandate that all landowners contain the first ½ inch of rain on their property.

**Insurance Risk Pool Levy** – Senator Raikes was successful in adopting **AM 2585 to LB 988**, the school finance bill. The amendment incorporates **AM 2134 to LB 1017**, which would make taxes levied by Educational Service Units and schools for insurance payments subject to the levy limit. The original bill would apply to all political subdivisions. The Committee amendments would limit the levy restrictions on insurance payments and bonds to school districts and Educational Service Units. Pooling arrangements by other political subdivisions would be unaffected by the amendment. The Legislature approved **LB 988** this week and Governor Heineman signed the bill into law.

**Natural Resources Committee packaged bill advances** – The Legislature advanced **LB 798** to Final Reading this week. The bill includes provisions of two other bills, **LB 799 and 800**. The original bill, **LB 798**, changes the definition of a headwater segment of a natural stream to an ephemeral natural stream which would be exempt from state storage and use permits. Included in the amendment is **LB 799** which allows for a transfer of surface water for irrigation when there is a change in the point of diversion which meets the following requirements: (i) The new point of diversion is on the same named stream, the same tributary, or the same river or creek as the approved point of diversion; (ii) the proposed point of diversion will not move above or below an existing diversion point owned by another appropriator; and (iii) the proposed point of diversion is not above or below a tributary stream or a constructed river return or a constructed drain.

Also in the amendment is **LB 800** which allows for all intentional underground water storage projects to charge a fee for withdrawal of water. Existing law prohibits projects existing on August 26, 1983 from charging a fee. The committee earlier rejected an amendment to involve the NRDs in the approval process for a fee on groundwater, but it was rejected by Chairman Loudon as he wanted no oversight on the fee.