IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 06-1308

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; ROBERT E. BECK, III

Plaintiffs - Appellees

vs.

JOHN GALE, in his official capacity as Secretary of State of Nebraska; JON BRUNING, in his official capacity as Attorney General of Nebraska

Defendants - Appellants

Appeal from U.S. District Court
District of Nebraska

BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE REQUEST FOR ORAL ARGUMENT

Proposed *Amici Curiae*, Sierra Club, The Great Plains Environmental Law Center, Nebraska Environmental Action Coalition and Rural Environmental Action (collectively "Environmental Amici") respectfully submit this brief in support of the Appellants seeking the reversal of the U.S. District Court, District of Nebraska's finding that Nebraska's Initiative 300 violates the Commerce Clause of the U.S. Constitution. (App. Vol. VIII at 1997-98).

The Environmental Amici are each membership-based non-profit organizations devoted to exploring, enjoying, protecting and conserving the Earth's wild places and natural resources and to promoting the responsible use of the Earth's ecosystem and to improving public health and protecting the environment by reducing pollution in air, water, and food. To this end, each of the Environmental Amici dedicates substantial energy and resources to assuring that state and local governments retain the power to enact and enforce local regulations that protect and conserve natural resources.

The Environmental Amici are concerned that if the District Court's decision is affirmed, then the rights of states to adopt regulations which serve to protect local environmental quality pursuant to their police power will be compromised, undermining the ability of the public to protect environmental quality, public health and natural resources. To avert the repercussions of the District Court's decision, which directly affects members of the Environmental Amici, the Environmental Amici respectfully submit this brief.

This appeal presents complex issues regarding states' rights under the dormant Commerce Clause of the United States Constitution. If the Court provides Plaintiffs-Appellees and Defendants-Appellants with the opportunity to present oral arguments, the Environmental Amici respectfully request the opportunity to participate.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Sierra Club, The Great Plains Environmental Law Center, Nebraska Environmental Action Coalition and Rural Environmental Action are all not-for-profit corporations.

_____

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Dated: April 3, 2006

SUMMARY OF ARGUMENT

The District Court's finding that Initiative 300, Neb. Const. Art XII Section 8, was facially discriminatory against out-of-state economic interests, and thus violated the dormant Commerce Clause of the United State's Constitution, was clearly erroneous. Initiative 300 makes no distinction between in-state and out-of-state interests, either on its face or in effect, and the District Court's finding otherwise was clear error that should be reversed by this Court.

The District Court further erred by subjecting Initiative 300 to "strict scrutiny" instead of the balancing the legitimate local benefit of the regulation against the minimal burden placed upon commerce by it, as required by *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970). Had the District Court applied the proper analysis under Pike, Initiative 300 could not have been found to violate the dormant Commerce Clause.

Should the District Court's decision be affirmed, the rule announced by the District Court threatens the legitimate use of Nebraska's police power to adopt local regulations that protect public health, natural resources and the environment.

For these reasons, the Environmental Amici respectfully move this Court to reverse the District Court's decision finding Initiative 300 unconstitutional.

ARGUMENT

II. INTIATIVE 300 ADDRESSES THE UNIQUELY LOCAL CONCERNS PRESENTED BY CORPORATE OWNERSHIP OF AGRICULTURAL LAND.

a. Corporate ownership of agricultural land has resulted in environmental degradation to Nebraska farm land, because ownership of the land is detached from the management of the land.

Inherent in the corporate form is the division between ownership, which is in the hands of stockholders or investors, and management, which is placed in the hand of employees and

managers. This form presents unique threats to environmental quality when it is applied to agricultural land. Effectively management of agricultural resources requires active daily management of the land with a goal of long-term sustainability. By the early 1980's Nebraska had witnessed its irreplaceable ecosystem succumb to the corporate farm land owner's reckless use of the land. [1]

In the late 1970's and early 1980's corporations, both in-state and out-state, had purchased agricultural and farm land in Nebraska yet were not involved in the day-to-day operations of the land. These corporations, due not only to their size but also to the inherent structure of the corporate form which separates ownership from management, hired managers for Nebraska farm lands. The separation between ownership and management lead to a disconnect between the decision-makers and the land itself, with the result that the corporations demanded more from the land than the land was capable to produce.

For example, in the mid-1970s, Nebraskans saw the fragile Sandhills area, located in the northwestern corner of the state, destroyed by corporation owners who came in and forced what was originally grazing area into heavily irrigated cash crop land. Corporate owners purchased land and bulldozed shelterbelts and farmsteads, resulting in blowing sand, erosion and nitrogen fertilizers seeped into the porous sandy soils subsequently contaminating groundwater. Corporate owners forced Nebraska's Sandhills to produce agriculture products that the area was not capable of sustaining.

The corporate owners used a pivot system to irrigate the Sandhills region because the region is comprised of "Valentine Sand" which is generally too light and unstable to be used for agriculture production. The Sandhills region is susceptible to wind erosion and farming in the

[1] The Environmental Amici adopt the statements of fact contained in Brief of Appellants and Addendum submitted by Appellants. References to factual statements in the record reflect those facts contained therein.

area is usually only successful by those with a focused commitment to the land. Due to the investment opportunities in farming with the pivot irrigation system, investors with no connection to the land responded to the investment opportunity. However, the way the corporations used the land quickly depleted local resources, and farmers on the surrounding land were faced with reduced water supplies and blowing sand that the shelterbelts had contained since the infamous dust storms in the 1930s. The corporations did not have day-to-day involvement with the farm land and had no concept of the effect the pivot irrigation systems had on the land. Subsequently, the developments by the corporate farmers in the Sandhills region destroyed the land itself and prevented any further sustainable agriculture production.

While the degradation of the Sandhills region illustrates current problems with corporate ownership, it reveals a historical problem. When ownership of agricultural land is disconnected from the management of that land, negative, at times catastrophic, impact on local natural resources results. The abuse of the Nebraska Sandhills reflects similar abuses of agricultural land which have resulted from the separation of ownership from management going back more than 3,000 to the Mayan empire in Mexico. *See e.g.* JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED AT 165-169 (Penguin Books 2005). Unfortunately for the Maya, these practices led to forced agricultural production that was ill-suited for the land, ultimately preventing any future agricultural yields from that land. DIAMOND at 176.

The ownership of agricultural land comes with rights and responsibilities that owners overlook when separated from the land. When a corporation owns the land, that corporation is not cognizant of the rights and responsibilities that come with owning the land because ownership is separated from the management aspect of the land. If a corporate agricultural land owner only sees the corn produced on the land, perhaps at a plant in New Jersey, for example,

then that owner will more than likely have no concept of what the production of that corn did to the land. In stark contrast to this model, a Family Farm Corporation, where the family that continues to work the land holds the majority of the stock, will understand the community and the environmental requirements surrounding the corn production. In turn, those corporations fail to act as good stewards and do not preserve the land for future crops or ensure the crop production does not affect the surrounding farmers' ability to fully utilize their land.

b. Nebraskans witnessed the environmental degradation in the Sandhills region and adopted Initiative 300 to protect Nebraska's unique ecosystem from further damage caused by corporate ownership.

Witnessing the environmental degradation in the Sandhills region caused by corporate ownership of agricultural land and recognizing the danger in corporate agricultural land ownership, Nebraska voters approved Initiative 300 to counter their concerns. [2] The events leading up to the voters adopting Initiative 300 shows an ongoing concern of protecting local natural resources from corporate ownership. In *MSM Farms, Inc. v. Spire*, the 8th Circuit recognized Nebraskans voted to pass Initiative 300 because they wanted to "promote family farm operations in Nebraska and sought to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land . . . ." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). The court further noted that supporters of the initiative believed corporate farming "would result in decreased stewardship and preservation of soil, water and other natural resources." *MSM Farms, Inc.* at 333.

Nebraska's Constitution Art. XII §8 states, *inter alia*: "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real

[2] Art XII §8 was added to the Nebraska Constitution following a voter reference in 1982 on "Initiative 300". In keeping with the District Court's decision recognizing the popular name of the provision, the Environmental Amici refer to the contested provision as "Initiative 300" herein.

estate used for farming or ranching in this state, of engage in farming or ranching." Initiative 300 provides an exception to the general prohibition against corporation ownership of Nebraska farm land, and "Family Farm Corporations" may own and manage agricultural land in Nebraska.

The plain text of Initiative 300 allows any person, whether in-state or out-state, to own land and participate in agricultural production in Nebraska. The only restriction placed on individuals desiring to own agricultural land is that they must be willing to accept personal responsibility liability for their actions or be actively engaged in the day to day management of the land.

Initiative 300 addresses the uniquely local concerns presented with corporate ownership of agricultural land. Nebraska voters were aware of the impact of corporate ownership on the Sandhills agricultural region, and they supported Initiative 300 to prevent further degradation and over-farming of valuable land. In supporting Initiative 300, the voters wanted to ensure landowners would farm agriculture land responsibly and respect the surrounding landowners Initiative 300 is a balanced approach to empowering Nebraska farmers to prevent further degradation to the land.

IV. NEBRASKA'S INITIATIVE 300 IS A VALID USE OF THE STATE'S POLICE POWER WHICH NEITHER DISCRIMINATES AGAINST OUT-OF-STATE INTERESTS NOR BURDENS INTERSTATE COMMERCE.

a. The Commerce Clause prohibits state regulation that burdens out-of-state interests while benefiting in-state interests, but does not prevent state regulations that address local issues through use of the police power.

The Commerce Clause's anti-discrimination principal proscribes state laws that "discriminate…against or unduly burden… interstate commerce and thereby 'impede free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)(*quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). As the Supreme Court has

explained, "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp v. Faulkner*, 516 U.S. 325, 330 (1996)(internal quotation marks and citation omitted). See also *Oklahoma Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 197 (1995); *Guy v. Baltimore*, 100 U.S. 434, 439 (1870). Consequently, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Tracy*, 519 U.S. at 300.

The "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lyn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). While the Supreme Court has applied the Clause to variations on that paradigm – including laws that tax "a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State" (*Fulton Corp.*, 516 U.S. at 331) or that "discourage domestic corporations from plying their trades in interstate commerce" (*Id.* at 333) – it has long been settled that the Commerce Clause is fundamentally directed at the use of state authority "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seeling, Inc*., 294 U.S. 511, 527 (1935). See *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978).

When state laws do not run afoul of this requirement, they do not impose a protectionist regime or penalize those who engage in interstate trade and nothing in the Commerce Clause prevents the use of a state's police power to protect local interests, including local natural

resources. Accordingly, state regulation of in-state natural gas wells applied even-handedly to both in-state and out-of-state producers and suppliers, does not violate the Commerce Clause. *Northwest Central Pipeline Corp. v. State Corporations Commission of Kansas,* 489 U.S. 492 (1989) (holding Kansas law with intended effect of increasing production from Kansas natural gas field, even when such production reduced natural gas production in other states, did not violate the Commerce Clause). Nor does a state garbage regulation requiring garbage be deposited in either a local in-state designated landfill or out-of-state landfill. *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste Management District*, 433 F.3d 600 (8th Cir. 2000). Based on both *Northwest Central Pipeline Corp.* and *IESI AR Corp.*, under the Commerce Clause, unless in-state economic interests are favored, a state may use its police power to protect its local resources.

b. The District Court erred in finding Initiative 300 facially discriminates against out-of-state economic interests because both in-state and out-of-state interests are treated equally.

When a state law even-handedly regulates in-state and out-of-state economic activity, as is the case with Initiative 300, the court applies the test stated by the Supreme Court in *Pike v. Bruce Church*, 397 U.S. 137 (1970). *City of Philadelphia v. New Jersey*, 437 U. S. 617, 623 (1978). Under *Pike*, "where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative benefit." *Pike*, 437 U.S. at 624, 98 S. Ct. at 2525, *City of Philadelphia*, at 142, 90 S.Ct. at 847.

Pike requires a three part inquiry be conducted: "(1) whether the challenged statute regulates even-handedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves

a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well …" *Hughes v. Oklahoma*, 441 U.S. 322, 334, 99 S. Ct. 1727, 1735 (1979). Applying the three part *Pike* inquiry and the Supreme Court's precedents, Initiative 300 does not violate the Commerce Clause.

Initiative 300 states, *inter alia*: "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." Neb. Const. Art XII Section 8. While Initiative 300 regulates the type of corporate entities that may own agricultural land in Nebraska, it does not make any distinction at all between Nebraska and non-Nebraska interest, and does not differentiate between in-state and out-of-state ownership. Therefore, Initiative 300 is a non-discriminatory regulatory effort that applies equally to all economic interests.

While States may not enforce regulations that "offer a commercial advantage to in-state activities at the costs of out-of-state interest,… or that have the inevitable effect [of] threatening the free movement of commerce by placing a financial barrier around the State," *American Trucking Associations, Inc. v. Michigan Public Service Commission*, ____ U.S. ____, 125 S. Ct. 2419, 2422 (2005), states are not prohibited by the Commerce Clause from enacting even-handed regulations in order to protect local public interests. *Id* at 2423. "For a statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *National Elec. Mrf. Ass'n v. Sorrell*, 272 F. 3d 104, 109 (2nd Cir. 2001).

Initiative 300 neither differentiates between in-state and out-of-state economic interests nor does it offer an advantage to Nebraska interests, Nebraska residents receive no benefit under Initiative 300 that is unavailable to non-Nebraskans. Initiative 300's prohibition against

corporate ownership of Nebraska farmland applies equally to both in-state and out-of-state corporations. There is simply no advantage under Initiative 300 to being a resident of Nebraska.

Initiative 300 is similar in this regard to the state regulation at issue in *IESI AR Corp.*, 433 F. 3d 600. The regulation considered in *IESI A.R. Corp.* did not favor in-state interest over out-of-state interest even though it regulated the flow of garbage within the State of Arkansas. There was no indication that in-state economic interests were favored by this regulation; in fact, in-state interests were subjected to the same regulations and equally "disfavored" as compared to out-of–state interests. 433 F.3d at 605. Similarly, under Initiative 300 both in-state and out-of-state interests are treated the same.

Initiative 300 does not impose a protectionist regime or penalize those who engage in interstate trade. Initiative 300 in no way isolates Nebraska's agricultural market because it does not impede or obstruct the ability of non-Nebraskans to purchase agricultural land in the State of Nebraska, see *Brown & Williamson Tobacco Corp. v. Pataki*, 370 F.3d 200, 217 (2nd Cir. 2003), Initiative 300 instead restricts ownership of agricultural land by certain corporate entities. Initiative 300 does not make distinction between corporations and syndicates that are located within the state of Nebraska and those that are not. Initiative 300 does not discriminate against out-of-state interests.

The District Court erred in finding Initiative 300 was facially discriminatory because all corporations, whether Nebraskan or not, are faced with the same regulatory burden. Initiative 300 offers no "commercial advantage to in-state activities at the costs of out-of-state interest" and as such it is not discriminatory and the District Court should not have found otherwise.

c. Initiative 300 does not impose a burden upon interstate commerce that is clearly excessive in relation to local benefits.

"A law that does not overtly discriminate against interstate commerce, but instead regulates even-handedly", will still be invalidated if "the burden it imposes upon interstate commerce is clearly excessive in relation to the putative local benefits." *U&I Sanitation v. City of Columbus*, 205 F. 3d 1063, 1067 (8th Cir. 2000) quoting *Pike*, 397 U.S. at 142. Determining whether a non-discriminatory local regulation violates the Constitution requires balancing a legitimate local public interest against an incidental burden on interstate commerce. See *Kassel v. Consol. Freightways Corp of Del.*, 450 U.S. 662, 670-71 (1981). A regulation will only be invalidated when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The burden posed by Initiative 300 is minimal, at best and does not outweigh the enormous local benefits.

Initiative 300 promotes and serves vital local interests. The protection of natural resources from waste and preservation of the beauty and quality of the environment are legitimate local purposes. *Northwest Central Pipeline*, 489 U.S. 493; *IESI A.R. Corp.*, 433 F.3d 600; *Eastern Kentucky Resources, v. Fiscal Court of Magoffin County, Kentucky*, 127 F. 3d 532 (6th Cir. 1997)(upholding Kentucky solid waste disposal program whose stated purpose was "to provide for the management of solid waste …in a manner that will protect health and welfare…and enhance the beauty and quality of our environment" against Commerce Clause challenge.) As this Court has previously held, and as the District Court acknowledged in its decision, Initiative 300 serves to prevent the concentration of farmland in the hands of non-family corporations and to preserve natural resources and rural economic development, all of which are legitimate state interests. *MSM Farms Inc.*, 927 F. 2d at 333. Thus any burden placed

on interstate commerce by the initiative must be balanced with the substantial, and legitimate, local interests which are served.

The only burden placed on interstate commerce by Initiative 300 is that associated with the prohibition of one type of corporate ownership of land in Nebraska, but even this limitation does not prevent all corporate ownership of Nebraska farm land. Initiative 300 provides an exception for family farm corporations or limited partnerships and these entities may own farmland in Nebraska. A "family farm corporation or limited partnership" is a business entity in which at least one family members "is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." Neb. Const. Art XII Section 8. A Family Farm Corporation is not defined as a uniquely Nebraska entity, the definition only requires that one person who is a stockholder be actively engaged in day- to-day farm activities. Under the definition, a Family Farm Corporation may be <u>located in any State under the definition contained in Initiative 300 </u>allowing the corporation to own agricultural land in the State of Nebraska. Initiative 300 places the minimal limitation on commerce that restricts one type of corporate ownership of agricultural land, while allowing other types of corporate ownership. This exceedingly minimal burden does not outweigh the legitimate local benefits provided by the Nebraska Constitution provision. Initiative 300 even-handedly allows "family farm corporations" to own agricultural land in Nebraska.

"[T]he Constitution neither displaces States' authority to shelter [their] people from menaces to their health or safety … nor unduly curtails States' power to levy taxes for the support of state government." *American Trucking*, 125 S. Ct. at 2423. Nothing in the Supreme Court's precedent prohibits a state from enacting laws pursuant to its police powers that do not

discriminate against interstate commerce and which serve legitimate local interests of protecting the welfare of local citizens with only minimal burdens on commerce.

V. IF THE DISTRICT COURT'S DECSION IS AFFIRMED, USE OF STATE POLICE POWER TO PROTECT PUBLIC HEALTH AND SAFETY AND THE ENVIRONMENT WILL BE SIGNIFICANTLY THREATENED.

In finding that Initiative 300 facially discriminated against out-of-state interest, and thus violated the Commerce Clause, the District Court reasoned: "The Supreme Court has found that legislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even which such legislation also burdens some in-state interest or include some out-of-state interest in the favored classification." (Order p. 23). This is plainly wrong and contrary to applicable law.

The Commerce Clause does not prohibit state laws that favor in-state interests, such as public health, environmental protection or general welfare. *American Trucking Associations, Inc*, ____ U.S. ____, 125 S. Ct. 2419. Instead, the Commerce Clause prohibits states from engaging in economic protectionism by adopting regulations that benefit in-state interests and burden out-of-state interests. See *Tracy*, 519 U.S. 278; *Fulton Corp*, 516 U.S. 325. The District Court's decision ignores whether or not Initiative 300 contains this benefit v. burden dynamic that is crucial to a Commerce Clause analysis.

If the District Court's reasoning were to stand, then all state regulations that have a favorable impact on the citizens of a state would be suspect under the Commerce Clause. The states have not lost the ability to pass laws or regulations that benefit their citizens by protecting public health or addressing local concerns, notwithstanding the District Court's view of the extent of the dormant Commerce Clause.

The people of Nebraska adopted Initiative 300 in response to threats to Nebraska's natural environment caused by corporate ownership of agricultural land. These threats were real and resulted in devastation to large areas of Nebraska's unique Sandhills environment. State regulations that protect local natural resources by preventing the concentration of farmland in the hands of non-family corporations are legitimate state interest. *MSM Farms Inc.,* 927 F. 2d at 333. The District Court's decision would eviscerate this legitimate use of Nebraska police power.

Any effort to conserve or protect local natural resources must reflect both the location of these resources and the regulatory authority of the state's police power. State laws will obviously reflect the "local" quality of natural resources being protected, and by doing so will reveal a distinction between in-state and out-of-state interests. However, laws and regulations that simply promote a state's in-state interests should not be ruled unconstitutional unless such laws and regulations unduly burden out-of-state interests. Initiative 300 does not burden out-of-state interests; it simply promotes Nebraska's natural resources.

Although the District Court based its decision on whether or not there were other means to protect the state's natural resources, the actual concern is whether the state's chosen course of action is unduly burdensome. The Supreme Court put forth this test in ***Pike*** and the District Court should have applied this test in this case. The District Court is not in a position to decide whether or how the state will decide to protect its natural resources; the court's role is to decide whether Initiative 300 is unduly burdensome. Nebraska does not need to show Initiative 300 is the exclusive means for protecting its natural resources.

The District Court struck down Initiative 300 finding "Initiative 300 had a discriminatory purpose and facially discriminates against interstate commerce, by treating out-of-state economic interests less favorably than in-state economic interests." (Order at 24).

However, "Disparate treatment constitutes discrimination [for purposes of the Commerce Clause] only if the objects of the disparate treatment are, for the relevant purposes, similarly situated." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 601 (1997); see also *Tracy*, 519 U.S. at 298. The Court's reasoning would preclude any state regulation that serves to protect the health, welfare and environment within a state, which by its very nature will favor in-state interests.

CONCLUSION

For all the reasons above, *Amici Curiae* The Sierra Club, The Great Plains Environmental Law Center, Nebraska Environmental Action Coalition and Rural Environmental Action, join with the Appellants in requesting that this Court reverse the decision below and provide to the citizens of Nebraska their right to protect their local, natural resource.

Dated this ____ day of April 2006

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned certifies that on April ____, 2006, a true and correct copy of the foregoing Brief of Amici Curiae has been served upon the Plaintiffs-Appellees and Defendants-Appellants by mailing a copy to their attorneys of record by regular United States first class mail, postage prepaid, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing the Brief of Amici Curiae created using Microsoft Office Word was scanned for viruses using the Norton Anti-Virus program and was found to be virus free.

Dated this _____ day of April, 2006.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,977 words.

Dated this ____ day of April, 2006.

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