

# Perkins County Canal:

## A Long Overdue Project with Potentially Long-Term Benefits

by Stephen D. Mossman, Jacob C. Garbison, and Andrew R. Spader

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## Introduction

Nebraska Governor Pete Ricketts recently said that, after its people, water is Nebraska's most precious resource. Of Nebraska's abundant water resources, its two most important elements are the Ogallala Aquifer and the Platte River from which Nebraska derives its name. "Nebraska" is based on an Otoe Indian word meaning "flat water," referring to the Platte River.<sup>1</sup>

The Platte River is formed at the confluence of the North and South Platte Rivers immediately east of the City of North Platte. This article is about the South Platte and the opportunities that await the State of Nebraska if proper and judicious choices are made.

Both the North and South Platte Rivers spring from the Colorado Rockies, but the North Platte makes only a cursory appearance in Colorado and then flows through Wyoming—entering Nebraska near Scottsbluff-Gering. A part of its journey in Wyoming contains the famous "Miracle Mile," by reputation one of the best miles of trout fishing in the world.



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The South Platte River flows from its headwaters in the Mosquito Range west of South Park across Colorado's northeastern plains. It also has famous trout fishing stretches, including Cheesman Canyon, near Sedalia. The South Platte River basin was the setting of James Michener's historical novel, "Centennial," which he released in 1976 to coincide with the Nation's Bicentennial. Michener believed his story about the South Platte River was truly a story about America's first 200 years. To the lead author of this article (the other two authors were years away from being born), Michener's novel and its accompanying 12-part mini-series sparked an interest in water law that explains why you are reading this article. To an 11-year-old ardent outdoorsman living within miles of the Platte River in Central Nebraska, the following admonition of Michener's character "Potato Brumbaugh" hit home:

One afternoon [he] Potato Brumbaugh took his son Kurt aside and said, "Report to Joe Beck in Greeley tomorrow and start to read law." His son, then eighteen, demurred on the grounds that he wanted to work the farm, but Potato saw the future clearly: "The man who knows the farm controls the melons, but the man who knows the law controls the river." And it was the river, always the river, that would in the long run determine life.<sup>2</sup>

The South Platte River enters Nebraska near Julesburg, Colorado. It's length in Colorado is approximately 380 miles, and it flows only another approximately 59 miles in Nebraska before meeting the North Platte near the river's eponymous city. Both states have adopted the doctrine of prior appropriation, also known as "first in time, first in right." Under this system, adopted by all Western states, appropriations to use water on a stream or river are based firmly on time: the oldest rights control the river and newer rights are regulated in priority to protect the oldest rights. Both states granted appropriations (the legal term for rights to use surface water) dating back to the 1800's. Appropriations in Colorado on the South Platte were granted for mining purposes in the Rockies and irrigation on the Front Range. In Nebraska, almost all appropriations were granted for irrigation or hydroelectric power.

## The South Platte Compact Negotiations

Conflicts between upper and lower states on a river are legion. With respect to the South Platte, the first major skirmish involved Western Irrigation District ("Western") which in 1916, filed a "Bill of Complaint" in the federal District Court for the District of Colorado against Riverside Irrigation District, several other Colorado irrigation districts and reservoir companies, and certain individual Colorado water commissioners.<sup>3</sup> Western claimed that, by diverting streamflow and filling reservoirs during the irrigation season, junior uses in Colorado had deprived it of its rightful share of the flow of

the South Platte River. Western claimed that it was entitled to 180 cubic feet per second ("cfs") of water for the irrigation of approximately 13,500 acres of land under a June 14, 1897 priority date. Western sought an interstate priority system to be applied to administer South Platte River flows.

Although the lawsuit had been filed in Western's name, it was widely understood that the action was actually being pursued by the State of Nebraska as the Attorney General of Nebraska was included as counsel for Western.

The Colorado Legislature reacted to the lawsuit in 1917 by enacting a statute forbidding diversion of water in Colorado for use in another State (an "export statute"). This move was designed to effectively block any attempt by the Nebraska interests to construct an interstate canal diverting water from the South Platte River along the proposed line of the "Perkins County Canal" or "South Divide Canal" which was being promoted by the Keith County Community Club.

Western's lawsuit and Colorado's export statute sparked Nebraska and Colorado to enter into negotiations for an agreement between the two states to govern their respective rights to use the waters flowing in the South Platte River. After the Western case was filed, representatives from 35 ditches and reservoirs on the South Platte River in Colorado met with the Colorado Attorney General and State Engineer to form the "Colorado Water Users' Association" (CWUA).

As one of its first acts, the CWUA funded hydrographer R.G. Hosea in a multi-year program of collecting stream flow and return flow data along the South Platte River and its tributaries. Hosea collected stream flow data and analyzed return flows from 1916 through 1918, as well as in 1920. He became the chief technical advisor to Colorado South Platte Compact Commissioner Delph Carpenter in 1921. For reasons probably lost in the mists of time, Carpenter became known as the "Silver Fox of the Rockies."

Nebraska was represented in these negotiations by H.R. Willis, its Interstate Streams Negotiator and South Platte Compact Commissioner.

After six years of negotiations the final compact was signed in Lincoln, Nebraska, on April 27, 1923. It represented the first effort of two states to use the treaty power of the Constitution for the settlement of interstate stream conflicts. Although the Colorado River Compact was actually signed four months earlier, the principles and objectives of interstate compacts were first tested and found acceptable on the South Platte River. From Carpenter's point of view, he had been able to persuade Nebraska that water users on the lower river would be protected "without injury to present and future uses in Colorado," thus permitting "practically unlimited expansion and development in Colorado." The Compact was adopted by the respective legislatures in both Colorado and Nebraska and ratified by an Act of Congress later in 1923.<sup>4</sup>

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The South Platte River Compact (the "Compact") guarantees that Colorado will pass 120 cfs of water to Nebraska through the South Platte during the irrigation season. As summarized by former Nebraska Department of Water Resources Director J. Michael Jess, Article VI of the Compact:

[P]rovides for operation of the (as yet un-constructed) Perkins County Canal. Presumably that canal would be used for supplying irrigation water to users in Nebraska not already served by the Western Canal. In conjunction with constructing the canal, terms of the Compact empower the State of Nebraska or its citizens to acquire necessary rights-of-way through "purchase, prescription, or the exercise of eminent domain . . ." To assure river flows arrive at the diversion works, Colorado agreed a) to recognize a December 17, 1921 priority date for diversions by the Perkins County Canal and b) during the October 15 to April 1 time period, to authorize the diversion of 500 cfs into it.<sup>5</sup>

### The Compact, The Canal, and The Current Proposal

Section VI of the Compact explicitly grants the State of Nebraska the right to construct and operate the Perkins County Canal and provides Nebraska an appropriation in Colorado to fill the Canal.

First, the states agreed that the "canal may commence on the South bank of said [South Platte] river at a point southwesterly from the town of Ovid, Colorado, and may run thence easterly through Colorado along or near the line of survey of the formerly proposed "Perkins County Canal" (sometimes known as the "South Divide Canal") and into Nebraska."<sup>6</sup>

Second, the states agreed to grant "Nebraska and its citizens the right to acquire by purchase, prescription, or the exercise of eminent domain such rights of way, easements or lands as may be necessary for the construction, maintenance, and operation of said canal."<sup>7</sup>

Third, the states agreed that "said proposed canal shall be entitled to direct five hundred cubic feet of water per second time from the flow of the river in the Lower Section, as of priority of appropriation of date December 17th, 1921, only between the fifteenth day of October of any year and the first day of April of the next succeeding year."<sup>8</sup>

The right to construct a canal, the right to use eminent domain in Colorado for the canal, and the granting of an Appropriation in Colorado for 500 cfs of water to be diverted from the South Platte River near Ovid with a 1921 priority date during the non-irrigation season are the basis of Governor Ricketts and the Nebraska Legislature's recent discussions to revive and build the Perkins County Canal.



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On January 9, 2022, Governor Ricketts and Attorney General Doug Peterson announced the Governor's proposal to request \$500 million in state funding to build the Perkins County Canal. This request was announced during a press conference led by Speaker of the Legislature Mike Hilgers announcing additional proposals by the Legislature's Statewide Tourism and Recreational Water Access and Resource Sustainability ("STAR WARS") special committee, which was created by LB 406 involving water resources. \$100 million of the half a billion-dollar request was for funding from the federal American Rescue Plan Act funds. The request was formally contained in LB 1014, the Governor's budget proposal to the Appropriations Committee, sponsored by Speaker Hilgers. A public hearing on LB 1014 was held on January 25th.<sup>9</sup>

In addition to the funding request, Speaker Hilgers introduced LB 1015 at the urging of Governor Ricketts to authorize the Perkins County Canal project. The Natural Resources Committee held a public hearing on LB 1015 on February 9th, where Governor Ricketts and Department of Natural Resources Director Tom Riley both testified in support. At the hearing, Director Riley stated: "In my 35 years as a water resources engineer practicing in the field, I have never seen a more important water project for Nebraska."<sup>10</sup>

LB 1015 was forwarded by the Natural Resources Committee, passed on General File by a 36-3 vote, and then

advanced unanimously from Select File to Final Reading. At the time of this writing, Senator Michaela Cavanaugh has two amendments and a bracket motion on LB 1015.<sup>11</sup>

The Perkins Canal funding bill, LB 1014, has faced stronger opposition. The Appropriations Committee approved only \$53.5 million of the Governor requested \$500 million in funding. LB 1014 was given first round approval on March 10th, despite Appropriations Chair John Stinner's concerns that the request was too large without further studies. LB 1014, with its \$53.5 million funding for the Perkins County Canal, advanced to Final Reading on March 29th with a 41-1 vote and is awaiting final approval by the Legislature.<sup>13</sup>

It is anticipated that both LB 1014 and LB 1015 will be passed in their current form during the waning days of the 2022 Session of the Legislature.\*

## Concerns Raised Over Perkins County Canal in the Legislature

The most active opposition to the Perkins County Canal on the floor of the Legislature has been raised by Senator John Cavanaugh of Omaha. Senator Cavanaugh's primary concern has been whether there will still be sufficient water available in the South Platte and whether Nebraska has foregone the right to build the Perkins County Canal in the 99 years since the passage of the South Platte Compact.<sup>14</sup>

In order to evaluate Senator Cavanaugh's concerns, we turn to U.S. Supreme Court precedent in original actions involving interstate compacts.

The Court's fairly recent decision in *Alabama v. North Carolina*<sup>15</sup> is instructive:

Like a treaty, a compact represents an agreement between parties. . . . The Court's duty in interpreting a compact involves ascertaining the intent of the parties. . . . Carrying out this duty may lead the Court to consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue. That much is surely implicit in the Court's reference to contract law principles elsewhere in its opinion in the instant case. . . .<sup>16</sup>

The Supreme Court also recently described compact interpretation in its *Montana v. Wyoming*<sup>17</sup> decision issued in 2011:

As with all contracts, we interpret the Compact according to the intent of the parties, here the signatory States. We thus look primarily to the doctrine of appropriation in Wyoming and Montana, but, like the States, we also look to Western water law more generally and authorities from before and after 1950.<sup>18</sup>

It is clear from the language of the Compact (as well as the historical record, the particulars of which are too detailed to be



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analyzed here) that the parties explicitly agreed that the State of Colorado would: (1) set aside flow sufficient to provide the State of Nebraska 500 cfs of water during the non-irrigations season, with a 1921 priority date and (2) provide Nebraska the legal authority to divert that water from the South Platte River in Colorado. Since this grant is both a contract and state law in Colorado, it is difficult to envision how Colorado could later renege on this “deal.”

Further, the well-known (but largely disfavored) doctrine of laches does not apply given the positive grants the Compact provides explicitly to the State of Nebraska. Colorado law supports this.

In *City of Thornton v. Bijou Irr. Co.*,<sup>19</sup> the City of Fort Collins argued that junior appropriators on the Poudre River had relied for almost 100 years on the return flows from irrigation with transmountain water of the lands associated with

shares of a mutual ditch company acquired by the City of Thornton. Fort Collins maintained that the delay by the ditch company and Thornton in asserting their reuse rights was unexcused and would cause extreme prejudice to these downstream users.<sup>20</sup> The Colorado Supreme Court disagreed, reasoning:

In light of our holdings concerning the creation and life of a reuse right in transmountain water . . . Fort Collins’ allegations of laches are without merit. **Initially, laches is not applicable to a party who has no duty to act.** . . . Because [the ditch company] gained the right to reuse its transmountain water by virtue of the act of importing it, . . . [it] was not required to assert a claim to this water. Accordingly, Thornton’s right, derived by transfer from [the ditch company], cannot be defeated by a perceived delay in taking an action it was not required to take.<sup>21</sup>



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In addition, the Nebraska Supreme Court has previously issued a ruling on the continued viability of the Perkins County Canal in a case involving an earlier attempt at its construction.<sup>22</sup> In *In re Applications A-15995 & A-16006 of Twin Platte Nat. Res. Dist.*,<sup>23</sup> the Court held:

When a state enters into an interstate compact with another state and the compact is approved by Congress, the state surrenders a portion of its sovereignty and may not unilaterally legislate so as to place burdens on the compact in question. . . . Congressional consent of an interstate compact transforms the compact into a law of the United States to which no court may order relief inconsistent with its express terms. . . . Additionally, a compact is not only a law but also constitutes a contract between the contracting parties.<sup>24</sup>

Thus, precedent from the United States Supreme Court and the Supreme Courts of both Colorado and Nebraska support the continued viability of Nebraska's right to construct the Perkins County Canal.

### Past Attempts to Construct the Perkins County Canal

Historically, there have been two attempts to construct the Perkins County Canal.

Over 30 years prior to the Compact, the Keith County Commercial Club mentioned above made the first attempt. As noted by the Omaha World-Herald in a recent article:

Even in communications between Delph Carpenter, who negotiated the compact for Colorado, and then-Nebraska Gov. Samuel McKelvie, the canal project was referred to as "old."

"The old Perkins County canal was projected in the early (1890s) with the object of diverting water from the South Platte some miles above Julesburg, within the State of Colorado, for the irrigation of lands in Nebraska lying south of the river and particularly of that beautiful area of land in Perkins County between Ogallala (sic) and Grant," a 1921 letter from Carpenter reads.<sup>25</sup>

While this attempt was abandoned due to financial reasons, the extant canal section near Julesburg, Colorado, is still visible. Indeed, the lead author of this article was able to clearly view the path of the canal on a recent flight from Denver to Lincoln.

In the 1980s, the Twin Platte Natural Resources District attempted to revive the Perkins County Canal but was thwarted by the Nebraska Nongame Threatened and Endangered Species Act. In a 1986 opinion, the Nebraska Supreme Court noted that the Court was faced with two questions, the first of which was whether the Act facially conflicted with the Compact. The Court found no facial conflict between the Act and Compact, and went on to hold:

Having concluded that the compliance with the Nongame and Endangered Species Conservation Act does not facially conflict with the compact, did the director act arbitrarily in requiring the applicant to first consult with the Game and Parks Commission before passing on the application?<sup>26</sup>

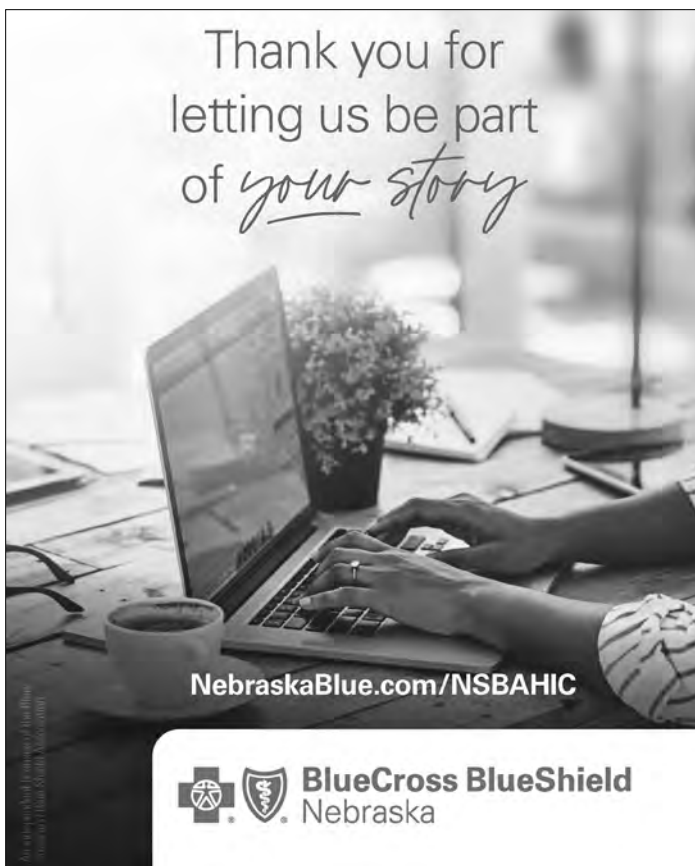
In the Court's conclusion on this second question, it found that the Director did not act arbitrarily by finding that the Twin Platte NRD failed to show compliance with the Act.

As noted above, the Twin Platte's failed attempt to construct the Perkins County Canal should have no impact on current proposals by the State of Nebraska.

### Potential Benefits to Nebraska by Constructing the Perkins County Canal


As a final note, the "why" should be addressed. Why now, 99 years since the Compact was signed, should the State of Nebraska construct the Perkins County Canal? The answer to the "why" question involves issues in both Colorado and Nebraska.

As stated by Governor Ricketts, the rapid growth and water demands in the Colorado Front Range have accelerated Colorado's demands on the South Platte River:



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As Colorado's desire for water grows, they're acting as if Nebraska's non-irrigation season water rights under the Compact don't exist. In 2016, the Colorado Legislature passed HB16-1256, the South Platte Water Storage Study, into law. Its purpose was to identify water storage options along the lower South Platte River. Colorado wants to make sure no water "in excess of the minimum legally required amounts" gets to Nebraska. In the study's final report, Colorado clearly assumes that Nebraska's legal requirement is only the 120 cfs during irrigation season. Since we haven't built the canal, Colorado is not planning to deliver any water to us during non-irrigation season. Zero.<sup>27</sup>

In an editorial written jointly by the long-standing members of the South Platte Compact Coalition in Nebraska (Western Irrigation District, Twin Platte Natural Resources District, South Platte Natural Resources District, Central Platte Natural Resources District, Nebraska Public Power District Central Nebraska Public Power and Irrigation District) the authors note that, in addition to addressing the threats to Nebraska's flow rights posed by Colorado's efforts to further develop the South Platte, constructing the Perkins County Canal would benefit Nebraskans in numerous ways:

Beneficiaries of this multi-purpose project will include water users across the entire Platte River Basin. This includes those reliant on the Platte River to irrigate crops and those who rely on hydro-power to light their homes and businesses. It also includes small and large municipalities that draw water from the Platte River but need more reliable water supplies to attract new industries and promote Nebraska's future growth and development.<sup>28</sup>

In summary, the authors conclude that the legal rights granted to Nebraska in the South Platte Compact to construct the Perkins County Canal are clear, the detriments inherent in not proceeding are troublesome and the benefits to the citizens of Nebraska are compelling. 

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**\*NOTE:** Since the drafting of this article, Gov. Pete Ricketts signed both LB 1014 and LB 1015 into law.

## Endnotes

- <sup>1</sup> Doris Bingham, *Nebraska Names Preserve Native American Awareness*, YORK NEWS-TIMES (June 22, 2010), [https://yorknewstimes.com/editorial/nebraska-names-preserve-native-american-awareness/article\\_0f03f62d-c590-54a5-8743-38e089d94088.html](https://yorknewstimes.com/editorial/nebraska-names-preserve-native-american-awareness/article_0f03f62d-c590-54a5-8743-38e089d94088.html).
- <sup>2</sup> JAMES A. MICHNER, CENTENNIAL 569 (1974).
- <sup>3</sup> See Water User's Protective Association correspondence re: The Western Irrigation District of Nebraska vs. The Riverside Irrigation District, the Bijou Irrigation District, A.A. Weiland, State Engineer, et al., (1916-1919), <https://archives.mountain-scholar.org/digital/collection/p17393coll167/id/265>.
- <sup>4</sup> DANIEL TYLER, SILVER FOX OF THE ROCKIES, DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS 109 (2003) (quoting South Platte River Compact Report to Governor of Colorado 1925 (Carpenter Report to Governor) at 9).
- <sup>5</sup> J. Michael Jess, *South Platte River Compact and U.S. Supreme Court Decree for North Platte River*, 2 (<https://water.unl.edu/documents/MikeJessRevisedWyomingPlatte.pdf>).
- <sup>6</sup> NEB. REV. STAT. § A1-105.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> *Proposal for Allocating Federal Pandemic Relief Funds Considered*, UNICAMERAL UPDATE (Jan. 26, 2022), <http://update.legislature.ne.gov/?p=31210>.
- <sup>10</sup> *Canal Proposal Seeks to Preserve Nebraska Water Rights Under Compact*, UNICAMERAL UPDATE (Feb. 10, 2022), <http://update.legislature.ne.gov/?p=31510>.
- <sup>11</sup> *South Platte River Canal Project Clears Second Round*, UNICAMERAL UPDATE (Mar. 30, 2022), <http://update.legislature.ne.gov/?p=32254>.
- <sup>12</sup> John Axtell, *Unicam Gives 1st Round Approval To Perkins County Canal Bill*, KCSR/KBPY (Mar. 10, 2022), <https://chadronradio.com/news/unicam-gives-1st-round-approval-to-perkins-county-canal-bill/>.
- <sup>13</sup> Todd Von Kampen, *Gering-Fort Laramie Canal Fix Survives First Round of Debate*, GERING COURIER (Mar. 30, 2022), [https://starherald.com/community/gering/news/gering-fort-laramie-canal-fix-survives-first-round-of-debate/article\\_3e6a5fbc-b081-11ec-ab62-137cef6215c4.html](https://starherald.com/community/gering/news/gering-fort-laramie-canal-fix-survives-first-round-of-debate/article_3e6a5fbc-b081-11ec-ab62-137cef6215c4.html).
- <sup>14</sup> *South Platte River Canal Project Advances*, UNICAMERAL UPDATE (Mar. 10, 2022), <http://update.legislature.ne.gov/?p=32034>.
- <sup>15</sup> 130 S.Ct. 2295 (2010).
- <sup>16</sup> *Id.* at 2317 (emphasis added) (citations omitted).
- <sup>17</sup> 131 S.Ct. 1765 (2011).
- <sup>18</sup> *Id.* at 1772 n.4 (emphasis added).
- <sup>19</sup> 926 P. 2d 1 (Colo. 1996).
- <sup>20</sup> *Id.* at 73.
- <sup>21</sup> *Id.* at 74 (emphasis added) (citations omitted).
- <sup>22</sup> Nebraska's previous efforts to build the Perkins County Canal are discussed below.
- <sup>23</sup> 223 Neb. 430 (1986).
- <sup>24</sup> *Id.* at 436-37 (citations omitted).
- <sup>25</sup> Sarah Gentzler, *A Canal, a Century-Old Compact between Nebraska and Colorado, and a Sea of Unknowns*, OMAHA WORLD-HERALD (Jan. 23, 2022), [https://omaha.com/news/state-and-regional/govt-and-politics/a-canal-a-century-old-compact-between-nebraska-and-colorado-and-a-sea-of-unknowns/article\\_f796f9bc-73c7-11ec-8d8f-6330d7e5e70b.html](https://omaha.com/news/state-and-regional/govt-and-politics/a-canal-a-century-old-compact-between-nebraska-and-colorado-and-a-sea-of-unknowns/article_f796f9bc-73c7-11ec-8d8f-6330d7e5e70b.html).
- <sup>26</sup> *In re Applications A-15995 & A-16006*, 223 Neb. 430, 437 (1986) overruled on other grounds by *In re Hitchcock and Red Willow Irr. Dist.*, 226 Neb. 146 (1987).
- <sup>27</sup> Governor Pete Ricketts, *Nebraska Must Act How to Secure Our Water*, (Feb. 23, 2022), <https://governor.nebraska.gov/press/nebraska-must-act-now-secure-our-water>.
- <sup>28</sup> *Proposed Perkins County Canal Project*, (Feb. 11, 2022), <https://www.cpnrd.org/proposed-perkins-county-canal-project/>.