

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1124

2007 HOUSE JUDICIARY

HB 1124

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1124

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/23/07

Recorder Job Number: 1661 and 1721

Committee Clerk Signature

JPenrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1124.

Ken Bertsch, State Seed Commissioner: (see attached testimony). Explained the bill.

Rep. Koppelman: In going over the language of the bill, I can understand why this language is sought. I'm wondering if it so delude the meaning of what certified seed is, that you fear that there might not be an advantage anymore.

Ken Bertsch: The answer from my perspective is no. Again, I refer back to my earlier comment, is what we're doing now in terms of certifying seed as to variety, varietal purity, all of the factors that are in the rules for certifying whatever type of seed there are, nothing changes with this bill. We are doing the same as we did five years ago, or will probably five years from now, except for whatever technological improvements are made during that period of time. I don't believe that is the case. Some might argue that because suddenly there may be some different language in the law that further expands the protections that we might enjoy by this, that means that suddenly seed certification is different. It will not.

Rep. Griffin: You feel that some of the language would shift the burden or liability burden more towards the producer. I saw there was one portion that refers to that.

Ken Bertsch: Probably what you are referring to is section 2 amendment, part 1 that I mentioned earlier that decouples the language regarding certified and noncertified agricultural producers from the Seed Dept. The answer to the question is no. That was simply an effort to make, the overview of the entirety of what we're trying to accomplish here is to bring clarity to the law. This was important from the AG's perspective so that there would be no misconception that under the previous language, it said certified and noncertified and the Seed Dept. would make no warranty or... In the opinion I heard, there could have been some confusion that all three parties were represented under the warranty. It is supposed to be for the Seed Dept. So the decoupling you see in parts 1 and 2 are simply to say that producers need to make their own warranty as to... and it goes on to say what those issues are, and then the Seed Dept. makes the same warranty as to the string of issues that were mostly, formerly under our disclaimer. But now is expanded to include variety. Otherwise everything else is the same.

Rep. Delmore: It seems that the liability issue that you have in here may guarantee that you won't have litigation. What are other states doing. Does MN have something that protects the seed people the way that this does.

Ken Bertsch: No, I don't think we will be immune from suit. I don't know for sure what other states have. I had heard that MN has a different disclaimer statement in their code that is more protective or stronger than ours. MN and a number of other states have seen litigation regards to certification. It's not without precedent.

Rep. Delmore: Would this address all seeds with this, or only those involved with potatoes.

Ken Bertsch: This would impact all seeds certified by the State Seed Dept. under certification programs that we operate, including potatoes and many other various products.

Rep. Klemin: In looking at the definition of certified, you first state what certified means, which means that it was randomly inspected and that's the rules of the department, we don't have the rules in front of us in terms of what it might otherwise mean, but what are you referring to specifically in this context when you talk about rule of the department.

Ken Bertsch: I actually some rules with me, in case that question came up. I can provide those to the committee. If you read chapter 74.03.02 for example you will find the rules that are involved with certification of cereals. Those are the rules that are outlined in administrative code for field inspection of those crops and for laboratory inspection of those crops. They contain issues such as field isolation standards, etc.

Rep. Klemin: Certified means more than just looking at it.

Ken Bertsch: Yes, the rules may not even be in the administrative code, they may be practices of certification agencies in terms of what actually happens in the process of a field inspection.

Rep. Klemin: You're talking about the steps you go through to determine whether the rule standards are met.

Ken Bertsch: Correct.

Rep. Onstad: On page 1, back in the definition of certified, certified means the ag seed is randomly inspected and must meet with rules of the department. Then it goes on, certification does not mean representation that the ag seed is of the variety. Please explain that.

Ken Bertsch: As I mentioned as part of my testimony at the outset, I believe that the definitions written in this way to lay the foundation for the language you see in the disclaimer further on. The point to the change in the disclaimers is to add the term variety to those areas that the department is protected against. While that might seem onerous, the problem that we've got is when we enter the field, we can provide a pretty strong guarantee (we don't

actually use the word guarantee) because we can't see every plant in that field. But when we're in a field, we can offer assurance that this variety is as stated, as was applied for because it matches the application. Beyond that, from what we've found out in a rather difficult way, is that all of a sudden if the variety is not as stated, sometimes, either by accident or beyond our control in some way, what inevitably gets planted the following year is not the correct variety. We have no control over that. It seemed important to state in black and white that this is what certification actually does. We had a post settlement meeting after this last week, in which we talked at length about what things that had to be accomplished to avoid this for the State Seed Department. One of the things that was told to me by the Solicitor General, look you guys have to clear this up. You have to tell people exactly what it is that you can and can't do and you have to make it black and white and you must do it in the rules and in the century code and in practice, which is what we have been working on for the past year. This is a culmination of that directive. The bill says what certification does and what it doesn't do, or what we can't guarantee.

Rep. Onstad: You're saying that you can't certify the seed variety.

Ken Bertsch: No, that's not what I am saying. If we certify the field, then we're also inevitably certifying that it's the variety that is claimed to be. I think the major difference here is the disclaimer language all of a sudden is changed to include the word variety; to also point out one of those areas that the Seed Department has no end control of when that seed gets planted in the ground. The other list of disclaimed issues, merchantability, fitness for a particular purpose, quantity and quality of crop produced, are all recognized by the legislature previous to this, as being those areas that the department has no control.

Chairman DeKrey: Thank you. Further testimony in support.

Dean Haas, Assistant AG: (see attached testimony).

Rep. Klemin: Section 7 repeals section 4-10-11 which is the section that provides for the inspector to furnish a certificate after inspection. Why are you repealing that.

Dean Haas: I don't have a copy of the century code in front of me. I don't remember what 4-10 will do.

Rep. Klemin: Why are you repealing that.

Dean Haas: I'm sorry about that. Mr. Bertsch indicated that he believes that the matter is now in section 4 of the bill.

Rep. Griffin: How did the plaintiff prove it was a different variety.

Ken Bertsch: The seed potatoes didn't set right, so there was some difference in the potatoes. But since there isn't a genetic test, the fact that the potatoes were certified as one strain within a variety and not caught, but if they're sold, problems can occur, such as soil and weather.

Rep. Onstad: In your testimony it says that the case settled before trial. I am assuming that there was some admission of guilt in this case.

Dean Haas: There was not an admission of responsibility, the state's usual release would indicate that there was no admission but what came about.

Rep. Onstad: So the Seed Department's now responsible, but the vendor was not.

Dean Haas: I believe there is still litigation going on up the chain of warranties. The problem in this case is that the very initial seller of the seed, which was a seller actually in MN, is bankrupt and out of business and so that next one down the chain is probably going to end up being the last recourse. The state of MN had also certified the seed in this case, in the same way as the ND Seed Department did.

Rep. Delmore: Was there liability on the part of MN, and what do other states do with other similar cases.

Dean Haas: I know that there has been litigation in other states. For example, in Idaho there was some litigation. I didn't do an exhaustive look at other states. We felt that coming here with these amendments wasn't that significant because we thought that's what the legislature already intended.

Rep. Delmore: Was there a liability issue in MN.

Dean Haas: MN was not brought into the litigation, no.

Rep. Onstad: Does the State Seed Department doing anything with this vendor in any manner, or able to recoup the costs.

Dean Haas: I know that the Seed Department has provided information to this vendor. There could be two claims by the farmers here. One against the seed farm and one against the vendor up the chain.

Rep. Onstad: So you're looking to change language so that if this case happened again, the Seed Department would not be held responsible even though they certified the seed.

Dean Haas: What we're looking at with the statute as it existed, it said that the Seed Department makes no warranty, representation of any kind, about the quantity or quality of potatoes. To us that meant that they shouldn't be looking at the state to guarantee their profit expectations.

Chairman DeKrey: Thank you. Further testimony in support.

Doug Barr, Director of Civil Litigation with the office of AG: I am here because I know a little about this issue and hopefully can present it in a very straightforward way. I am not a seed expert, I don't represent the Seed Department directly and I was not directly involved in this litigation. I was indirectly involved, as the Director of Civil Litigation, but I did not handle it as the attorney. The AG asked me why should the State Seed Department be immune if they screwed up. I said that they shouldn't. We all agree to that. That isn't what this bill does.

That's not the intent of the bill. The intent of the bill is to make clearer what is the duty of the Seed Department and to make clear to the public what they can expect, about what it means when seed is certified. After this litigation, they talked to me about the case. To me, if people misunderstand what it means when you certify, make the law and rules clearer so that no one can come back and say when you certify, we thought you were guaranteeing or promising this. It really disturbed me that someone could believe that, when as you've heard in testimony today, that there isn't any scientific way for the Seed Department to guarantee that strain is a certain strain. They can look at it, if there isn't a genetic test they can do, that's all they can do. To me, it should be clearer to the public that the Seed Department is not making those promises. All they're doing is a visual inspection and based upon that, there is no reason to disbelieve that it's not what the grower says it is, but that they are not providing 100% guarantee. So the purpose of this bill is not to immune the Seed Department if they mess up. It is to make clear what is their duty, both to them and to the public. With the new language, there shouldn't be this misunderstanding. Mr. Haas mentioned the public duty doctrine. I worked with this committee on that last session. There are arguments that that would apply to this case, but there are very strong arguments that it would not. As we work up the special relationship language together on that, there are arguments that there would be a special relationship. But even under that special relationship, one of the requirements of that is that the person recently relied on a statement from the government. Again with this language, the person cannot misunderstand what the government is promising. The AG doesn't support agencies not being responsible if they mess up; but that's not what this bill does.

Rep. Delmore: Was there never an understanding of quality when somebody bought these seeds in the past. That they were certified to be what they thought they were. I would assume

that if someone is buying seeds to plant, that there be a reasonable guarantee, not warranty, is what I'm looking at, that I'm getting what I am supposed to get.

Doug Barr: That was basically the plaintiff's argument, that because the Seed Department certified these, they must have warranted or guaranteed this. The Seed Department makes a visual inspections, etc.; but it's very clear that they cannot guarantee through any testing, through any observations, what those seeds are. They are primarily relying on the people down the chain to say that this is what it is. They can make sure all that matches; but they can't give a guarantee.

Rep. Onstad: You are saying that the Seed Department can't certify a certified field.

Doug Barr: It depends on what you mean by certified. If certified means that they are guaranteeing it is this strain, no, they can't certify the seed. They can't distinguish between one strain from another.

Rep. Onstad: So if that's the case, why wasn't that disclaimer put on the label, saying that.

Doug Barr: They had disclaimers in their books, they thought they were already covered. Because of the lawsuit it became apparent that they weren't covered.

Rep. Kretschmar: There are certain warranties on the sale of good in the UCC, are warranties in this bill more or less stringent than the UCC.

Doug Barr: I'm far from an expert on the UCC and candidly admit that. I have no information regarding what warranties the producers of these seeds sell. I'm here solely from the legal perspective of the duty and there is no warranty from the Seed Department in the sense of a UCC warranty because they aren't the sellers. They are simply saying we inspected and this is what we know.

Rep. Griffin: In section 2, it says the vendor may not disclaim their responsibility, but above that it says that the seed producers do not warrant. So if you were a certified seed producer

and then you went and had the Seed Department certified it, and then sold it, then would you be a vendor and you would be the one that is liable.

Doug Barr: As I read this and understand it, the vendor cannot disclaim responsibility for the label information.

Rep. Griffin: If there was a certification, I am assuming that would be put on the label information. I don't know what has to be put on the label, or required by law to be put on there.

Doug Barr: Mr. Bertsch would be better able to respond to what the labeling requirements are. I am not fully aware of what needs to be on the label and how that impacts the certification process.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Sarah Vogel: (see attached testimony).

Rep. Klemin: The existing warranty says we're not warranting that they are of that quality, now they are adding "or of the variety". Are you saying that is a substantive change.

Sarah Vogel: Yes. That's a seed change, that's the Seed Department saying we're not in the certification business any more. That's what they are doing.

Rep. Koppelman: Let's get back to your opening statement, you referred to the legislation that was passed in 2005 with the insertion in ND law. As you know, as I think he alluded I think there might be an issue with regard to the Seed Department because the public duty doctrine has to do with the general duty that a governmental entity has for the public at large vs. a special relationship where the governmental entity has maybe made a representation or guarantee of some sort for a specific party to do a certain thing. That changes the potential liability of that public entity. I think what Mr. Barr was getting at that because the State Seed Department certifies seed, some might think that's a special relationship and they are trying to clarify, as I'm understanding what they are bringing to us, that because what they do is spotty

and random and generalized, and they sell certified seeds to lots of folks, they aren't going out and inspecting every plant in the field, etc. that it could be misunderstood to be a special relationship when it really isn't, and this language clarifies that. Do you disagree with that.

Sarah Vogel: When we are in a special relationship in the litigation, the state is now. The judge said there was a question of fact, we tried this on summary judgment, meaning no questions of fact, only questions of law. The judge said he wasn't going to dismiss that part of it, because he felt that there was a question of fact. That was the general law. We were citing to an ID case. The definition of this law, though, was never discussed.

Rep. Koppelman: I don't want to get into the details of that case. I wasn't meaning to draw you there. As a general course of things, do you think there ought to be a special relationship construed between the Seed Department and everybody that buys certified seed.

Sarah Vogel: I don't think that could occur. A customer buying something isn't going to have a one-on-one contact with the ND State Seed Department. They are going to order potatoes and they are going to come. They're not going to have that one-on-one contact. It says direct contact between the state and the injured party. An assumption by the state by its promises and actions of an affirmative duty to act and have the party who was injured. If they want to talk about having a special exemption from the special duty, that's fine. Then you could conceivably draft a bill on special duty and add that to the general state tort claims act for the State Seed Department. That's not what this bill does, though.

Rep. Onstad: A seed breeder will develop a new breed for certain characteristics. A farmer will purchase that seed knowing that he wants those same characteristics, whether it's disease free. If this was passed the way it is, who is there to really guarantee any kind of certification.

Sarah Vogel: There isn't. The irony is that the State Seed Department still wants to collect all the fees. Quite a bit of money for seed certification services. If they aren't going to certify, somebody else should do it to certify the variety.

Rep. Charging: What happens if the producer doesn't certify the seed. Then they aren't privileged the sell.

Sarah Vogel: Are you talking about from the farmer's standpoint. Yes, for example, no one can sell seed potatoes to ND unless they are certified. You can plant less than 1 acre and not use certified seed potatoes. If you plant more than 1 acre you must use certified seed. That's one of the requirements. Certification is extremely important because of variety. You rely on that information when you plant, etc. If the seeds aren't certified they could not sell them as certified. Now potato seed has to be certified.

Rep. Charging: If this definition on page 1 is put into law, that won't be specific to potatoes.

Sarah Vogel: The 4-10 references refer to potatoes, 4-09 is everything else. The very definition of variety means that it can be separated from other varieties of the same type. So when something is called a variety, it means you can tell the difference between it and other varieties. It might be difficult. It is a question of training.

Rep. Klemin: What does MN do about certifying.

Sarah Vogel: Their system is pretty much the same as ours. I think most of the states are pretty similar; 27 states have seed certification for potatoes. That's one of the things that's concerns me, unless every other state says we don't certify for variety either, then I think competitive forces are going to say, let's go buy potatoes where the State Seed Department provides the third party, independent verification of varieties, that we have historically enjoyed for the last 70-80 years.

Rep. Klemin: So other states do certify for variety.

Sarah Vogel: Yes, as has ND. One of the things in our lawsuit, I was extremely surprised about was that their first defense was, well there's no duty that was breached to you because we don't have a duty to inspect for potato variety. It certainly isn't what the inspector said they did. The inspector said they inspected for variety. The judge finally said that they do have a duty to inspect for variety. Now we come to this legislature and say take away that duty, but I think the purpose of the law is not to protect the Seed Department. It is to protect the farmers.

Chairman DeKrey: Thank you. Further testimony in opposition.

Barb Price, Dakota Resource Council: (see attached testimony).

Chairman DeKrey: Thank you. Further testimony in opposition, neutral. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1124

House Judiciary Committee

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Hearing Date: 2/6/07

Recorder Job Number: 2956

Committee Clerk Signature

Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1124. What are the committee's wishes.

Rep. Kretschmar: Explained the amendments. The subcommittee consisting of myself, Rep. Klemin and Rep. Griffin went through the bill very carefully and made some changes.

Rep. Koppelman: What is the substantive affect of the amendment.

Rep. Kretschmar: It will not allow the Seed Department to be back under sovereign immunity. I asked for input from the department, but didn't receive any. I move the amendments.

Rep. Klemin: Second. We removed sovereign immunity for the state of North Dakota some time ago. This would reinstate sovereign immunity just for the Seed Department. I don't think that's reasonable.

Rep. Charging: What is the value of these certified seeds, is it defined.

Chairman DeKrey: Certified seed is what somebody is going to pay for it.

Rep. Charging: But the way the bill contradicted itself later.

Rep. Kingsbury: MN has a law that protected them. ND did not have protection, so they could sue. The seed originated in MN.

Rep. Koppelman: I'm not sure whether the bill really sought to reinstate sovereign immunity as much as did to define what certification really means. Sounds to me that the court determines what certification is.

Rep. Kretschmar: Certification is defined the bill and in the law. We did not like the new definition.

Rep. Klemin: Just to expand on that, we made the new definition of certified in section 1 the same as the existing definition of certified in section 3. Then we removed the warranty disclaimer language out of the definition, which first of all, we didn't think it was appropriate to put that language in that definition. Secondly, we felt that the scope of the disclaimer really meant that certified didn't have any meaning. Finally, by deleting section 2 and 5, we keep the existing language about the warranty in the substantive section. So there is still a warranty disclaimer section under current law.

Rep. Koppelman: Is the bill unnecessary if it is there in current law.

Rep. Griffin: It does offer a little bit of protection or extra protection under the fact that we added "at the time of inspection" because part of their concern was they can inspect it but the farmer has control over it for the rest of the time period. The State Seed Dept doesn't have control over it. The way the bill was written, it was really saying that certification really doesn't mean anything because they weren't guaranteeing anything. It might be the variety, it might not be. But then not only that, they were putting the liability on the vendors, so if the vendor could not rely on the Seed Department to certify it. As a vendor you could sell it, and someone could sue you for it not being the right variety.

Chairman DeKrey: We will take a voice vote. Motion carried.

Rep. Kretschmar: I move a Do Pass as amended.

Rep. Klemin: Second.

Chairman DeKrey: The clerk will call the vote.

10 YES 2 NO 2 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Kretschmar

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1124

Page 1, line 1, remove "4-09-20.1,"

Page 1, line 2, remove "4-10-12.1," and remove "vendor responsibility for"

Page 1, line 3, remove "data on seed labels," and remove ", and immunity from liability from contract or tort suits"

Page 1, line 4, remove "for inspection, analysis, and certifications of agricultural" and replace "crops" with "crop warranties or representations"

Page 1, line 24, after ^{before (Seed)} ~~department~~ insert "at the time of inspection" and remove "Certification does not mean or constitute any warranty"

Page 2, remove lines 1 through 4

Page 5, remove lines 9 through 30

Page 6, line 8, overstrike "and regulations", after "department" insert "at the time of inspection", and remove "Certification does not mean or"

Page 6, remove lines 9 through 12

Page 8, line 3, replace "use on seed labels or tags, or use or attach to literature," with "alter the label or certificate furnished by the inspector under subsection 4."

Page 8, remove lines 4 and 5

Page 8, line 7, remove "potato seed" and replace the underscored colon with "certified potato seed that"

Page 8, line 8, remove "a. That" and replace ", or bears false or" with an underscored period

Page 8, remove lines 9 through 31

Page 9, remove lines 1 through 4

Page 9, line 7, after "**Warranties**" insert "or representations"

Page 9, line 9, remove the overstrike over "or"

Page 9, line 10, remove "or identity of variety or selection"

Renumber accordingly

House Amendments to HB 1124 (78063.0102) - Judiciary Committee 02/01/2007

Page 1, line 1, remove "4-09-20.1,"

Page 1, line 2, remove "4-10-12.1," and remove "vendor responsibility for"

Page 1, line 3, remove "data on seed labels," and remove ", and immunity from liability from contract or tort suits"

Page 1, line 4, remove "for inspection, analysis, and certifications of agricultural" and replace "crops" with "crop warranties or representations"

Page 1, line 24, after "department" insert "at the time of inspection" and remove "Certification does not mean or constitute any warranty"

House Amendments to HB 1124 (78063.0102) - Judiciary Committee 02/01/2007

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House Amendments to HB 1124 (78063.0102) - Judiciary Committee 02/01/2007

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Renumber accordingly

Date: 2/6/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1124

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Kretschmar Seconded By Rep. Klemin

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Meyer	✓	
Rep. Charging			Rep. Onstad		
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller		✓			
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 10 No 2

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1124: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). HB 1124 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "4-09-20.1,"

Page 1, line 2, remove "4-10-12.1," and remove "vendor responsibility for"

Page 1, line 3, remove "data on seed labels," and remove ", and immunity from liability from contract or tort suits"

Page 1, line 4, remove "for inspection, analysis, and certifications of agricultural" and replace "crops" with "crop warranties or representations"

Page 1, line 24, after "department" insert "at the time of inspection" and remove "Certification does not mean or constitute any warranty"

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Renumber accordingly

2007 SENATE AGRICULTURE

HB 1124

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1124

Senate Agriculture Committee

☐ Check here for Conference Committee

Hearing Date: March 16, 2007

Recorder Job Number: 5198

Committee Clerk Signature

Passa Krow

Minutes:

Sen. Flakoll opened the hearing on HB 1124, a bill relating to labeling requirements and potato seed and crop warranties or representations and to inspector certificates. All members (7) were present.

Ken Bertsch, State Seed Commissioner, testified in favor of the bill. See attached testimony.

Sen. Flakoll closed the hearing.

Sen. Heckaman motioned for a do pass and was seconded by **Sen. Klein**, roll call vote 1: 7 yea, 0 nay, 0 absent. **Sen. Klein** was designated to carry the bill to the floor.

Roll Call Vote #:

1124

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Do Pass

Heckaman

Klein

[illegible]

Total (Yes) 7 No 0



Floor Assignment Sen. Klein

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 19, 2007 9:28 a.m.

Module No: SR-51-5627
Carrier: Klein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1124, as engrossed: Agriculture Committee (Sen. Flakoll, Chairman) recommends
DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1124
was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1124



North Dakota State
NDS
Seed Department

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Kenneth J. Bertsch
State Seed Commissioner

Testimony

House Bill 1124
House Judiciary Committee

January 23, 2007

Good morning Chairman Dekrey and members of the House Judiciary Committee. For the record, my name is Ken Bertsch and I serve as State Seed Commissioner and administrator of the State Seed Department based on the campus of NDSU in Fargo. I am before you today to provide information and background on HB 1124 and ask your support for these critical amendments to Chapter 4-09 and 4-10 governing the certification programs of the Seed Department.

HB 1124 seeks to strengthen liability protections and warranty disclaimer language that protects the Department and State while in the process of seed certification. HB 1124 accomplishes three important goals:

1. Clearly codifies definitions of certification, variety and clones of true varieties, along with clearly stating the responsibilities of the agency for certification of seed.
2. Expands the warranty disclaimer language to account for issues related to labeling and variety determination.
3. Helps protect the Seed Department from lawsuits for issues beyond the scope of our inspections, or the lack of testing technology available to complement the visual inspection process.

These changes to century code become necessary after 2005-2006 litigation regarding seed performance, a complaint thought to be moot under the current disclaimer.

I would like to present the Committee some basic background on the litigation in order to explain the genesis of the bill and the need to clearly define the duties of the Seed Department.

I have distributed copies of my testimony, along with three documents; 1) Testimony from Dr. Ken Grafton regarding determination of variety, 2) an unpublished article written for the Valley Potato Grower magazine in March, 2006 that provides background on the lawsuit, and 3) a slide presentation to the northern region Association of Official Seed Certification Agencies meeting that links the precedent in this case to certification of any crop.

I will speak to you purely from an administrative view, and how this issue impacts our agency. The State Solicitor General, Doug Bahr and our agency litigation counsel, Assistant Attorney General Dean Haas, are present today to speak to you regarding issues of law surrounding the bill.

Background

Five plaintiffs settled a lawsuit on January 27, 2006 against the ND State Seed Department regarding the performance of a potato seed lot planted in central Minnesota in 2003. The plaintiffs were commercial growers in Minnesota and seed growers in North Dakota, who claimed that the Seed Department was responsible for their economic losses by incorrectly identifying the variety of a seed lot.

The plaintiffs had filed claims with the State of North Dakota Risk Management Division in excess of \$11 million dollars by December, 2003. Mediation failed to garner a favorable result for the plaintiffs, and the State Seed Department was sued by the two commercial and three seed growers in December, 2004

After almost two years of discovery and case preparation, the trial was scheduled to begin on January 30, 2006. The parties began negotiating in the week prior to trial, and agreed on a settlement of \$600,000 on January 27th.

The seed lot in question originated in tissue culture in 1998, and was certified in Minnesota as nuclear generation Red Norland seed. The lot was planted in Minnesota in 1999 and 2000, and certified by the Minnesota certification agency in those years, before being sold into North Dakota and planted by a North Dakota grower in 2001. The seed lot was transferred to another North Dakota grower (a plaintiff party), planted in 2002 and subsequently sold to the Minnesota commercial growers for planting in the 2003 crop year.

All field certification and shipping point inspections in 2001 and 2002 were performed by the State Seed Department. Throughout the life of the seed lot, the variety name declared by each of the growers, inspected under standard practices by both of the agencies, and listed on all labels was the **selection** of Norland called Red Norland. It is noteworthy that the tissue culture lab is no longer in business, eliminating legal recourse to the initial grower.

The plaintiffs claimed the seed did not set skin or tuber type to their satisfaction, and was subsequently abandoned in the field. It should be noted that potato seed varieties and strains perform differently under dissimilar environments. In this case, the seed was grown in a sandy, irrigated setting after being certified in dryland, black-soil locations. Nevertheless, the fact remains that the seed lot MAY have been mislabeled by two different agencies, a fact that remains in dispute to this day.

In summary: The Seed Department was sued for a problem that originated elsewhere, was missed by two different inspection agencies, is difficult to see under normal visual inspection routines, is impossible to test for, and is subject to innumerable environmental variables affecting performance of seed.

Mr. Chairman and Committee members, what should be clear is that this was a case of **PRODUCT PERFORMANCE**. Yet, despite having a strong disclaimer (adopted by many other agencies) specifically disclaiming "quantity and quality of crop produced", we were sued for product performance under the guise of negligent inspection and negligent publication. This point is significant in our pursuit of the amendments in HB 1124.

HB 1124: Overview

Section 1 contains two significant additions to the definitions in Chapter 4-09. Page 1, line 23 defines the term "certified", and lays the foundation for disclaimers in section 2. Page 4, line 18 contains a definition for the term "selection", whose meaning is becoming more important in both rule and statute.

Section 2 contains the most important amendments to Chapter 4-09.

Paragraph 1 (beginning on page 5, line 14) accomplishes three important things. First, the paragraph decouples "certified or non-certified agricultural seed producers" from mention of the Seed Department. If you look to line 17, you will notice that both are mentioned jointly in the current language. This decoupling makes clear that each party is responsible for its own warranty, and any implied disclaimers do not exist.

Line 16-17 is simply a restatement of federal law, wherein the vendor or labeler is responsible for the information on a seed tag. It was suggested in litigation that by virtue of providing a label, the Seed Department is responsible for the label contents. Again, we are simply trying to clearly state responsibilities in statute.

Paragraph 2 (beginning on page 5, line 19) is largely a restatement of current disclaimer, with the addition of the terms "variety, type or selection". Some may argue that guarantee of variety identity is a primary purpose of the agency. I will explain that this is an impossible guarantee to provide, and that **varietal purity** is the most important objective of seed certification.

Page 5 (line 27-30) contains an explicit disclaimer intended to strengthen the Department's protections for the previously outlined factors (merchantability, fitness, performance, absence of disease etc.). The use of the term "make no warranty or representation of any kind" coupled with the "'cause of action" statement is intended to do what we believe the legislature originally intended: to protect the agency from litigation regarding the list of issues above (fitness etc.)

The statement also acknowledges the responsibility of the Department for label claims on the seed it produces, consistent with the remainder of the bill and the legal requirements for grower/labeler. The sole warranty becomes more consistent with intent of the entire chapter: the producer or vendor, having control of the seedstock is the only party able to warrant or disclaim. A more accurate reference to rules (which is overstruck in this section) has been created in the definitions section we reviewed in Section 1, under the term "certified."

Section 3 amendments create definitions for "certified" and "selection" in Chapter 4-10, which governs potato seed certification. The definitions are replicated from Section 1 of the bill.

Section 4, paragraph 4-6, (page 7 and 8) creates new language regarding grade inspection and labeling potatoes. The intent of the section is to clearly state the labeling process for potatoes only, and is modeled to a large extent upon language in Chapter 4-09-14, a prohibitions section dealing with the labeling of field crops.

Section 5 and 6. The remainder of HB 1124 recreates language from Section 1 and Section 2 and shifts similar functions to Chapter 4-10 governing seed potato certification programs.

Why HB 1124 is a critical change in a changing environment

Mr. Chairman, this issue has relevance to all crops and programs of the Seed Department, especially now given that we have defended litigation involving seed performance.

In the past, a variety of wheat was known for certain performance or quality characteristics and was more easily distinguishable in the field from others. Today, varieties have special use characteristics or may even contain genetic improvements that help protect against certain diseases such as fusarium (scab). As new varieties become vessels for delivery of improved nutritional or food quality traits, problems involving variety labeling or identification will become more prevalent. Many wheat varieties grown in North Dakota look nearly identical by visual analysis, coming from similar parentage, and the testing technology to distinguish between varieties in most crops is unreliable or nonexistent.

Potatoes are an even more difficult situation. Strains and selections of true varieties are certified and grown in each state, and demanded by the industry for specific processing purposes. There are dozens of strains currently grown in North Dakota; some have been in production for decades and are vital to the potato industry. These strains or selections are certified nationwide because the industry demands it, despite the fact that the visual inspection must be done without the benefit of a true variety description. ***As a result, we MUST be able to certify selections for seed health and purity factors, despite the legal risk of doing so.***

While we can test for variety identification and herbicide tolerance in some crops like wheat, the technology is not reliable in other crops, and nonexistent for strains, selections or clones of true varieties. ONLY true varieties can be identified by laboratory testing. The issue is more profound when considering the expansion of genetic properties that cannot be determined through visual inspection routines. ***As a result, although we have the ability to "guarantee" variety, purity or any other health factor while the seed is in our purview, it cannot be done while the seed is in the control of someone else.***

The testimony of Dr. Grafton will help explain some of the technical difficulties associated with varietal determination.

With this basic information in place, let me explain the central issue behind this bill: **CONTROL**

- **Certification of seed is a process of shared responsibility.** Producers are responsible for production and handling processes, and certifiers responsible for "snapshot" looks at health and purity standards. We are partners in this proposition. The grower has full and total control of the seed from planting to harvest, storage and delivery. **To expect a performance guarantee or warranty from the certification agency under these conditions is unreasonable.**
- **The assurance of variety identity is an audit process, whether in North Dakota or any other state.** While the statute and rules are clear on the issues of varietal purity, disease, presence or absence of weeds and other factors, it is silent on the issue of variety identification or a guarantee thereof.

An agency is asked by the applicant to accept a seed lot for certification, checks that the documentation provided by the applicant is accurate, and is totally dependent on the accuracy and integrity of the applicant beyond this point. If the characteristics observed during visual inspection match the variety as described, the seed lot's variety name is verified. This is truly an audit of eligibility and pedigree, and is dependent on accuracy throughout.

Upon receiving and accepting a valid application, certifiers practice what can be called a "presumptive inspection". To presume means "to constitute reasonable documentary evidence for assuming; to suppose something is reasonable or possible in the absence of proof to the contrary". The definition of the term is accurate in this case: absent compelling evidence to the contrary, certification agencies are hard-pressed to reclassify or reject seed lots regarding variety name. If the variety meets the standard for visual inspection based on the breeder's objective description, it cannot be rejected for reasons other than admixture or purity of the seed lot. **For this reason, the disclaimer language must be expanded to include variety or selection.**

- **Certification programs cannot meet expectation that require responsibility for issues beyond its control.** Those issues may be as noted above, or a host of others that pertain to the handling of seed by producers. Given the fact that control of purchase, planting, care, harvest, storage, cleaning, delivery and replanting is handled by one or more parties, it is troubling to me that we can be saddled with the liability for the performance of seed products. This is not certifying a static product like refrigerators; this is an unstable substance until it goes into the ground; subject to improper handling, contamination by other crops, weeds and even disease until it reaches the final destination. **Again, the question must be asked: Should the Seed Department be held financially responsible for the actions of others?**

In the meantime, the Seed Department is doing everything in its power to protect growers from the issues of mislabeling and/or misidentification, but these powers are minimal.

1. We have changed our rules to allow for mandatory variety testing; yet the technology does not exist for most crops, and is only as reliable as the sample provided to us.
2. We are examining more regulatory samples each year and "catching" accidents at a greater pace; yet cannot sample each seed lot in the state immediately before it is planted.
3. We train inspectors with the best information and practices regarding variety and disease determinations; yet our inspectors cannot accomplish the impossible by visually inspecting and identifying what is largely invisible.

Two alternatives remain ⁴/₄

- 1) Change the law to reasonably protect the agency.
- 2) Change programs to minimize risk in a manner that balances needs of the agency and grower.

Without change to protective statutes, certification agencies like ours will be forced to operate in an ultra-conservative manner; we will have no choice if the state remains at financial risk. We have alternatives in changing certification programs; but the Seed Commission does not believe these changes would benefit our growers....which is our ultimate goal.

Summary

You will hear arguments from those who prefer that the door of opportunity remain open for filing suit against this agency, but for the reasons I've explained, most importantly the fact that we have no control of the seed that gets planted, I very strongly believe this is wrong.

This bill will not decrease confidence in the North Dakota seed industry, or the Seed Department for that matter. Our reputation(s) are solid with or without HB 1124. Given the fact that our field inspection and laboratory analysis programs operate **EXACTLY** the same as any other in the U.S. (and I would maintain at a higher level), growers and seed buyers recognize and accept for the most part that some risk exists in either varietal identity, purity or potential for performance...**all predicated on the idea that there cannot be an absolute guarantee in seed certification, production and handling.**

They probably understand better than any attorney or administrator how critical seed pedigree, documentation, and management practices are, and how grower integrity and ability influences end product quality. The bill does not change in any way the issue of "guarantee of variety" or any other certification factor; these have always been and remain as good as the label claim, and the action of each and every grower that has planted the seed lot from its origin.

Mr. Chairman and Committee members, this bill is not about protecting our agency from malfeasance, negligence or lack of professionalism. It is about a lack of technology in certain areas, and of meeting the expectation for product performance or profit expectations in a litigious environment; both are impossible expectations to meet under the conditions that all certification agencies operate. **Regardless of the outcome of this legislation, we will still verify with a high level of certainty a number of criteria in the field and laboratory, but remain powerless to offer any type of guarantee regarding a product that is planted.**

This bill is about what can be factually accomplished: it is factually impossible to reliably differentiate or provide a guarantee of variety for potato strains (or for some other invisible or un-testable trait), and the Department ought not to be liable for a failure to do what cannot be done. It's about saddling an agency with risk and liability about matters over which it has no control. We gladly meet the challenge of responsibility and accountability for issues within our control, field or laboratory.

The bottom line; this agency has little control of and much risk for the products we certify.

Thank you for your time and patience in this rather extensive review and explanation of HB 1124. I ask for your support and positive vote on the bill, and will answer any questions you may have.

*College of Agriculture, Food Systems, and Natural Resources**315 Morrill Hall**Fargo, ND 58105-5435**701.231.8790**Fax 701.231.8520**deancoa@ndsuent.nodak.edu**www.ag.ndsu.edu/academics**North Dakota Agricultural Experiment Station**315 Morrill Hall**Fargo, ND 58105-5435**701.231.7655**Fax 701.231.8520**exp-dir@ndsuent.nodak.edu**www.ag.ndsu.edu/research*

Testimony

House Bill 1124 House Judiciary Committee

January 23, 2007

Testimony provided by Ken Grafton, Dean College of Agriculture, Food Systems, and Natural Resources, and Director of the North Dakota Agricultural Experiment Station

Chairman Dekrey and Members of the Committee: For the record, my name is Ken Grafton and I serve as Dean of the College of Agriculture, Food Systems, and Natural Resources at North Dakota State University and also as Director of the North Dakota Agricultural Experiment Station. I am unable to present this testimony to you in person, due to numerous scheduling conflicts, but prepared this testimony for submission because of the importance of the issue addressed in HB 1124. This testimony was prepared to provide you and the members of the committee an understanding of the variety development process, the plant breeder's use of visual determination among like lines, and the development of useful descriptors to identify the newly released variety from among other varieties of the same crop commodity. I base this testimony on my more than 27 years of experience as a plant breeder and geneticist, and in my role as Dean and Director.

Plant breeding is a long and thorough process of developing useful variation in a crop (in my case, dry edible bean, but this discussion could be used for all crops grown in ND) by making hybridizations. This is followed by rigorous evaluation and selection of individuals and lines until superior lines are identified, which then become candidates for release as varieties. Plant breeders seek opportunities to test lines in diverse growing conditions – often the same series of lines are evaluated in five or more sites per year in order to effectively test lines for adaptation, yield stability, disease resistance, and stability of quality traits.

Plant breeders evaluate their material for a number of traits – some crops, such as soybean, require only a few traits, while others, such as barley and hard red spring wheat, evaluate more than 30 unique traits. Information on these traits is important so that the breeder can adequately determine the probability of success if a variety is released.



The length of time required for this process (from hybridization to variety release) is approximately 10-12 years (hybridizations made today will result in varieties released in 2017), so plant breeders and geneticists become very familiar with individual lines in their respective breeding programs. Regardless of the degree of familiarity, lack of phenotypic variation makes it difficult to differentiate among lines, and there is a certain amount of uniformity in many of the crops grown in the state – this is in response to producer demand of what the commodity should look like, and how it should perform in the state.

Plant breeders typically use visual selection (also known as phenotypic selection) whenever possible. Visual differences are easily identified and used either in a positive fashion (e.g., this line stands erect throughout the season and is early) or a negative fashion (e.g., this line has no foliar disease resistance). However, many of the lines developed in a breeding program are very similar, so visual selection is minimal or difficult, since similarity among lines is quite high. Still, the breeder, because of his/her unique understanding of the crop, can discern slight differences among lines that can be used for differentiation purposes – these may not be readily apparent to others.

For example, barley characters that are easily used to differentiate among varieties include the following seed characteristics: awn roughness (smooth vs. rough), rachilla hair length (long vs. short), row type (six vs. two), and aleurone color (blue vs. white). The problem with these characteristics is that there is not much variation among varieties grown in North Dakota. All six-rowed barley varieties currently grown in North Dakota have a white aleurone and semi-smooth awns. For six-rowed varieties, differentiation among the varieties Foster, Drummond, Stellar-ND, Legacy, and Tradition is nearly impossible because they all have semi-smooth awns and long rachilla hairs. Similarly, differentiation between the varieties Robust and Legacy is nearly impossible because both have semi-smooth awns and short rachilla hairs. Other characteristics of kernel morphology, such as the amount of hull wrinkling and the shape of the end of the kernel where it attaches to the rachis are unreliable, (but required for Plant Variety Protection applications). Other characteristics may be used to differentiate among the varieties in this example, such as heading date, straw strength, or disease reaction. But, these traits can be greatly affected by the environment in which the varieties are grown, thereby making differentiation using these traits very risky, if not impossible (e.g., in the absence of disease development, either because of no inoculum or poor environment, differences in disease reaction is impossible).

As the plant breeder identifies lines that may become varieties released to the public, he/she is asked to prepare a thorough description of the variety that is the basis of the Plant Variety Protection application. Historically, this application is based on phenotypic descriptors (how can you tell variety A from variety B?)

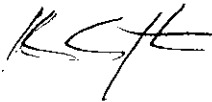
usually comparing the candidate variety against an existing variety to which it is very similar, or against a known variety used as a standard, but parameters have changed. Breeders now MUST include differences at the DNA level. Breeding programs now use DNA markers to substantiate claims that the variety is unique – differentiation that cannot be made visually – again, this is usually identifying differences between two or, at most, a few varieties. Molecular marker technology is not sufficiently advanced to allow widespread use. As this technology continues to advance, its use will become more prevalent in determining varietal differences, but certainly, the technology remains confined to properly equipped laboratories, not the field.

What I describe is based primarily on crop development of pure-line varieties, but this is also true for clonally propagated varieties, such as potato. In addition, clones (in the case of potato) or selections (in the case of pure-line varieties like soybean, barley, or wheat) further complicate the issue because of the great similarity of the clone or selection to the original variety.

House Bill 1124 seeks to strengthen liability protection and warranty disclaimer language that protects the North Dakota State Seed Department while conducting seed certification activities. The bill provides additional and reasonable protections for the Seed Department in dealing with the issue of variety determination. This, in my opinion, is just common sense. Individuals are trained to evaluate and inspect fields do so based on description of the variety. This might be extremely difficult to do, based on similarity of appearance (remember, plant breeders use molecular techniques to verify with certainty varietal differences). Once the inspector leaves the field, a wide range of situations can occur that could affect the "purity" of the field (mis-labeling, seed mixture, etc.). Neither the inspector nor the State Seed Department has control over such accidents or events. Also, molecular marker differentiation would be based on samples submitted to the appropriate laboratory, post harvest – again, this is well after inspectors visit the seed fields.

Mr. Chairman, Members of the committee, I thank you for your time in reviewing this testimony and urge that you consider approval of this bill. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Grafton', with a stylized flourish at the end.

Kenneth F. Grafton
Dean and Director

Valley Potato Grower article: (March, 2006: Unpublished)

Title: 1) Certification Lawsuit Settled, or 2) Potato Case Reaches Settlement ???

Five plaintiffs recently settled a lawsuit with the ND State Seed Department regarding the performance of a potato seed lot planted in central Minnesota in 2003. The plaintiffs were commercial growers in Minnesota and seed growers in North Dakota, who claimed that the Seed Department contributed to their losses by incorrectly identifying the variety of a generation 4 seed lot.

The Case

The Seed Department was sued based on two separate causes of action in the complaint: Negligent Inspection and Negligent Publication.

The Negligent Inspection complaint claimed that the Seed Department failed to correctly identify the variety of the seed lot in question. The seed lot, grown in North Dakota and planted by commercial producers/plaintiffs in central Minnesota, was labeled as Red Norland and failed to perform as expected in the field. The seed growers/plaintiffs then complained that their business reputation was ruined, and that they suffered monetary losses as a result of settling claims with their customers.

The Negligent Publication complaint claimed that as a result of publishing the seed lot in their seed directory as Red Norland, under the category heading "variety", the Seed Department in essence "named" the seed as a true variety. The complaint also claimed that the manner in which the seed was listed in the directory contributed to the commercial grower's purchasing seed they did not want. While innocent on the surface, the challenge of "if you call it a variety, you ought to be able to guarantee its identity" soon became clear.

The Background

The seed lot originated in tissue culture in 1998, and was certified in Minnesota as nuclear generation Red Norland seed. The lot was planted in Minnesota in 1999 and 2000, and certified by the Minnesota certification agency in those years, before being sold into North Dakota and planted by a North Dakota grower in 2001. The seed lot was transferred to another North Dakota grower, planted in 2002 and subsequently sold to the Minnesota commercial growers for planting in the 2003 crop year. All field certification and shipping point inspections in 2001 and 2002 were performed by the State Seed Department. Throughout the life of the seed lot, the variety name declared by the grower, inspected under standard practices by the agencies, and listed on all labels was Red Norland. It is noteworthy that the tissue culture lab is no longer in business, eliminating legal recourse to the initial grower. The remaining "deep pocket" and most high profile target for suit was the State of North Dakota.

The Minnesota plaintiffs claimed the seed matured late, set smaller than normal tubers, yielded poorly and failed to hold skin at harvest. The growers abandoned much of the production from this seed lot in the field in August of 2003.

The plaintiffs had filed claims with the State of North Dakota Risk Management Agency in excess of \$11 million dollars by December, 2003. Mediation failed to garner a favorable result for the plaintiffs, and the State Seed Department was sued by the two commercial and three seed growers in December, 2004.

The Settlement

After almost two years of discovery and case preparation, the trial was scheduled to begin on January 30, 2006. The parties began negotiating in the week prior to trial, and agreed on a settlement of \$600,000 on January 27th. Confidentiality of settlement information was never requested by the State, contrary to some published articles.

Settlement discussions accelerated after the trial judge deferred ruling on two plaintiff pre-trial motions; 1) a motion seeking to prevent the jury from considering evidence that the State Seed Department conducted inspections in this case in the same manner as all other potato certifying agencies, and 2) a motion seeking to prevent the jury from considering evidence that certified seed directories from Idaho, Oregon, Minnesota, Michigan and Wisconsin list potatoes by strain, selection and variety in precisely the same manner as done by the Seed Department in its directories.

It should be noted that successful settlement takes two parties who understand strengths, weaknesses and threats of their case, and are interested in avoiding courtroom litigation. While the State was confident in their factual and legal cases, a settlement avoided protracted litigation for the Seed Department, and potentially destructive image and marketing results for the industry.

The State's Opinion

Most alarming for the Seed Department was the prospect of an adverse jury ruling leading to major changes to potato certification programs.

Potato growers understand the technical nature of certification, the differences between varieties clones, selections, strains, and the marketing of potatoes. A citizen jury could not learn the foundational aspects of potato certification and production necessary for contemplating a legal result in a few days. An adverse ruling may have led to outcomes such as:

- **Certification and marketing of seed carrying only a true variety name.** This would be a significant hardship for North Dakota commercial and seed growers, who would only be able to buy or sell seed by variety name. For example, Red Norland and Dark Red Norland would become Norland. All Norkotah selections would be certified only as Norkotah. This inability to name the selection would damage North Dakota's seed industry, which would be less competitive in the national markets under a variety-only scenario. Under the Court's analysis in this case, the Seed Department would not be able to certify potatoes by selection name without risking liability.
- **Mandatory variety testing,** with associated costs of testing inevitably passed down to growers, would become the norm. Interestingly, technology does not exist to identify strains, clones or selections of potato varieties, only the true or parent variety. Regardless, testing would have ensued purely as a protective measure for seed growers and the agency who, as we now know, risk liability and litigation on this issue.
- **The trickle-down effect of a damaging precedent** in North Dakota would have ultimately affected other certification programs in the United States.

In short, the Seed Department believed that potato certification may have been turned upside-down by an adverse jury verdict. The risk of this outcome was enough incentive for the agency to discuss and negotiate a settlement.

We believe that this situation could have happened in any state; unfortunately litigation happened here and the aftermath is stranded here. Interestingly, while selections have been certified for decades, this may be the first time a certification agency has been sued for the supposed misidentification or performance of a seed lot.

Going Forward

The issue of variety identification will not fade away with settlement of this case. In fact, neither the inspection or publication protocols used by State Seed or other certification agencies can guarantee that a conflict regarding selections will not happen again. The liability for certification of a seed selection, or its performance, is one that seed certification agencies cannot undertake given certain facts:

1. Certifiers practice what can be called a "presumptive inspection". To presume means "to constitute reasonable evidence for assuming; to suppose something is reasonable or possible in the absence of proof to the contrary". Absent compelling evidence to the contrary, certification agencies are hard-pressed to reclassify or reject seed lots regarding variety name.

The takeaway here is: Accuracy of seed's documented **pedigree** is critically important to any certification effort, for both certifier and grower.

2. A certification program cannot meet a standard of care that requires responsibility for issues beyond its control. Those issues may be as noted above, or a host of others that pertain to the handling of seed by producers.

Certification programs take "snapshots" of seed while in the field, in the laboratory or in shipping point stages. The grower has full and total control of seed during harvesting, storage or delivery. To expect a performance guarantee or warranty from the certification agency for a snapshot view of seed is similar to expecting a doctor to be responsible for the long term health of a patient he sees two or three times.

3. Certification of seed is a process of shared responsibility. Producers are responsible for production and handling processes, and certifiers responsible for technical, health and purity standards.

Make no mistake, the practice of defining seed purity by applying tolerance for admixture is profoundly different than guaranteeing a selection's identity by visual inspection. In this case, the seed was pure and healthy but mislabeled from birth.

4. Interestingly, this problem is not isolated to potato: one could speculate about any seed crop for the very same reasons stated above. Many seed varieties in other crops look almost identical in visual inspection processes that are standard in seed certification. However, testing technologies can assist in making a final determination in most crops and most true varieties, but are not mandatory under rules of certification.

In this case, the Seed Department is fully accountable for the actions of staff in the certification process, and has learned a difficult lesson in terms of the risk of certifying seed selections. It will be our job to help growers and industry to understand the limitations of variety/selection determination, and the importance of knowing the seed source pedigree, to help minimize the potential for litigation for the grower and our agency.

Liability for varietal certification or seed performance cannot be assumed by agencies. The cost of providing a guarantee of varietal identity or performance such as the plaintiffs sought would normally be passed on to the industry. If the Seed Department were to assume the costs of warranty guarantee, the Department would be forced to dramatically increase the inspection fees. The Seed Department is convinced that the legislature did not intend this result: therefore, the Department will enact enhanced administrative rules, add improved disclaimer language to its forms and publications, and practice additional care in all certification processes associated with variety identification.

North Dakota State
NDSSD
Seed Department

Legal Implications of Potato Litigation to Field Seed Certification

Ken Bertsch
ND State Seed Commissioner

Northern Region AOSCA Meeting
Fargo, ND
April 11, 2006

North Dakota State
NDSSD
Seed Department

NDSSD Background

- Est. 1931, ND Legislative Assembly
- State "Designated Authority"
 - Seed certification: Field Crops and Potato
 - State Seed Laboratory
 - State/Federal Cooperative programs
 - Regulatory
- Unique structure/mission
 - Board Directed (9 industry, university reps)
 - Self Funded- Service Fees

North Dakota State
NDSSD
Seed Department

Discussion Points

- Situation Overview
- Case Background
- Precedent- Legal Implications to Certification Programs and Agencies
- Corrective Measures
- Summary

North Dakota State
NDSSD
Seed Department

Overview: Hartkopf/Rudnick vs NDSSD

Issue: Performance of seed lot certified in ND prior to commercial planting in 2003

- Tissue Culture: 1998, Minnesota
- Field Generations: 1999-2002 (MN. and ND)
- Emergence of problem: July 2003
- Claims filed (State of ND): Dec. 2003
- Failed mediation: March, 2004
- Lawsuit filed: September, 2004
- Discovery: 9/2004 though 11/2005
- Trial Scheduled: January 30, 2006
- Settlement: January 27, 2006

North Dakota State
NDSSD
Seed Department

Potato Tissue Culture



North Dakota State
NDSSD
Seed Department

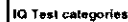
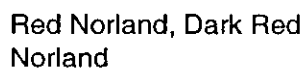
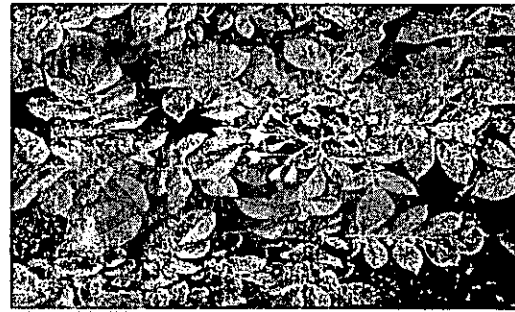
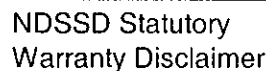
Overview: Case Specifics

Complaint(s):
Negligent Inspection
Negligent Publication

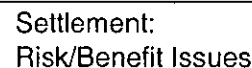
Plaintiffs:
Commercial Growers: St. Cloud, MN Area
(2 individuals, 1 operation)
Seed Growers: Minto, ND (3 individuals, 5 entities)



Issue: Guarantee of varietal identity, perceived responsibility for performance of crop

[illegible]

"A warranty of any kind, either expressed or implied, including a warranty of merchantability, fitness for a particular purpose, or absence of disease, is not made by the commission, the department, the commissioner or certified or noncertified agricultural seed producers as to the **quantity or quality of the crop produced from the agricultural seeds** or as to other produce which is inspected and certified, except as provided in this section. **The sole warranty made is that the agricultural seeds or other produce were produced, graded, packed, and inspected under the rules of the state seed department or United States department of agriculture.** The commissioner and the commissioner's employees function and serve only in an official regulatory manner."



- **\$600,000 cash settlement w/ plaintiffs**
 - Original claims: \$11.5 million
 - Settlement claims: \$1.5-4.5 million
- **Risks**
 - Certification of only "true varieties"
 - Mandatory testing: costs
 - "Trickle down" to other certification programs/crops
- **Benefits**
 - Avoidance of protracted litigation (est. 2-3 years)
 - Avoid destructive press, image, marketing results



Residue for ND Certification Programs

Precedent: First lawsuit pitting producer vs 3rd party certifier based on quantity/quality of production? (Performance)

Labeling: Regardless of law/responsibility, does incorrect labeling fall to certification agency?

Economics: At what point should certifiers assume the cost of warranty, become the insurers of profit expectations?



Implications for Other Certification Programs

We believe this litigation has broad impacts across all crops, all agencies!

- Inspections are based on visual observation
- Testing technology has not kept pace w/ variety, trait or clones/selection development
- Potential weakness of warranty disclaimer language
- Is there a LEGAL DUTY to inspect and certify variety, or is the duty to determine varietal purity?



Challenges to Seed Certification

- **Presumptive Inspection:** dependence on pedigree
- Meeting a standard of care requiring responsibility for issues beyond our control
- Migration of this "selection determination" problem to "variety determination" litigation



Operating on the "Trust" Policy

Certification is a process of shared responsibility

Growers: Production, handling, storage, delivery (90%??)

Agency: Inspections (1-3)

Lab analysis (sample provided by grower)

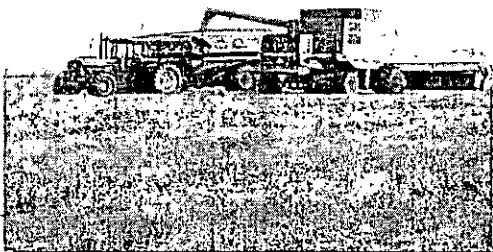
Regulatory sampling (10%??)

Dependence on PEDIGREE, HONESTY, ABILITY

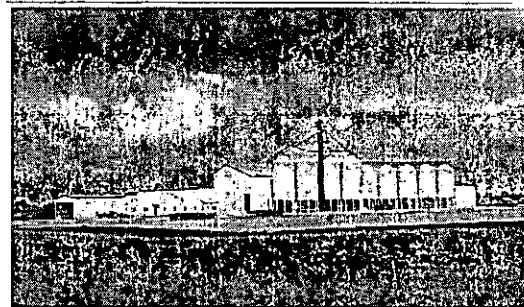
ACCOUNTABILITY



Harvesting and Handling



Conditioning, Labeling, Retailing



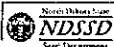


What does North Dakota have to worry about?

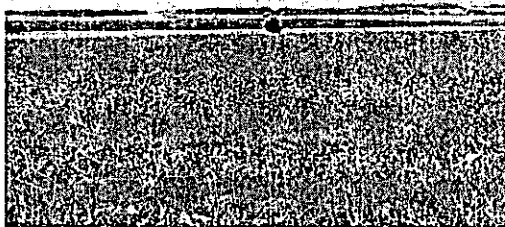
300,000+..... Total acres field crops inspected
4,100+..... Total fields inspected
20+..... Crops Inspected
300+..... Varieties inspected
850+..... Seed growers
161..... Bulk retail facilities
160..... Approved seed conditioners
35-40..... Field Inspectors



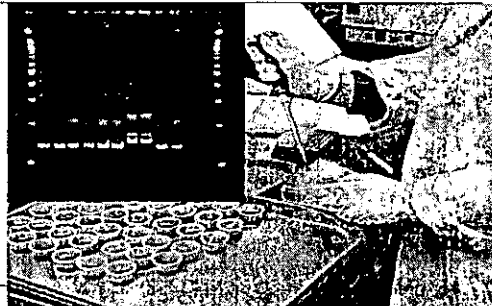
Training Processes?



Seed Inspection Processes?



Laboratory Inspection Processes?



What next? Corrective Measures

- Disclaimer Language
- Publications
- Testing?
- Training; documentation thereof



New Disclaimer Language

"Inspections, tests, certifications and other acts are not intended to induce reliance on the Seed Department's inspections, certifications, or any other action or inaction for any purpose relating to quantity or quality of the seed or crop produced, fitness for purpose, merchantability, absence of disease or variety/selection identification. Certification means only that the seed was randomly inspected, and at the time of the inspection the field or seed lot met the rules of the Department."

(Additional to statutory disclaimer)

2005 ACREAGE SUMMARY	
VARIETY OR SELECTION	ACREAGE
ALTIUS HUSSET *	15.0
ATLANTIC	354.6
BANNOCK HUSSET *	33.0
CALRED	11.7
CASCADE	2.0
DAKOTA CUSP *	90.9
DAKOTA JEWEL *	126.2
DAKOTA PEARL *	817.3
DAKOTA ROSE *	54.1
FRIED LAY VARIETIES *	1,327.5
GOLD RUSH *	299.2
IVORY CRISP *	197.7
LACHRIPPLE	65.5
LARGOUE	37.8
MISCELLANEOUS	27.1
ND 5822-C7 *	2.3
NOTA 427/ISH	7.1
NOPLAND, DARK RED	655.8
NOPLAND, RED	1,773.8
NOVALLEY *	318.4
RANGER HUSSET *	287.5
RANGER RUSSET (AMISK)	252.0
RED LABODA	717.2
RED LABODA-NEW YORK	594.1
RUSSET HIRSHANK	1,426.0
RUSSET MONKOTAH	281.7
RUSSET MONKOTAH (LYON STRAIN)	0.5
RUSSET MONKOTAH 220 *	13.0
RUSSET MONKOTAH 298 *	10.2
RUSSET MONKOTAH 5 L	1.7
SANGRE	319.0
SANGRE *	-

Publications

IQ Test in place

Selections noted

Stating the Obvious

Testing and Other Protective Measures	
■ Electrophoresis: Adequacy of industry standard	
■ Molecular markers: Until defined and catalogued, not realistic	
■ Instituting mandatory testing requirements in an environment that is high cost/low reliability	
■ What about those rotten clones?	

Who Else Should Worry?	
■ Foundation Seed groups?	
■ Breeders?	
■ Universities AND private companies?	
■ Research Foundations?	
■ Brokers?	
■ Variety and performance issues have generally been litigated between company or seedsman and commercial grower	
■ Where does the liability chain snap?	

Shifting Focus: Operating in a State of Caution	
■ Primary concern used to revolve around disease and purity issues affecting crop quality	
■ Now, much higher focus on variety identification or determination (especially with varieties spawning clones and selections)	
■ Do we institute mandatory variety ID testing for all crops, even though it doesn't work on all seed?	
Will Seed Certification become a CYA process?	

The Alsen Parallel	
■ Unscrupulous grower: certified Alsen & Briggs	
■ Scab pressure: Briggs market rots; Alsen demand strong	
■ Seed grower bulks/replaces Alsen lot w/ Briggs	
■ Grower loses crop to scab: commercial performance issues, questions	
■ Tests as Briggs, impure or indeterminate	
■ NDSSD: blamed for negligent inspection, publicizing as Alsen in seed directory	
■ How does a Seed Certification Agency mitigate this risk?	

Summary and Takeaways	
■ How does a certification agency, seeing "snapshots" of field inspection or lab sampling assume responsibility for entire "motion picture"?	
■ What level of legal responsibility for product quantity, quality or performance is in our future?	
■ What are the risks of certifying crops possessing non-visible traits, that cannot be tested with current technologies (doing the impossible)?	
■ How can we allow staff to practice their craft, speak without fear, make decisions without supervisory oversight?	

House Bill 1124
House Judiciary Committee
January 23, 2007

Good morning Chairman DeKrey and members of the House Judiciary Committee. For the record, my name is Dean Haas, and I'm an Assistant Attorney General, employed by the Office of the Attorney General. I've served as counsel to the North Dakota State Seed Commission in litigation relating to seed certification and inspections. I am before you today to provide information and background on HB 1124.

The Seed Commission introduced HB 1124 to address liability concerns that were identified during the course of litigation brought by potato farmers Hartkopf and Rudnik. The farmers brought claims alleging negligent inspection and negligent misrepresentation, which requires proof of the existence of a legal duty, breach, proximate cause, and damages.¹ Plaintiffs alleged large economic losses, and during discovery the Department discovered the losses to be in the vicinity of \$1.2 million. The case settled shortly before trial for \$600,000.00.

DUTY.

The Hartkopf and Rudnik negligent inspection claims alleged that the Seed Department's visual inspections should have discovered that the potatoes that the plaintiffs grew were an undesirable and unmarketable strain of potato called Red Norland Strain 72, rather than Red Norland potatoes, as they had been certified² by the Department to be. The Seed Department defended the claim on the theory that the legislature did not intend to create a duty or private right of action, citing N.D.C.C. § 4-10-12.1, which provides:

The state seed commission, state seed department, commissioner and the commissioner's employees, certified seed potato producers, and wholesale potato dealers licensed under chapter 4-11 *make no warranty of any kind, expressed or implied as to the quantity or quality of the crop produced from the seed potatoes or through other produce inspected and certified, including merchantability, fitness for a particular purpose, or absence of disease.* The only representation is that the potatoes or other produce were produced, graded, packed, and inspected under the rules of the state seed department or United States department of agriculture. *The commissioner and the commissioner's employees function and serve only in an official regulatory manner.*

And duty is usually a question of law for the court, rather than a fact question for a jury.³

¹ *Ficek v. Morken*, 2004 ND 148, ¶ 9, 685 N.W.2d 98.

² Certification means that "the potatoes were randomly inspected and found to meet the rules and regulations of the state seed department." N.D.C.C. § 4-10-01(2).

³ *Id.* See also *Stanley v. Turtle Mountain Gas & Oil, Inc.*, 1997 ND 169 ¶ 8, 567 N.W.2d 345. ("Although negligence actions are ordinarily inappropriate for summary judgment one of the elements of the tort of negligence is the existence of a duty on the part of the

The trial judge ruled that while N.D.C.C. § 4-10.12.1 bars breach of contract claims against the Department as seller of seed, the statute allows tort claims to proceed.⁴ This interpretation significantly limits application of N.D.C.C. § 4-10-12.1, because the Seed Department is rarely the seller of potato seed, but inspects and certifies nearly all potato seed.

The statute is naturally read more broadly, to preclude any claim—like the Hartkopf and Rudnik tort claims—“as to the *quantity or quality of the crop produced* from the seed potatoes.” The trial judge’s unusual reading of N.D.C.C. § 4-10-12.1 appears to ignore the original intent of the statute, which denies that a legal duty exists to protect a farmer’s profit expectations relating to “quantity or quality” of potatoes. To ensure this intent governs in future cases, the proposed amendments to the statute in HB 1124, section 5, at pages 8-9, clearly disavow creation of any private right of action.

In the Department’s view, the facts in this case—which show that the Department’s visual inspections could not have avoided the plaintiff’s losses—also serves to illustrate the need to amend N.D.C.C. § 4-10-12.1.

BREACH.

The second element in proving a negligent inspection claim is failure to discharge the duty owed; and, of course, whether the party breached its legal duty is normally a fact question for the jury. A close examination of the facts in *Hartkopf* serves to illustrate problems with the breach element of the cause of action. The Department had inspected the potatoes growing in the fields the year prior to each plaintiff’s purchase, but had not determined that they were Red Norland Strain 72 potatoes rather than Red Norland strain potatoes.

A central fact question at trial would have been whether an inspection utilizing the proper standard of care could have determined that the seed was actually Red Norland Strain 72, as it now appears they probably were. The potatoes had originated in Minnesota, and that state’s seed inspection agency had earlier identified the seed as Red Norland. It is important to note that visual inspections cannot reliably differentiate strains of potatoes—even the plaintiffs here had alleged that the Department’s visual inspections couldn’t reliably differentiate potato strains.⁵ And numerous studies, including NDSU Potato Breeding field trials, have grown Red Norland and Red Norland Strain 72 side by side, finding them nearly impossible to distinguish. The fact that visual inspections cannot

alleged tortfeasor, and whether a duty exists is generally a preliminary question of law for the court.”)

⁴ *Id.*, Memorandum Opinion and Order, December 30, 2005, at 3 “the language of the section regarding ‘quantity’ and ‘quality’ seems directed at sale or distributions of products.... Justification for application of the Economic Loss Doctrine is to limit remedies in tort in instances where contractual remedies exist, which is not the case here.” And, “[t]he North Dakota State Seed Department does have a duty to inspect and determine correctly the variety of potatoes subject to certification.” *Id.*, at 4.

⁵ *Id.*, Complaint ¶ 34; Amended Complaint ¶ 47, 53.

reliably differentiate potato strains means that that there is no standard of care governing inspections that will ensure that the potatoes' strain is properly identified—and shows why the Department should not owe a duty to farmers to inspect potatoes to ascertain its variety.

HB 1124 CLARIFIES THAT THE DEPARTMENT DOESN'T OWE A LEGAL DUTY TO PROTECT FARMERS AGAINST ECONOMIC LOSS.

House Bill 1124 seeks to restore the initial broad reading to N.D.C.C. § 4-10-12.1—that no duty exists to protect farmers against economic loss. The proposed language in the bill, section 5 at pages 8-9 is:

The state seed commission, state seed department, commissioner and the commissioner's employees, make no warranty or representation of any kind, expressed or implied as to the quantity or quality of the crop produced from the seed potatoes or through other produce inspected and certified, including merchantability, fitness for a particular purpose, absence of disease, or identity of variety or selection. The only representation is that the potatoes or other produce were produced, graded, packed, and inspected under the rules of the state seed department or United States department of agriculture. The commissioner and the commissioner's employees function and serve only in an official regulatory manner, and this chapter does not create a cause of action against the department except if the department is the vendor of the seed, then the department is responsible for the data on the label.

The amendment adds "or representation" to the disavowal of warranty, and pointedly denies creation of any cause of action. The statute is also consistent with the Economic Loss Doctrine⁶ and economic theory which posits that *the seller's warranty* is the most efficient method of regulating quality and yield issues that might arise between buyers

⁶ Plaintiffs Hartkopf and Rudnik alleged pure economic losses. The North Dakota Supreme Court has noted that pure 'economic loss' includes claims for lost profits. *Cooperative Power Ass'n v. Westinghouse Elec. Corp.* 493 N.W.2d 661, 663, n. 5 (N.D. 1992). Their claims for lost profits were thus tailor-made for dismissal under the Economic Loss Doctrine—when the sole injury is to the product itself (and the loss of income from the inability to use the product). The essence of the Economic Loss Doctrine is to check the incessant tide of tort law that tends to erode and eventually swallow contract law. The premise is that economic interests are protected, if at all, by contract principles, rather than tort principles. In other words, the remedy for lost profits is to sue the seller of the product for breach of warranty, rather than suit in tort. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986); *Steiner v. Ford Motor Co.*, 2000 ND 31 ¶ 7, 606 N.W.2d 881, 883-84. And agricultural seed is a product coming within the ambit of the economic loss doctrine. *Hapka v. Paquin Farms*, 458 N.W. 2d 683, 688 (Minn. 1990) (the Economic Loss Doctrine barred a claim brought by a farmer who'd purchased potatoes from another farmer, and lost profits because the potatoes were infected with bacterial ring rot); *King v. Hilton-Davis*, 855 F. 2d 1047, (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (loss of profits due to failure of potato crop barred by Economic Loss Doctrine).

and sellers of seed (e.g., warranty as to variety may establish a reasonable expectation as to yield and quality). Efficient markets establish pricing mechanisms to determine the value of warranty. The Seed Department submits that such market mechanisms are undermined when the State is viewed as the final guarantor of farmer's profit expectations.

The farmer's remedy for loss due to failure of the seed to meet quantity or quality expectations is a contract action against the seller of seed for breach of warranty. N.D.C.C. § 4-09-14(4)(e) precludes the seller of seed from disavowing warranty or responsibility for "the data on the label," which includes the variety of seed sold. Section 5 of HB 1124 repeats this language, that the seller of seed—even if it's the Seed Department—remains responsible for the data on the label.

**TESTIMONY OF SARAH VOGEL
HOUSE JUDICIARY COMMITTEE
HOUSE BILL NO. 1124**

January 23, 2006

Good morning, Chairman DeKrey and members of the Judiciary Committee. I am testifying in my own behalf, as a person concerned about the future of the certified seed industry in North Dakota and the well-being of our farmers who depend each spring on good seed, if they want to have a good year. I personally am glad that we have a farmer/rancher as chairman of the Judiciary Committee, because the topic before you has more to do with farming, and less to do with liability.

I urge that you do not pass this bill.

One of the stated objectives of the bill, and the primary reason for its introduction, is to provide immunity to the North Dakota Seed Department. The caption states it relates "to immunity from liability from contract or tort suits for inspection, analysis and certifications of agricultural and potato seed and crops." This portion of the law insofar as it affects torts is duplicative and unnecessary. As you are aware, the state has a law governing tort claims against the state. It sets forth strict requirements that must be met for any tort claim against any agency, provides a cap on damages, requires strict deadlines on claims filed against state agencies, and so on. The protections and immunities that State agencies already enjoyed were increased during the 2005 session. In a

comprehensive bill dealing with governmental immunity enacted as Chapter 299, the legislature passed revisions to N.D.C.C. Chapter 32-12.1 (dealing with claims against public subdivisions) and Chapter 32-12.2 (dealing with claims against the state). This law provided significant new immunities from liability for breach of "public duties" such as the duty to inspect. As amended, the State Tort Claims Act provides immunity for inspections in N.D.C.C § 32-12.2.2-02(3)(f)(1), which states:

3. Neither the state nor a state employee may be held liable under this chapter for the following claims:

...

- f. A claim relating to injury directly or indirectly caused by a the performance or nonperformance of a public duty, including:

g.

- (1) **Inspecting, licensing, approving, mitigating, warning, abating or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.**

...

I have attached a copy of an article by Mike Hagberg, Staff Attorney, of the North Dakota Supreme Court regarding the reasons and impetus for adoption of the new law providing immunity from liability based on faulty inspections.

If the basic purpose is to protect the Department against liability for its negligence there is no need to adopt the bill. This immunity has already been

provided to the Seed Department and other state regulatory agencies by the 2005 legislative assembly. And, frankly, I can see no basis whatsoever for any agency having "immunity" for breach of contracts. Even when the State enjoyed complete sovereign immunity from torts, it generally allowed suits for breaches of contracts.

The Seed Department serves a very critical role in the state regarding certification of seed variety. I will not use my own words to describe this role. I have attached a copy of January 27, 2004 testimony from State Seed Commissioner Ken Bertsch to the Interim Public Services Committee which states the critical role of the Department in the economy of the state better than I can. I have also attached an article from the North Dakota Seed Journal by the Director of the Field Seed Program that explains the importance of the department's role to make sure (to "verify") that farmers get the seed that they order. There is no time to review this material during this hearing, but I urge that you read these statements before recommending passage of this bill so that you can fully understand the impact of this bill.

As you may be aware, interstate shipments of seed are governed by federal laws which generally require that such seed be certified as to variety by an official state seed certification department such as the North Dakota State Seed Department.

For example, the requirements for interstate shipments of potatoes provide that "U.S. No.1 Seed Potatoes" are "unwashed potatoes identified as certified seed by the state of origin by blue tags fixed to the containers or official State or Federal State certificates accompanying bulk loads, which identify the variety, size, class, crop year and grower or shipper of the potatoes, and the State Certification Agency." (Emphasis added.) In North Dakota we call these "blue tag" potatoes. Under federal law, only "blue" (U.S. No. 1) and "yellow" (U.S. No. 2) potatoes can be shipped out of state. All potatoes under one tag must be of one "variety." If there is even the slightest admixture, the potatoes will not meet blue or yellow tag standards. If a potato cannot meet these blue and yellow tag requirements, including the certification for variety, it is a "white tag" potato and can be sold only intrastate.

I have attached a copy of the front and backs of blue, yellow and white tag potatoes. As you can see, the blue and yellow tags depict North Dakota as the "geographic center of North America" and lines emerge from North Dakota all across the county and abroad to show the distribution of these seed potatoes.

I am very afraid (and I wish that this wasn't so) that, if passed, this bill will affect the eligibility of North Dakota seed potatoes and other seeds to be shipped interstate. Even news of this bill could hurt our competitive position *vis a vis* other seed producing states. On page 1, starting at line 23, and page 6, starting at line 27, the bill states "'Certified' ... does not mean or constitute any type of warranty or representation that the agricultural seed is of the variety or selection identified on the label." Similar language appears at page 5, starting at line 18, and page 8, starting at line 27: "The seed commission, seed department, commissioner, and the commissioner's employees make no warranty or representation of any kind, expressed or implied as to ... identity of variety"

In essence, the Seed Department is asking you to authorize it to get out of the seed purity verification business that it has occupied since 1909, when the state's first pure seed law was adopted. See, 1909 ND Session Laws, Chap. 209,

Pure Seed Law 1929 ND Session Laws, Chapter 186, Potato Inspection; 1931 ND Session Laws, 214, Inspection, Grading, etc., of Potatoes and Other Produce.

During the time that it has been certifying seeds, North Dakota's acreage of certified seed production has grown to over 350,000 acres. And these are high value, niche crop acres. The certified seed business cannot continue in the same strong manner as it has in the past unless buyers of seed have confidence in the certification process. If the one and only certifier in North Dakota, the Seed Department, does not take responsibility in certifications, then buyers will not have confidence in North Dakota seed.

At the same time the state proposes to leave the certification business, it does not provide any opportunity for another entity to enter the certification business nor does it propose to share the fees that it collects. It is not necessary that a state agency be the official seed certifying agency; in fact, in many if not most states, seed certification is done by a crop improvement association. But under present law, no other agency or entity may legally certify seed in North Dakota. See, N.D.C.C. § 4-09-17. Perhaps, if the Seed Department does not want to certify seed variety, another firm would like to step in – but if so, adequate lead

time and preparation must be allowed and the laws must be changed so that the fees paid by the farmers (the Seed Department is fully supported by fees, and not general fund dollars) can be redirected to some other entity that is willing to do the work. That may not be a bad idea at all, but this bill does not provide the necessary time for a shift in seed certification to another entity.

The bill places the principal responsibility for assuring the variety of the crop on the grower. For example, it states "A vendor may not use on seed labels or tags ... a disclaimer or nonwarranty clause with the intent to disclaim responsibility for the data on the label required by law." Variety is required by federal and state law to be on the label. No one would deny that the grower of certified seed has an independent responsibility to do the best he or she can to assure the genetic purity and quality of the seed that is sold, but a grower cannot serve the vital role that an official state seed certification agency must serve. A grower cannot serve as an independent third party verifier on the crop that he/she grows. Certified seed customers want and need the extra safety of knowing that a state agency or other official state certification agency has inspected the crop in the field for verification of variety. They may know or trust the breeder or grower, but the certified seed buyer still needs independent verification that the

variety is correct. And this is good for the grower/seller too. If a certified seed grower has received the wrong variety, the grower would much prefer to have the seed rejected by a certifying agency than have it improperly certified and resold to other customers. Seed is simply too important to be left to chance.

Frankly, I am appalled that the bill was even proposed by the Department. I believe it betrays a fundamental disregard of the historic purposes of the Agency: protection of the seed customer - the farmer - and ensuring consistent high quality of North Dakota-grown certified seed. This bill should be rejected by you in the same way that a good farmer will reject bad seed. Nothing good comes of bad seed; nothing good will come from a bad seed law.

I would be pleased to answer any questions or provide any legal or factual background to the Committee that I am able to provide, now or in the future.

Thank you.

Legislature Widens Scope of Government Immunity

By Mike Hagburg, Staff Attorney, North Dakota Supreme Court



Mike Hagburg

The legislature during the 2005 session overhauled North Dakota's state and political subdivision liability statutes, addressing the public duty doctrine and eliminating language relating to the personal injury exception.

The legislature also adopted new statutory language specifying that the state and its political subdivisions cannot be held liable for injuries caused by non-employees.

The legislature's revisions to N.D.C.C. chapters 32-12.1 and 32-12.2 on state and political subdivision civil liability can be found in chapter 299 of the 2005 North Dakota Session Laws.

The Public Duty Doctrine

Public duty doctrine language is now part of N.D.C.C. §§ 32-12.1-03 and 32-12.2-02. The basic principles of the doctrine are set out at the end of § 32-12.1-03(1): "The enactment of a law, rule, regulation, or ordinance to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist." Like language is used in § 32-12.2-02, with "state" substituted for "political subdivision."

Under §§ 32-12.1-03(3)(f) and 32-12.2-02(3)(f), a state or political subdivision employee may not be held liable for claims "directly or indirectly caused by the performance or nonperformance of a public duty." The statutes list some public duties: inspection and licensing; monitoring probationers and parolees; providing law enforcement services; and providing fire protection.

Public duty immunity under the amended statutes is not absolute. Sections 32-12.1-03(3)(g) and 32-12.2-02(3)(g) limit immunity when there is a "special relationship" between the government entity and the injured party. For a special relationship to exist, there must be: direct contact between the government entity and the injured party; assumption of an "affirmative duty" to protect the injured party; knowledge that neg-

lect of this duty could cause harm; and the injured party's "justifiable reliance" on the government entity's fulfillment of its duty.

The North Dakota Supreme Court considered the public duty doctrine in *Ficek v. Morken*, 2004 ND 158, 685 N.W.2d 98. *Ficek* involved a house that had many construction problems. Fargo municipal building inspectors had inspected the house more than 40 times during its construction. Gary and Rhonda Ficek, who bought the house from the people who built it, claimed Fargo breached its duty to properly inspect the house. The jury agreed, awarding the Ficeks \$107,000 in damages.

Fargo claimed the public duty doctrine made it immune from liability. The Supreme Court rejected Fargo's position, calling the public duty doctrine "incompatible with North Dakota law." *Ficek*, 2004 ND 158, ¶ 31. In a special concurrence to *Ficek*, Chief Justice Gerald VandeWalle, joined by Justice Dale Sandstrom, explained that the wording of § 32-12.1-03(1) barred adoption of the public duty doctrine.

Although the *Ficek* court rejected adoption of the public duty doctrine, the court stated that "[i]f the legislature believes certain activities conducted by political subdivisions require more stringent protection than the limitations currently provided in N.D.C.C. ch.

32-12.1, it may provide that protection." *Ficek*, 2004 ND 158, ¶ 30. The changes approved by the 2005 legislature appear to provide "more stringent protection" to both political subdivisions and the state by incorporating the public duty doctrine into North Dakota's immunity statutes.

The Personal Injury Exception

In addition to making public duty doctrine amendments to the state and political subdivision liability statutes, the legislature eliminated language in § 32-12.1-03(3) that restricted political subdivision immunity when a "personal injury" arose from "the execution of any legislative or quasi legislative act, judicial or quasi judicial act, or discretionary function." 2005 N.D. Laws ch. 299, § 2.

The personal injury exception, while not part of the state immunity statutes, has been part of N.D.C.C. ch. 32-12.1 since 1977. 1977 N.D. Laws ch. 303, § 3. The North Dakota Supreme Court discussed the exception in *Peterson v. Traill County*, 1999 ND 197, 601 N.W.2d 268. *Peterson* involved a detainee who suffered a serious head injury while confined in the Traill County jail. Traill County claimed immunity from liability for

Continued on page 18

the injury and won judgment as a matter of law. The Peterson court reversed and remanded the case for a new trial.

As one ground for its decision, the Peterson court relied on § 32.1-12.1-03(3)'s personal injury exception. The court indicated that the statute precluded legislative, judicial or discretionary function immunity in situations where a governmental act or omission caused a personal injury. Peterson, 1999 ND 197, ¶ 19. Based on this reasoning the court decided that, because the plaintiff in Peterson alleged he suffered personal injury caused by the negligence of his jailers, the trial court erred in dismissing his claims as a matter of law.

Under the Peterson rationale, the personal injury exception would have barred a political subdivision from using legislative,

judicial or discretionary function immunity to escape a case without a trial if the plaintiff alleged that a government act or omission caused a personal injury. But the 2005 legislature deleted personal injury exception language from § 32.1-12.1-03(3). Now, if grounds for immunity exist under § 32-12.1-03, a political subdivision may be able to seek dismissal as a matter of law regardless of the type of injury claimed.

No Liability for Non-Employees

Finally, in new language added to §§ 32-12.1-03(3) (e) and 32-12.2-02(3) (e), the legislature specified that political subdivisions and the state would not be liable for "injury directly or indirectly caused" by a non-employee. This is consistent with prior law -- the North Dakota Supreme Court decided

long ago in *Montain v. City of Fargo*, 38 N.D. 432, 166 N.W. 416 (1917), that a political subdivision is not liable for injuries caused by an independent contractor.

Because the modified comparative fault statute, N.D.C.C. § 32-03.2-02, allows apportionment of "the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury," the new statutory language may give governmental bodies a tool to reduce their liability in cases where a non-employee causation is an issue.

Opinions expressed in this article are those of the author and not necessarily those of the North Dakota Supreme Court.

THE LAWYERS CONSULTANT



Dwain Fagerlund
Counselor at Law

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- Arbitration

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- Retreats/Seminars
- Litigation Strategy
- Individual Consultations

EXPERIENCE

- Licensed in North Dakota and Minnesota state and federal courts
- 15 years general practice and civil litigation
- Practice Areas (both Plaintiff and Defendant):
 - Personal Injury
 - Ag Drainage/Flood Control
 - Construction
 - Will Contests
 - Commercial
 - Insurance
 - Professional Liability
 - Governmental Liability
- MSBA Board Certified Civil Trial Specialist
- North Dakota and Minnesota Qualified ADR Neutral

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POTATO CERTIFICATION

Defined by Standardization Committee
Certification Section
Potato Association of America (PAA)

Certification is a service provided to the public by a third party for the maintenance and increase of quality propagating material of cultivars grown and distributed in such a manner as to insure variety purity.

Certification consists of making visual inspections of potato plants and tubers and applying appropriate disease, grade defect and varietal mixture tolerances for those criteria that have been identified in this article. Tolerance is a permissible allowance for these factors. Inspection is based on visual observation of sampled plants and tubers of each seed lot. Sample sizes and methods of inspection are at the discretion of the State Seed Department.

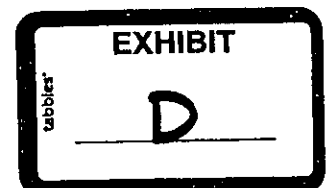
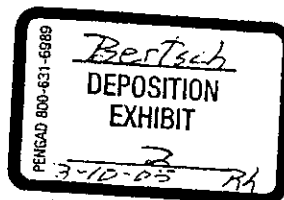
When zero tolerances are applied, Certification does not mean the lot is absolutely free of disease, but that none was visually observed during routine inspections.

Diseases and diseased plants, varietal mixtures and grade defects which cannot be observed visually at the time of inspection may be present in excess of specified tolerances.

Special laboratory testing may be carried out for those pathogens that are not exhibiting clear, concise disease symptoms on the plant or are considered latent in the potato.

Basic Certification Procedures are as follows:

1. Planting acceptable (approved) seed stock
2. Making at least two visual inspections during growing season for disease or off-types
3. Observing tubers at harvest or storage time
4. Grade (tuber quality) inspection made at shipping time





North Dakota State
NDSSD
Seed Department

1313 18th St. N., P.O. Box 5257
Fargo, ND 58105-525
Phone: (701) 231-5400
Fax: (701) 231-5401
Web: ndseed.com

Ken Bertsch
State Seed Commissioner

Testimony

Interim Public Services Committee
Northern Crops Institute
Fargo, ND

January 27, 2004

Good morning Mr. Chairman and members of the Public Services Committee. My name is Ken Bertsch, and I serve as the North Dakota State Seed Commissioner and Administrator of the North Dakota State Seed Department (NDSSD). I appreciate the opportunity to speak to you today on behalf of the State Seed Commission, and to provide you with information regarding the work of the State Seed Department for the agriculture industry of the state.

I hope to provide you with a broad overview of our programs and operation, leaving enough time to answer questions the Committee may have. Our entire program management team is in attendance and will be happy to provide you with technical information if needed. An important goal of this presentation is to lay groundwork, so to speak, for our tour of the Seed Department facilities later today, where you will get a better insight into the services provided in our laboratory and seedstock production areas. I will be giving more detail in the certification and regulatory areas, but will still be "hitting the high spots" to the greatest extent to leave time for questions for our staff.

NDSSD Overview

The ND State Seed Department was formed in 1931 by action of the Legislative Assembly. The Seed Department is the state-designated authority for seed certification, seed regulatory and laboratory testing services for North Dakota producers and the agriculture industry. Our organization is unique among peers in the certification or seed regulatory industry. Many, even most, states designate a private entity such as a Crop Improvement association as the state's field seed certifying agency. Either a Department of Agriculture or University agricultural division generally provides potato certification. State departments of agriculture do virtually all seed regulatory work. Only one other state (Arkansas) houses all seed related functions in one unit in a state agency format. Taken a step further, North Dakota is the only state to do this, but oversee their agency with a board of directors and without general fund monies. As a self-funded agency of government, the NDSSD derives its revenues from fees for services provided.

The State Seed Commission is the statutory governing board for the North Dakota State Seed Department, approving budgets, program changes and fee schedules, setting policy guidelines and appointing the Seed Commissioner. The Seed Commission is comprised of members appointed by various industries the Department serves, and represents a broad cross-section of

agricultural commodities grown in this state and region. The nine-member group consists of a representative from the ND Crop Improvement and Seed Association, the ND Certified Seed Potato Growers Association, the ND Agricultural Association, the ND Dry Edible Bean Seed Growers Association, the Northern Plains Potato Growers Association who is a North Dakota resident, an elected member of the ND Potato Council, a representative of the ND Grain Dealers Association who also operates a state-approved seed conditioning plant, the Director of the NDSU Agricultural Experiment Station, and the Commissioner of Agriculture or designee who serves as chairman. The Commission appoints the State Seed Commissioner who serves as chief executive officer of the agency.

Again, the most unique feature of this agency is the self-funded and board governed operation of the Department. The Seed Commission provides a business-minded, producer focused appraisal of the department's fee structures, programs and operations.

Organizational Structure

The NDSSD operation consists of five primary Program areas: ***Field Seed, Regulatory, Potato, Laboratory Services and Administration.***

The information provided in Appendix #1 is an organizational chart for the Seed Department. Additionally, we have included as Appendix #2 a program flowchart, which shows the Departments organizational structure in terms of the programs and services provided here. An interesting piece of information included in this presentation is a look at how the Department budget is divided by program area. Taken together, these three items provide a structural look at the agency, its people and the financial resources utilized in our work.

Field Seed Program

The ***Field Seed Program*** is the second largest (in budget terms) and fastest growing program area at NDSSD, performs an expanding role in the agriculture industry in North Dakota, and is the largest of it's kind in the U.S. The primary program functions include: Field Inspection, Final Certification, Custom Programs, Seed Promotion, Conditioner and Handler Approvals and Technical Assistance.

The goal of this program is maintenance of high quality seed grown and utilized in North Dakota through a product certification system. NDSSD is a member of AOSCA, the Association of Official Seed Certification Agencies, which serves as the umbrella organization for all seed certifiers in the U.S. and Canada. North Dakota certification standards (found in Title 74 of ND Administrative Code) are modeled upon, and usually more strict than similar standards utilized for seed certification of crops of the same types in other states.

Program services include:

- Field inspection and certification of virtually all northern grown crops
- Final certification of seed based on lab analysis and field inspection results consistent with ND seed certification standards
- Inspection and approval of certified seed conditioning plants and bulk retail facilities
- Development of custom programs designed to provide service to seed industry (re. food grade soybean quality assurance, identity preservation/segregation services for specific quality factors)
- Acceptance of imported seed based upon quality standards equal to ND

- Providing technical resources to ND Crop Improvement and Seed Association., NDSU Foundation Seedstocks Program and plant breeders, NDSU Research Foundation and various commodity group seed committees
- Promotion of production and usage of ND certified seed

Full-time and seasonal field inspection staff is trained in all areas of field certification criteria important to the quality assurance of seed in the Field Inspection process. Too numerous to mention here, these criteria assure that the genetic integrity and purity of seed meets the field quality standards necessary to pass to the next step of the certification process. I have included some statistics related to this program for the just-completed season.

The Final Certification process takes the quality assurance protocols to the next level. Harvested seed is sampled and sent to the State Seed Laboratory for purity and germination analysis. Other important factors analyzed include noxious weed and seed diseases, depending on the type of crop being examined. All seed to be sold must meet the final certification standards for that crop before it can be legally labeled and marketed in North Dakota.

Traditional seed certification duties such as field inspections and final certification are the primary functions of the Field Seed Program. However, custom services such as quality assurance and identity preservation programs are becoming high profile issues for the Field Seed Program as the agriculture industry evolves.

Seed Certification differ from Quality Assurance (QA) programs in that Certified standards are consistent state-to-state, while QA programs carry the quality standards as described by the company or owner of a particular seed variety. These standards may vary between companies, and the only requirement is that the product meets the standards claimed by the label. The Seed Department provides contract field inspection services for seed companies like ProSeed, based on their internal QA standards for seed production.

By virtue of language in Ch. 4-09, the Department also provides the bulk of the promotion effort for the certified seed industry through the ND Crop Improvement and Seed Association. Department personnel develop and implement advertising campaigns through various types of media using on-campus and outside technical assistance and vendors. Our staff provides hundreds of person-hours at statewide and regional tradeshow "selling" the product of our certification programs. The funding for this effort is a combination of final certification monies granted to the NDCISA for advertising costs, and Department budget devoted to travel and personnel costs.

Additional staff and administrative effort is devoted to direct involvement with other on-campus and industry partners such as NDSU Foundation Seed, NDSU breeding programs and AOSCA, among others.

The final function of the certification program is actually a combined effort of Field Seed and Regulatory personnel. Seed Conditioner and Facility Approval inspections are designed to ensure that seed conditioning and handling processes will maintain the purity of seed prior to and during distribution to producers. North Dakota requires certain equipment for the conditioning and handling of certified seed, as do most states at some minimum level. Without these minimum requirements, a seed cleaning plant or bulk retail facility cannot legally process or distribute certified seed. These criteria are the last, but extremely important part of the Field Seed certification process.

Regulatory Program

The **Regulatory Program** is responsible for the enforcement of state and federal seed laws, regulation of seed labeling and sales, and consumer protection issues for the seed industry. Sampling, testing, auditing and investigating complaints on seed related issues are all functions of the Regulatory Program. Regulatory personnel administer Non-Resident Seed Dealer and Seed Labeling permits which are an integral part of tracking and identifying seed sales. Regulatory inspections are performed throughout the state, wherein inspectors draw samples from bagged and bulk seed lots and send to our laboratories for analysis. The samples are tested for compliance with label claims, and if found out of tolerance, are stop-saled pending further evaluation by the department or action by the retailer.

The proliferation of protected varieties (re. Plant Variety Protection Act), being developed by private industry and public universities will increase the workload of our regulatory staff. Field Seed and Regulatory programs work cooperatively to determine potential problems and violations adversely affecting seed growers, private companies, NDSU, and their collective proprietary interests. A growing issue in the regulatory program is dual ownership of seed, through germplasm and trait partnerships. For example, most Roundup-Ready seed varieties are co-owned by a seed company or university (germplasm or variety) and Monsanto (RR trait). Seed violations are usually the responsibility of the variety owner, however, seed disputes regarding unlawful use of protected seed (violations of PVP or technology agreements) become multi-faceted. In all cases, the first line of responsibility for pursuit of violations involves the owner, with Seed Department regulatory efforts maintaining a second position. In North Dakota, specific laws related to seed disputes have evolved in the past two legislative sessions which outline specifically the steps to be take in dispute situations, and now include action by the Seed Commissioner through activity of Field Seed and Regulatory programs.

Potato Program

The **Potato Program** remains the largest program area in budget and staffing terms despite reductions over the past decade. While increasing disease problems and market pressures have lowered certified seed production acreage in North Dakota, these difficulties also expand the need for technical resources of the program. The Potato Program administrative functions are handled in Fargo, while the operation center for field work is performed through a regional facility in Grafton.

As in the Field Seed version, the Potato Certification program is strictly product quality based. The major difference in the two areas is the "intensity" of inspection. The number of disease factors associated with potatoes as a vegetable crop are more numerous and invisible than with other field crops certified by the Department. The amount of training and experience necessary for successful disease and physical quality determination in potatoes is immense, necessitating a different approach to program training and staffing.

The Potato Program provides these services to the potato industry in North Dakota:

- Field inspection and certification of seed potatoes
- Grade inspections for seed and commercial growers, and processors
- Licensing and bonding of wholesale potato dealers
- Approval of seed quality for imported product
- Winter disease testing program carried out in Homestead, Florida
- Support and technical resource for ND Certified Seed Potato Growers Assn.

- Promotion of the production and usage of ND certified potato seed
- Production and distribution of foundation potato seedstocks

The inspection process requires 3 field inspections by rule, and visually analyzes virus levels, pathological diseases and examines plant type factors as minute as leaf color variations and structure. Field inspectors must be able to determine if one plant in thousands is infected with potato Ring Rot symptoms (for example), invisible to the layman, which if allowed to proliferate on a farm may cost millions of dollars in damages. Obviously, the legal liability in these situations is profound and can inevitably reflect back on certification agencies.

Potato certification programs operate on strict limited generation systems, meaning that no potato seed will be reused more than a certain number of years, helping to keep disease levels low. Potatoes failing to meet the quality standards set forth in rule for those particular generations are removed from the seed system.

Potato Shipping Point Inspection is a service requested by growers or brokers to determine the physical quality, or grade, of a seed or commercial potato lot. The service is provided by the Seed Department through a cooperative agreement with USDA/AMS to perform commodity grade inspections on vegetables, under USDA standards. These standards are replicated (for the most part) in NDAC Title 74, and examine the internal and external defects of potato tubers. These determinations are provided as an independent, third-party review, and function as an observation of potato quality for both buyer and seller of the commodity.

Potato seed certification has a different method of final certification, accomplished through the Post-Harvest Testing process. North Dakota's post-harvest test is performed in Homestead, Florida on property owned by the ND Certified Seed Potato Growers association. Seed destined for re-certification is sent to Florida in small amounts (300-1200 tubers per seed lot), planted in November and visually examined in January for the presence of disease symptoms. Much like final certification in Field Seeds, the seed lots failing to meet growout criteria are eliminated from the ND Seed Program. The post harvest testing process is a critical component of the certification process in terms of maintaining seed quality.

The NDSSD is one a few certification programs in the U.S. to house it's own nuclear seed production unit in our Potato Seedstocks unit. The first generation of potato seed tubers must be produced under sterile, tissue culture environments. Seed is developed through a process of stem/node cutting and growth in tubes. From there, plantlets are transplanted in our greenhouse, grown to physiological maturity and harvested, creating pre-nuclear seed. This seed is the finest, disease-free product on the market, and is expensive in terms of our production costs and sales-price to the grower. This is truly the first step in a complicated and high-input process that is potato production.

The Potato Program is also responsible for a number of other parallel activities associated with the seed industry. Program staff handles seed promotion work similarly to Field Seed programs including advertising and on-site trade show promotion on behalf of the ND Certified Potato Seed Growers Assn. Program staff is actively involved with a number of certification groups, serving on various committees and projects, and interact with NDSU and regional breeding programs in research and production on new varieties.

Laboratory Services Program

The NDSSD **Laboratory Services Program** is an enterprise expected to grow in the next decade. The development of genetically enhanced materials, and trait specific conventionally bred seed, is creating a demand for advanced trait and quality analysis services, including laboratory testing, for a growing number of types and varieties of crops. Our laboratories also perform internal (non-revenue producing) functions by analyzing seed for regulatory and other purposes.

As Field Seed and Regulatory programs evolve, and seed biotechnology expands, the Laboratory Services division will be expected to deliver high-quality technical services. The training process for advanced purity analysis requires long-term commitment to additional staffing. A critical issue for future program development in this area is one of determining adventitious presence of traits in seed and commodities. This laboratory support for IP inspection programs is an example of the interaction between distinct Department program enterprises.

The Laboratory Services Program is comprised of the Seed Quality and Diagnostic laboratories. Program services include (among others):

Diagnostic Laboratory

- Varietal ID (electrophoresis)
- Plant health/pathology/disease testing
- Seed trait analysis
- GM event testing
- Potato virus testing

Seed Laboratory

- Germination testing
- Seed purity testing
- Trait bioassay (growouts)
- Import/export quality tests
- Seed vigor testing

The State Seed Laboratory is designated as the state's official seed lab in Chapter 4-09. Its primary function is in support of Field Seed Program certification efforts, however, the lab performs service testing for producers throughout the region. The bulk of testing in this enterprise involved germination and purity analysis on cereals, oilseeds, soybeans, edible beans and grasses. Most of the internal support for Regulatory Programs occurs in verifying label claims for purity and/or germination.

The Diagnostic Laboratory concentrates it's focus toward plant pathology and disease testing. An important service performed here includes electrophoresis testing, a varietal determination test especially important to supporting Regulatory activity. Additionally, the Diagnostic Lab has expanded it menu of services to include trait testing for specific proteins by ELISA, and DNA based PCR testing.

The Laboratory Service area of the Department has the potential for growth similar to Field Seed custom programs. Much of the identity preservation work in the future will likely require backup laboratory testing to determine the presence or absence of traits. Much of today's herbicide tolerance testing can be accomplished in a bioassay, or growout, type of method. While this may continue in the future, it is likely that protein or DNA based testing will be the method of choice, taking far less time to accomplish. Testing costs will moderate as competition and test perfection occur.

Administration Program

The **Administration Program** provides overall coordination of facility, equipment, technology and support service resources to the Department. Administration budgets include capital improvements, facility maintenance, information technology and equipment funding necessary to provide internal operating support to all program areas. A positive outcome of improving technology internally has customer service impacts. A major software overhaul two years ago included a customer access function to information generated by the Department. NDSSD clients can receive a password protected entry to our database in order to access information related to laboratory testing or field inspection services provided to them. This instant-access feature helps growers and seed companies in marketing product and operating efficiently.

Predicting and Planning for the Future

Many factors are affecting the research, development and implementation of services in the seed industry.

- The corn and soybean industries have moved from certification services to internal or third party quality assurance processes for verifying quality control. If this evolution holds true in the future for crops predominant in this region, designated agencies such as the Seed Department will have a less "concrete" foundation of business.
- Industry consolidation is leading to fewer, larger and more research-intensive breeding programs in private seed companies, driving increasing release of private seed varieties. While healthy for agriculture in terms of varietal availability, two consequences occur: higher priced product, and less incentive for state governments to fund public breeding programs. Proof is in the corn industry, where public breeding efforts are nearly gone, and a few major companies release most of the new germplasm in the marketplace. The point: private companies may opt for the QA route of seed quality assurance. Also, these companies may either own the specialized traits, or join with trait providers, and further distance from traditional certification services in favor of alternative QA options.
- Food security issues will begin impacting all certification services, including seed. It is inevitable that food labeling will occur at some point in the not-too-distant future, requiring that food products be traceable, or identified back to some level of source identification. That source identification could extend as far back as a farmers field. This may sound far-fetched, but agencies such as NDSSD must be positioned to provide field inspection and laboratory services that can accomplish this feat.

A copy of the Seed Department Long Range Plan is attached as Appendix #3 of this testimony. The Plan provides a glimpse of the Seed Commission's intentions to pursue future improvements for Department programming, and mirror to a great extent the impact areas highlighted above.

Summary

Mr. Chairman, we believe there to be a number of challenges facing the Seed Department in the next decade. As the Seed Department Long Range Plan points out, a major challenge for us is the pressure to respond to needs like a private business, while meeting the requirements of state government. It should be no surprise to this Committee that the term "the wheels of government often turn slowly" is not without some truth. However, as pointed out previously, the Seed Department must be flexible enough to initiate and provide needed services for the agriculture industry. This flexibility is critical to responding to constant change in the seed industry.

Many of the obligations of our agency to the agriculture industry cannot be predicted, but must be immediately addressed. Dealing with quarantine pests such as karnal bunt or potato diseases, or testing for biotech traits in seed or commodities typically fall upon the Seed Department. The Legislature continues to discuss many of the issues related to biotechnology, but the agriculture industry would expect an immediate response should a need develop. As we have seen recently with the BSE scare in the livestock industry, public patience for government reaction to problems is not long. The Department must be versatile enough to cover any and all of these possibilities in a timely manner.

The Seed Department is a very self-reliant agency, with the ultimate goal of providing high-quality, low-cost service to the agriculture industry. The real advantage to producers in North Dakota by comparison to other states; their seed certifying agency can concentrate on "breaking even" rather than creating profit. This is kept in mind while creating budgets and operating the agency. Despite this self-reliant attitude, it is clear that the NDSSD must seek to create partnerships and cooperative ventures that allow us to build critical services and maximize the use of limited resources.

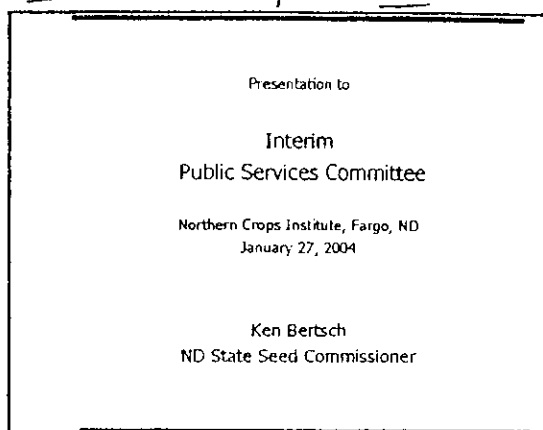
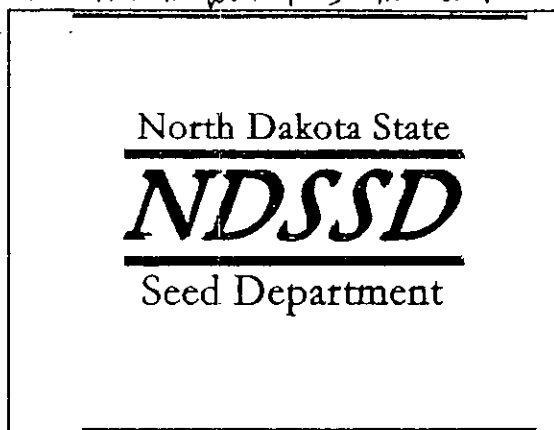
The take-away message we hope to deliver is this: Allow us the flexibility to operate effectively, we intend to deliver "ahead of the curve" service for agriculture in North Dakota.

I wish to thank the Chairman and Committee for your time and attention to this report, and will offer to answer any questions you may have on the ND State Seed Department.

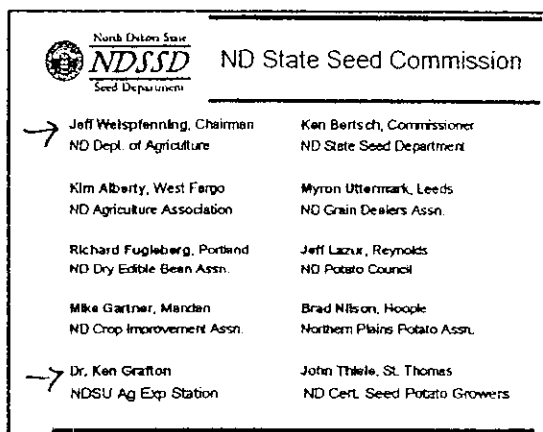
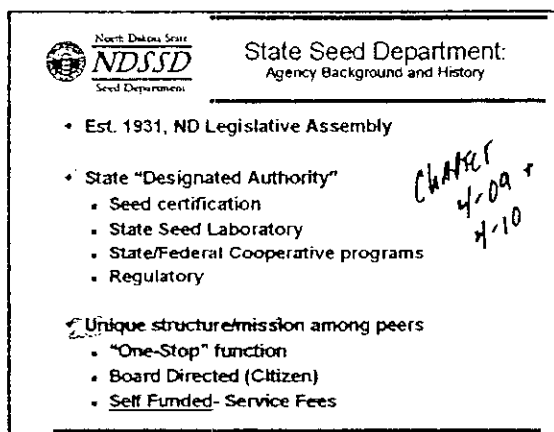
SPEAKING on Behalf of Seed Commission : INTRODUCE man

PROGRAM MANAGEMENT TEAM: ~~HANDLING~~, HANDLING Really Tough Questions

Will TRY TO WORK THES ACCORDING TO TIME RESTRAINTS : Really MOVE FAST

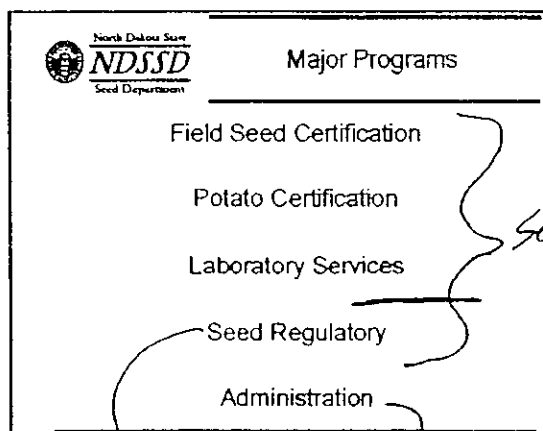
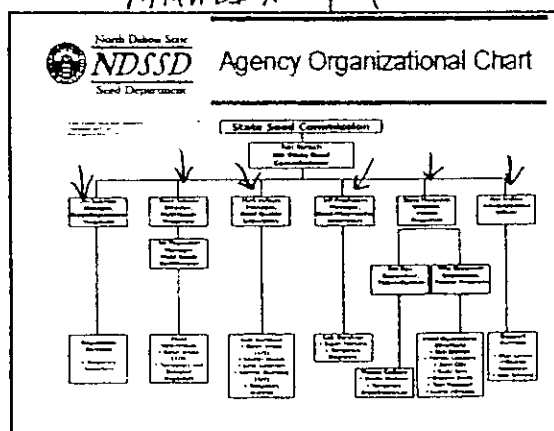


Put TOGETHER A Primer on NDSSD : High Points, Significant Functions of our operation
Groundwork for Tour



BROAD Cross-Section of Industry

APPENDIX #1



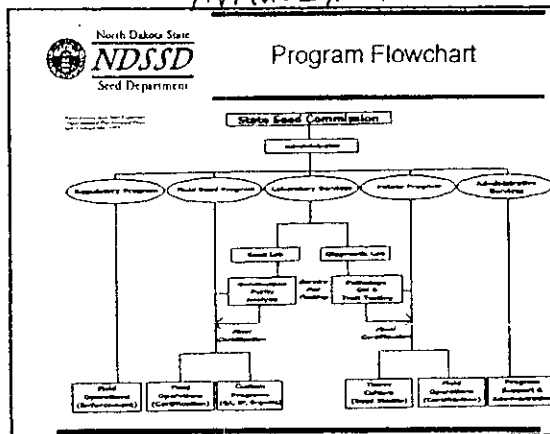
Programs : Strategically Aligned
(will show in 2 slides)

INTRODUCE MGMT. TEAM

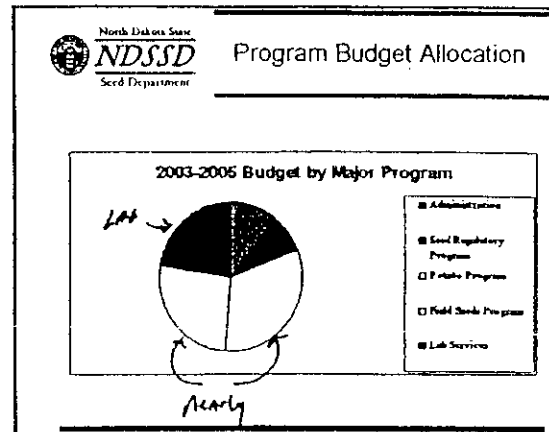
100189

TAKEN TOGETHER
 PROVIDES STA WITH LOOK
 PROGRAMS, ORGANIZATION + RESOURCES

APPENDIX #2



ORGANIZATIONAL STRUCTURE FOR PROGRAMS



NEARLY
 EQUAL
 BUDGET-WISE

North Dakota State
NDSSD
 Seed Department

Field Seed Certification Programs

- Field Seed Inspection
- Seed Final Certification
- Custom Programming
- Seed Promotion
- Technical Assistance
- Seed Conditioner & Facility Approval

Program Director: Steve Sebesta, MS
 NDCC 4-09, 4-42

SS: PLANT BREEDERS - PRIVATE COMPANIES
 - FOR SEED PROGRAMS

North Dakota State
NDSSD
 Seed Department

Field Seed Inspection

- Purpose: Product Certification and Assurance of quality factors
- Largest Field Crop certification program in U.S.
- Association of Seed Certification Agencies (AOSCA)
- Field Cert. Standards- NDAC 74-03

STEP I

PRODUCT CERTIFICATION: STANDARDS, PRODUCT INSPECTION
 ANALYSIS + TESTING

North Dakota State
NDSSD
 Seed Department

Field Inspection Training

Applying the criteria in practice

FT + SEASONAL STAFF: TRAINED

- FIELD STANDARDS - ALL TYPES
 - HAND TYPES
 - GLUME + KRAEL CHARACTERISTICS

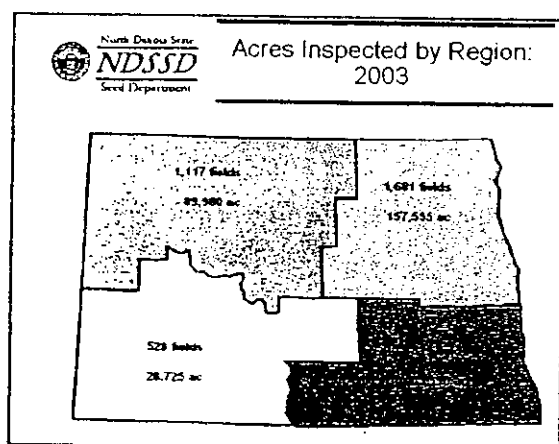
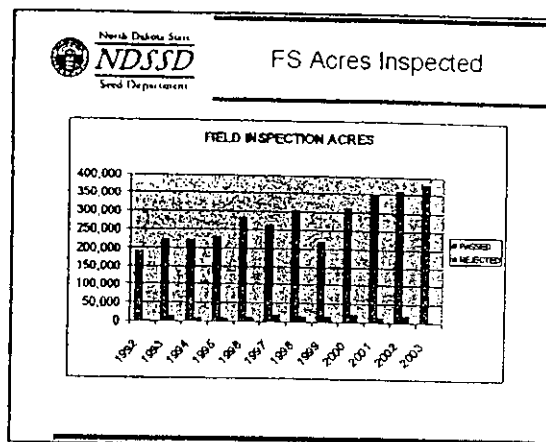
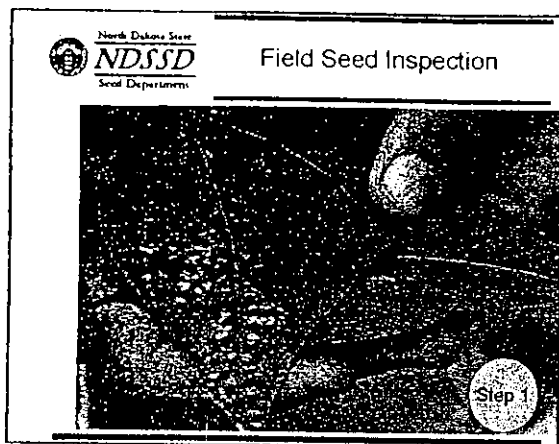
BASED on VARIETY
 DESCRIPTIONS

- ARROWS + PROBLEM WEEDS

North Dakota State
NDSSD
 Seed Department

Field Seed Inspection

- Field Eligibility
 - Seed eligibility
 - Field Isolation



North Dakota State
NDSSD
Seed Department

FS Program: Facts and Figures, 2003

385,551	Total acres inspected
4,542	Total fields inspected
90	Days, "Window of Opportunity"
23	Crops inspected
283	Varieties inspected
846	Seed growers
160	Bulk retail facilities
157	Approved seed conditioners
37	Mobile seed conditioners
34	Field inspectors
4	States inspected in
1	Citizens attending rules hearing

Courtesy: Weiland

EACH W/ DIFFERENT CHARACTERISTIC

Working Relationships of Neighbors
AGRA INTERAGENCY

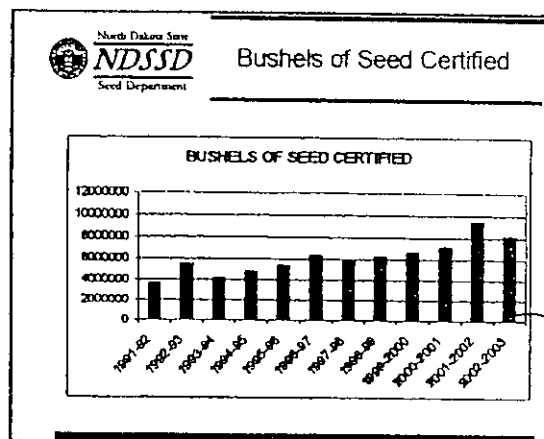
Committee
INTEREST IN
Rule Making

North Dakota State
NDSSD
Seed Department

Final Certification

- Laboratory analysis of quality factors
 - Germination
 - Purity standards
 - Presence/absence of noxious weeds
 - Presence/absence of disease
 - Presence of known traits (herbicide resistance)
- NDAC 74-03

Step 2



STEP II

No Retained
GRAIN YET

100191

3

North Dakota State
NDSSD
Seed Department

Custom Programs

- Identity Preserved (IP) Inspections
 - "Traceability" of product
 - Movement to food chain
- Move toward Quality Assured (QA) processes
 - Internal or 3rd party inspections, company criteria or standards
- "Process" Certification: ex. Organic inspection, USDA/AMS Process Certified programs

North Dakota State
NDSSD
Seed Department

Promotion and Technical Support

- Seed Industry Promotion (NDCISA partners)
 - Statewide and regional trade shows
 - Print, radio and TV medias
- Technical Support & Partnerships
 - NDCISA (other commodity/seed groups)
 - NDSU Foundation Seed Project, Breeders
 - AOSCA- Regional & National Assn. (Committee Assignments)

All Funds
Generated B
Final Certifica.

Interestingly:
Active w/
Breeders in
Describing
Characteristics
of Varieties

North Dakota State
NDSSD
Seed Department

Conditioner and Facility Approval

- Annual Inspection and Approval process
 - Ensuring ability to generate and market quality product
- Technical Support
 - New facility construction
 - Facility improvements
 - Conditioning processes
 - Compliance with standards
- Conditioner/Facility standards, NDAC 74.03

Step 3

LAST
STEP: But
Important

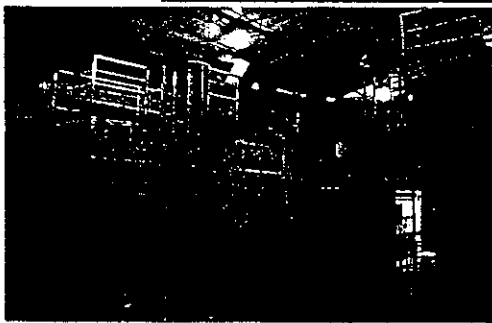
North Dakota State
NDSSD
Seed Department

Conditioner photo



North Dakota State
NDSSD
Seed Department

Conditioner Approval



North Dakota State
NDSSD
Seed Department

Warehouse/Handler



Primary

North Dakota State
NDSSD
Seed Department

Seed Regulatory Program

Responsibilities:

- Enforcement of State and Federal Seed Law
- Regulation of seed labeling and sales
- Compliance Measures:
 - Sampling, testing, auditing.... "Stop Sale"
- Consumer Protection: Primary objective
- Regulatory rules, NDAC 74-02

Program Manager: Jim Swanson, BS
NDCC 4-09, 4-24, 4-25

Step 4

Post Field Seed Marketing

Secondary BUT Growing

North Dakota State
NDSSD
Seed Department

More Regulatory....

- Plant Variety Protection (PVP) — *Limited*
- Evolution of "Joint Ownership" of seeds
 - Owner of seed germplasm
 - Owner of trait
 - Technology agreements vs variety protection
- Evolution of "Seed Disputes", impacts on state regulators (see: NDCC 4-24-13, Nelson Law)

Authority to pursue

unchartered territory

AG Department + Seed Department: Mandated Investigatory Process -

Designed to protect producer

North Dakota State
NDSSD
Seed Department

Potato Certification Programs

Potato Field Inspection

Shipping Point Inspection

Post Harvest Testing

Potato Seedstocks Production

Program Director: Steve Marquardt, MS+
NDCC 4-09, 4-10, 4-26

2nd largest in United States (IDATO #1)

North Dakota State
NDSSD
Seed Department

Grafton Office



Operations Center

CENTRAL Point - Field SERVICES

2-4 Years Field "Apprenticeship"

STAFF

North Dakota State
NDSSD
Seed Department

Potato Field Inspection

- Product Certification, to a different degree
- Based on visual factors, plant analysis
 - *Intensive* (3 inspection minimum)
 - Criteria: *nearly invisible to untrained eye*
 - Disease/virus factors are primary
- Limited Generation systems (nationwide)
 - Perishable commodity, high liability levels
- Potato Cert./Grade standards, NDAC 74-04

Step 1

North Dakota State
NDSSD
Seed Department

Potato Field Inspection



*AVC
15-20 years experience*

Criteria / Standards

- Virus
- Disease symptoms

*- Masking
- Environment Sensitive*

(Heat, Drought, Pesticide Application)

2 Guys Arguing About A Plant w/ "Symptoms"

5

100193

North Dakota State
NDSSD
Seed Department

Field Inspection factors



North Dakota State
NDSSD
Seed Department

Shipping Point Inspection

- Based upon visual analysis of physical quality factors: ex. rots, hollow heart, size/weight etc.
- USDA-AMS/NDSSD Cooperative Agreement:
 - USDA Commodity Grade standards for vegetable inspection
 - Examining internal and external defects
- Applies to both seed and commercial production (at request of grower).

Step 2

North Dakota State
NDSSD
Seed Department

Shipping Point (Grade) Inspection



North Dakota State
NDSSD
Seed Department

Post-Harvest Testing

- Requirement for re-certification of seed (all programs nationwide).
- ND Winter Test: Homestead, Florida
- ND Cert. Seed Potato Growers Assn.: Land, production costs, testing
- NDSSD: Technical inspection services
- Objective: Determination of virus carryover

A Final Certification - NRC process

Step 3

*UNDER STANDARDS - INCLUDING FOR RE-CERTIFICATION
(Continued SEED Expansion)*

North Dakota State
NDSSD
Seed Department

Florida Winter Test



North Dakota State
NDSSD
Seed Department

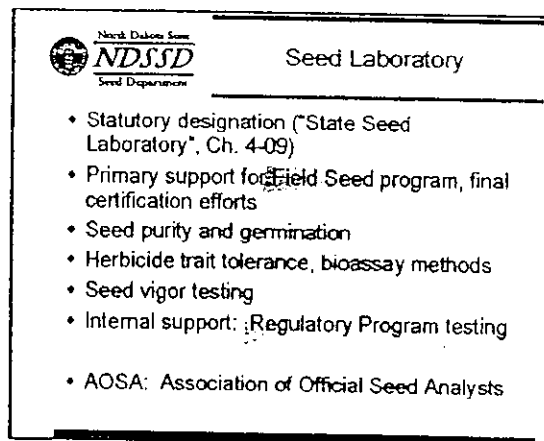
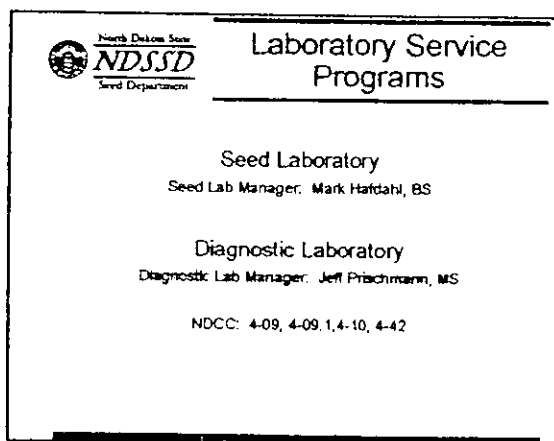
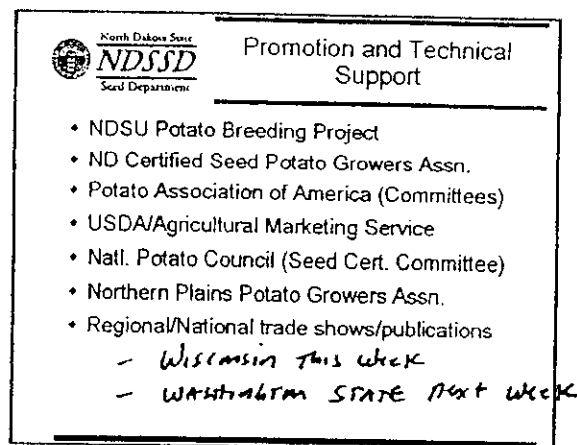
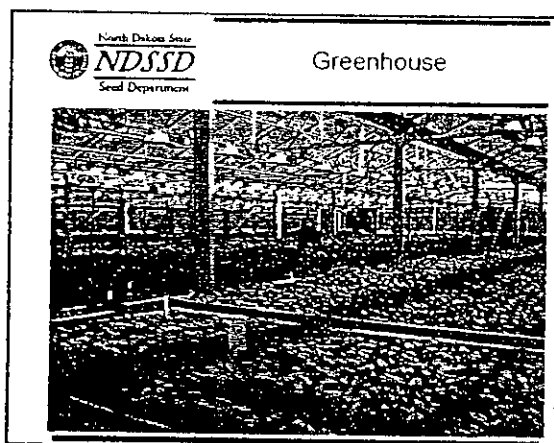
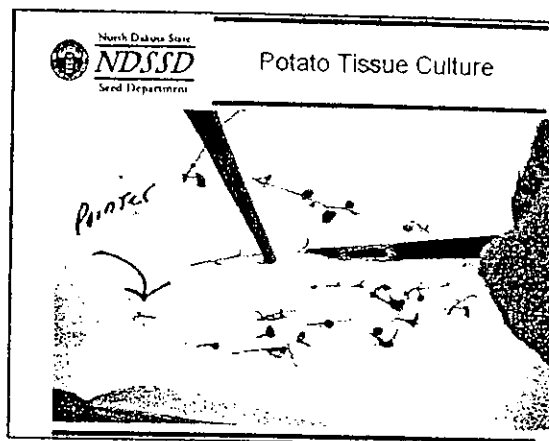
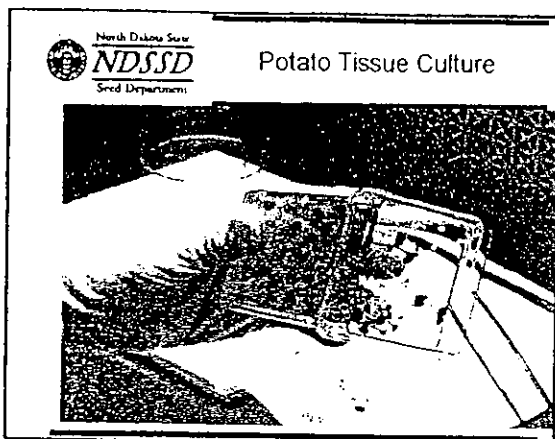
Potato Seedstocks

- Production of Foundation class, disease-free seed under controlled, sterile conditions
- Quarantine environment, tissue culture lab
- Tissue culture/variety *bank* "MITTEL Plants"
 - 75-100 distinct varieties
 - 3-4 clones, each variety
- Main supplier of early generation seed to ND Potato Industry

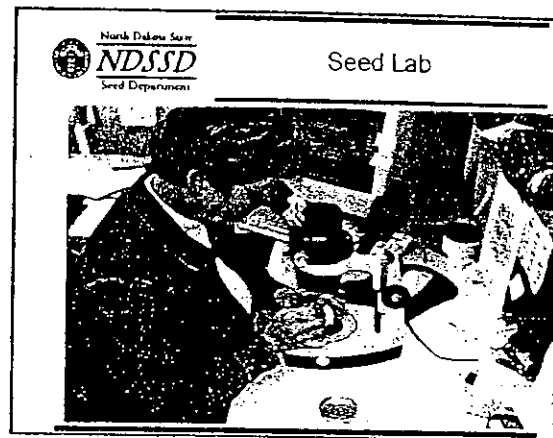
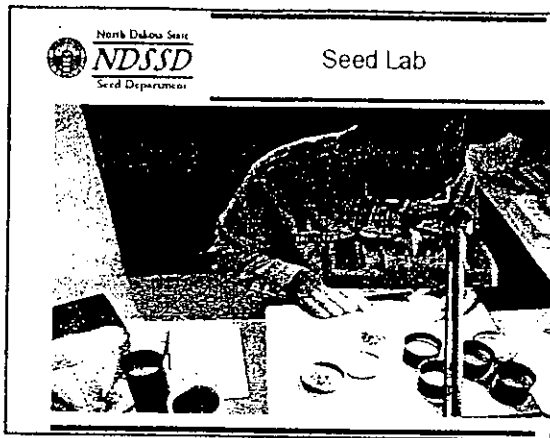
Seedstocks Production Manager:
Debra Boer, MS

Pre-Step

Will SEE on Tour - INTERESTING



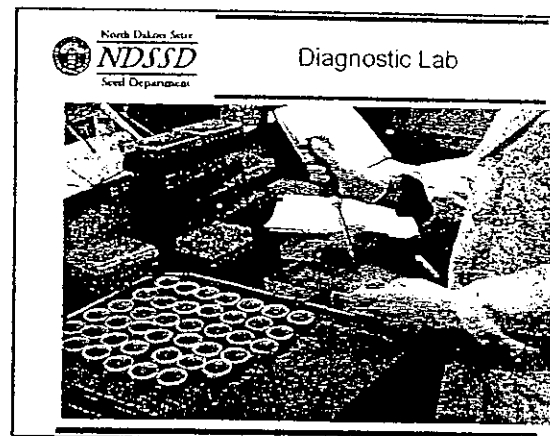
Again - Will see this Enterprise
on Tour



North Dakota State
NDSSD
Seed Department

Diagnostic Laboratory

- Primary support for Potato Program
 - Plant pathology/disease testing focus
 - Potato virus/pathogen testing
- Varietal identification (Electrophoresis)
- GM Trait/Event testing
 - Protein based: ELISA
 - DNA based: PCR
- Test Development/Regulatory support
- AOSA, SCST (Society of Commercial Seed Technologists)



North Dakota State
NDSSD
Seed Department

Potential for Growth

- Commodity grading
- Plant health testing
- Seed/commodity trait testing
 - DNA
 - Herbicide tolerance
- "High-end" technologies
- Focus: Northern Grown Crops

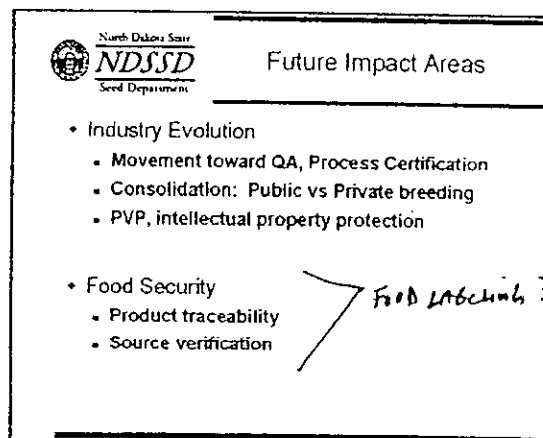
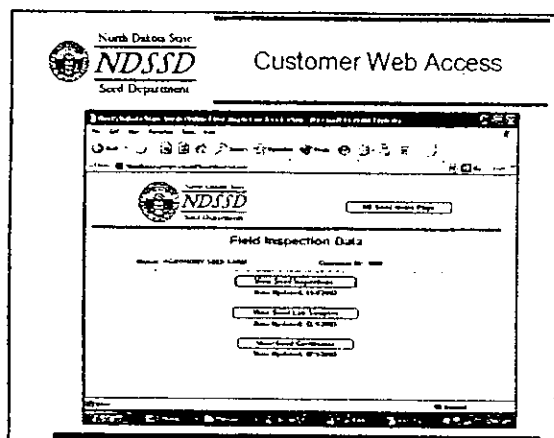
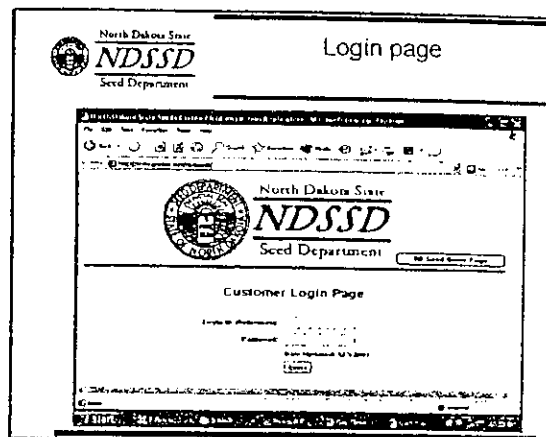
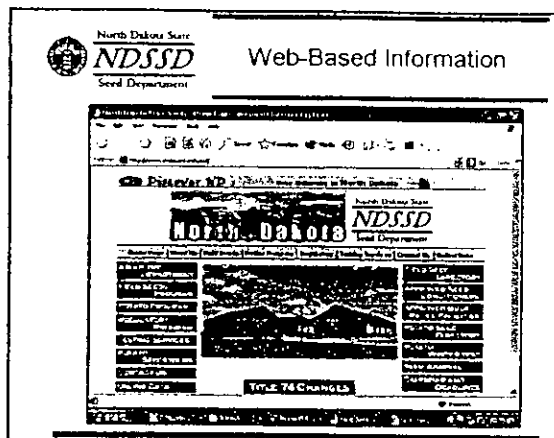
North Dakota State
NDSSD
Seed Department

Administration

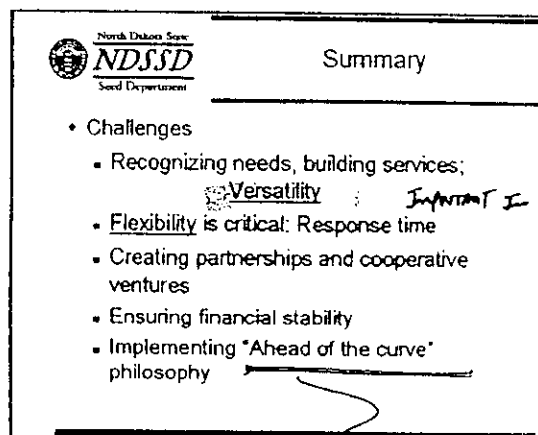
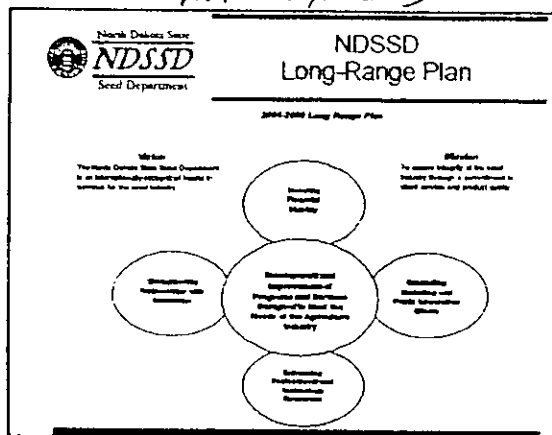
- Coordination of Administrative functions
- Technology (ITD, vendors)
- Human Resources
- Budget administration
- Legal
- Equipment and Capital Improvements
- Support services

Administrative Officer, Krs Niciday
NDCC 4-09, 4-09.1, 4-10, 4-11, 4-24, 4-25, 4-26, 4-42

In other words: Don't compete w/
large out-of-state labs for
massive quantity of corn testing



APPENDIX #3



Please Review AT Your Convenience
Mirrors some issues above - Impact Areas

IF Given Opportunity
TO PRACTICE
Versatility



The North Dakota Seed Journal

DECEMBER 2004

Newsletter of the North Dakota State Seed Department

Inside

- 1 Capture the Value of Certified Seed
- 2 From the Commissioner's Desk
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- 3 FSA Maps Are Required
- 4 Sampling and Sample Sizes Required for Testing
- 4 Tips for Submitting Seed Samples
- 5 Seed Quality Observations
- 5 Labeling Seed for Interstate Shipment
- 6 Calendar

Capture the Value of Certified Seed

Steve Sebesta, Director, Field Seed Program

Quality. How do you recognize it? How do you measure it? What value do you place on it? Everything has value, some things more than others. When you begin the task of selecting varieties for your farm what do you consider? Some common criteria include brand, product performance, availability and price. But, how about seed quality? Do you consider seed quality when making your seed buying decisions?

Seed quality is perhaps one of the most important factors in your buying decision. All seed is not equal. Plant breeders invest approximately ten years developing new varieties from the time a cross is made until final release. During that time, experimental lines are tested for yield potential in multiple environments, quality characteristics and tolerance to pests. It is an exten-

sive evaluation process in order to bring you new genetics that will provide value to your farm and the agricultural industry. Think of the advances in the last five, 10, 20 or 50 years of plant breeding. Has the genetic contribution to higher yields improved? Undoubtedly! Have you captured the value of those varieties? Purchasing quality seed of proven, adapted varieties is the best way to capture the true value of every variety.

The seed certification process was established to ensure that the attributes selected by the breeder are actually delivered in the seed you purchase. The process was established to ensure an adequate supply of high quality seed through a series of field inspections and laboratory analyses.

Lets examine why certified seed is a value.

Value continued on page 2

North Dakota State
NDSSD
Seed Department

The North Dakota Seed Journal is published and edited by the Seed Department, State of North Dakota, under the provisions of Chap. 258, S.L. 1931, as administrative and instrumental matter required for effective transaction of the Department's business and for properly fostering the general welfare of the seed industry in the state.

Steve Sebesta, Editor
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www.ndseed.com



Certification Manager Joe Magnusson (c) and Galen Briese, Field Seed Specialist (r), discuss a durum seed field with grower Mike Gartner (l).

EXHIBIT

A



From the Commissioner's Desk

Is the wild ride over yet?

The variability and challenges of this growing season seem to be extending into pre-winter. As I write this column it's two hours away from deer season opener, and I know there are a lot of producers on a combine, tractor, or standing next to a grain dryer... everything except sighting in the rifle or out spotting an animal.

Now, it isn't unusual to have corn harvest going at this time of year, but edible beans, soybeans, flax and wheat? All we can do is hope for the best for our growers who are still out plugging away at a harvest that resembles a growing season that has been bizarre, even by North Dakota standards.

Now our focus and concern shifts to seed storage, condition and subsequent performance issues. Early reports suggest variability in physical quality of most seed crops, either very good or poor without a lot in between. Our main concern now lies with the storage of crops harvested in high-moisture conditions, and the risk of good quality seed falling into the marginal or poor range due to storage degradation. While this isn't an uncommon problem, it is one that we can assume much higher odds this year. Low-heat or natural-air drying may present challenges in maintaining the condition of this seed crop, and near-constant management of stored seed lots will be in order over the next few months.

Hopefully, our staff has been responsive in helping overcome some of the challenges of the harvest season. With a relatively high number of applications, especially in soybeans, our staff was pressed to stay out in front of harvest. I hope that our team contributed in a timely manner to easing the stress of the season for you and your business interests.

Best wishes and happy hunting.

Ken Bertsch

Ken Bertsch State Seed Commissioner
Steve Sebesta Director, Field Seed Program
Steve Marquardt Director, Potato Program
James Swanson Seed Regulatory Manager
Joe Magnusson Seed Certification Manager
Mark Hafdahl Seed Laboratory Manager
Jeff Frischmann Diagnostic Laboratory Manager
Kris Nicklay Administrative Officer
Galen Briesse Field Seed Specialist
Mike Oostewijk Potato Program Supervisor

FIELD INSPECTED

...to ensure genetic identity

The number of generations seed may be used for multiplication is limited, usually to three generations; Foundation, Registered and Certified. This means that certified seed is never more than three generations removed from breeder seed, the purest available. This ensures that the genetic potential that was bred into a variety, the very potential that gives a variety its unique value, is still present in the seed you plant.

Certified seed producers must provide proof of genetic identity when they apply for certification. Our staff verifies the identity of every variety in every field prior to acceptance into the certification process. Trained field inspectors then examine each seed field based on the variety characteristics described by the breeder to verify the variety is correct.

...to ensure seed purity

Field inspectors also examine seed fields for other factors that affect purity of the seed such as isolation, the presence of other crops or other varieties. They also check for a long list of weeds that can impact the purity of the seed.

Most crops are inspected once prior to harvest. Some crops such as soybeans may be inspected twice to check for flower color or field reaction to herbicide, or in the case of dry edible beans, for incidence of seed-borne diseases such as anthracnose and bacterial blight.

PROFESSIONALLY CONDITIONED

...to ensure proper handling

Field-inspected seed must be conditioned at an approved conditioning facility to ensure its high quality. Annual inspections by the Seed Department ensure that the conditioner has the proper equipment to adequately clean and handle certified seed, maintains a clean facility, and maintains proper records on each lot of seed they condition. Approved seed conditioners and mobile mills are listed in the Seed Directory and the department website. A representative sample of every

conditioned seed lot must be submitted to the seed department for lab analysis.

LABORATORY TESTED

...for purity

Trained seed technologists at the NDSSD examine every conditioned seed lot for physical purity. The purity analysis must be listed on the tag or bulk certificate of every lot of certified seed. Certified seed must meet or exceed minimum standards for purity, generally at least 98%. The percentage of inert matter, other crop seed and weed seed will also be listed on the seed tag.

...for germination

Each eligible seed lot is tested for germination before it can be called certified seed. Certified seed must meet or exceed minimum germination standards, usually 85%. Seed lots with high test weight, high germination and seedling vigor will generally yield better than lower quality seed. Germination must be listed on the seed tag or bulk certificate.

...for seed-borne diseases

Certain diseases are spread through seed-borne mechanisms, whether in or on seed. In order to control these diseases, every lot of specific crops must be tested. It's another tool to ensure North Dakota certified seed is the best it can be.

Field-inspected seed is not certified until it has been lab tested and approved. Ask for a seed tag or bulk certificate with every seed purchase to make sure you are getting quality seed.

Success begins with quality certified seed.

When you plan for the next crop year, purchase certified seed. Planting certified seed is the best way to capture the value bred into that variety. Field inspected, professionally conditioned and lab tested, certified seed meets the high expectations of today's successful farmers. Don't leave anything to chance. Demand certified seed for your farm.

Quality. It's what distinguishes certified seed from all the rest.

Certified seed. Invest in quality. Reap the benefits.

Effects of Frost on Soybean Seed Quality and Storage

Steve Sebesta, Director, Field Seed Program

Many areas of the region were hit by freezing temperatures before crops had reached physiological maturity. Soybeans were particularly hard hit as the majority of the crop was still in the field due to the slow growing season.

Reduced yield and low test-weight are common expressions of an early freeze, but the potential losses extend beyond that. Germination and vigor may also be affected. Storage of green beans that were not properly cleaned or dried before binning can lead to deterioration in the bin. Seed spoilage is usually caused by mold growth and germination can be affected before mold is even detected visually. Proper drying to safe storage moisture is critical.

Immature seed can be stored successfully, but it is important to clean the seed and cool the bins properly. The moisture level of immature seed, weed seed or green plant parts are typically high enough to promote mold growth. Molds will grow first on those wet materials, and as they do they produce moisture and heat, which in turn, promotes additional mold growth in surrounding seed. Keeping bins cool will help decrease the initial infection and spread of molds and will also reduce insect activity. **Check your bins often!**

Producers should be aware that electronic moisture meters may read green or immature beans dryer than they really are. Iowa State University ag engineers suggest adding 1.5 percentage points to readings on these beans for safety.

Germ tests early in the fall may not be a true indicator of the quality of the seed. Our seed lab manager suggests that producers delay germ testing in soybeans until December. They should also request an accelerated aging test to determine the vigor of the seed lot (see "Cold Temperatures Cause Problems" in the September 2004 issue of the *Seed Journal*). Avoid planting low vigor seed in less than ideal conditions next spring.

With proper attention to details now frost damaged seed may be stored reasonably well.

FSA Maps Are Required

It seems a little premature to be thinking of field inspections for 2005 already, but this topic is important enough that we're going to hit it from now until next summer.

Seed producers applying for field inspection with the North Dakota State Seed Department **MUST include FSA maps** for all fields. Applications will be considered incomplete without proper maps. The boundaries of each seed field must also be clearly identified on the map.

Hand-drawn maps are undesirable because too often they are drawn incorrectly. In addition, FSA maps allow our staff to identify incorrect legal descriptions on the applications. These common errors cause inspectors downtime, which in turn reduces the number of fields they are capable of completing each day and may even cause us to miss your field. Inspection delays ultimately reduce our efficiency and yours. Help us serve you better by including FSA maps next year.

Sampling and Sample Sizes Required For Testing

Jeff Prischmann, Diagnostic Laboratory Manager

Sampling is an extremely important part of seed testing that can often be overlooked. Seed growers, producers, and conditioners need to pay attention to how samples are taken when submitting them for testing. The most important factor in sampling is obtaining a sample that is representative of the field or seed lot. This can be done in a number of different ways. Probing bags or bins is one way. Usually, several probes are taken and then bulked into a single sample. A portion of this sample can then be submitted for testing. A convenient way to sample is to periodically draw a sample at regular intervals as the seed is going into or out of a bin. These samples can be bulked and mixed together in the same manner as probed samples. Growers should also keep a reference sample on hand as a backup sample.

The importance of having a representative sample to submit for testing cannot be over emphasized. **A seed test is only as good as the quality of the sample submitted.** In fact, the accuracy of some seed health tests is highly dependent upon the sample submitted. For example, bean anthracnose testing is essentially a positive or negative test. One infected seed in a seed lot would classify the sample as contaminated. For best results 1,000 seed should be tested for anthracnose.

The following is a list of sample sizes required by the North Dakota State Seed Department.

SEED HEALTH TESTS

- Anthrachnose (Edible Bean; 2 lb. seed)
- Ascochyta, 500 seed test (Field Pea, Chickpea, Lentils 1 lb. seed)
- Ascochyta, 1,000 seed test (Chickpea; 2 lb. seed)
- Bacterial Blight (Soybean; 5 lb. seed)
- Barley Stripe Mosaic Virus (½ lb. seed)
- Blackleg (Canola; ½ lb. seed)
- Dome Test (Edible Bean; 3 lb. seed)
- Lentil Fungal Scan (½ lb. seed)
- Loose Smut (Barley, Wheat; ½ lb. seed)
- Phomopsis (Soybean; ½ lb. seed)
- Other virus tests (soybean mosaic, bean pod mottle; call)

HERBICIDE TRAIT/TRANSGENIC TESTS

- Roundup® Herbicide Bioassay Test (Soybean; ½ lb. seed)
- Liberty®, Roundup®, or Clearfield® Herbicide Bioassay Test (Canola; ½ lb. seed)
- Lateral Flow Strip GMO presence (Soybean; 1 lb. seed)
- ELISA GMO presence (Soybean; 1 lb. seed)
- PCR qualitative GMO presence (Soybean; 1 lb. seed)

GENETIC PURITY/VARIETY IDENTIFICATION

- Seed Protein Electrophoresis Test (cereals; ½ lb. seed)
- DNA Test (1 lb. seed)

GERMINATION/PURITY TESTS

Germination Tests:

The minimum size of samples submitted for a germination test shall be at least 800 seed.

Seed Purity Tests:

- Four ounces of small-seeded grasses, white or alsike clover or seeds of similar size.
- Eight ounces of sweet clover, red clover, alfalfa, grasses, millet, rape, flax or seed of similar size.
- One and a half pounds of cereals, soybeans or seed of similar size.

Tips for Submitting Seed Samples

Rhonda Rabideaux

Follow the steps outlined below to ensure your samples are processed quickly and correctly. Failure to do so will reduce turn-around time.

When sending in a sample for testing, please be sure to:

1. Include a return address so we know who to send the results to.
2. Identify the kind, variety, lot number and what tests you want done.
3. Identify field-inspected seed by using the current field application number (e.g. S0412345) — **not** the lot number of the seed that was planted.
4. If we are supposed to send a copy to someone else, or bill someone else, let us know.
5. Submit enough seed for the tests you want done (see *Sampling and Sample Sizes Required For Testing* article in this issue).

Conditioners — when sending in a sample for final certification, please remember:

1. We need a sampler's report for each lot (remember — **each bin is a separate lot**).
2. Be sure to fill in the blanks on the sampler's report, especially the field inspection number(s), clean bushels, number of bulk certs requested, who to send them to, who to bill, and any special instructions.
3. If the seed is being re-tested or has been re-conditioned, be sure to provide the certification number from the initial sample.
4. If we are supposed to use a pre-germ, smut, dome, anthracnose or ascochyta test that was previously done for the lot you are submitting, be sure to provide those test numbers so we don't repeat those tests.
5. Fill the plastic bag full and make sure you seal the zip-loc seal as well as the second sticky seal.

Seed Quality Observations

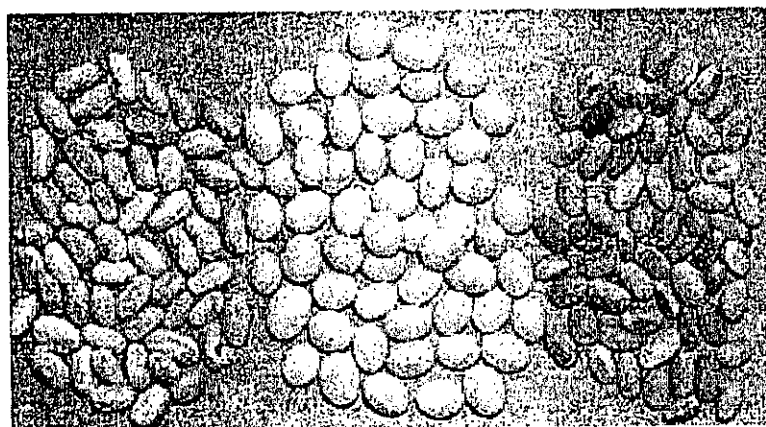
Mark Hafdahl, Seed Laboratory Manager

The Seed Laboratory has conducted tests on about 1300 samples at this point. While we haven't seen samples from every part of the state, we have seen some trends that are worth noting. The lack of heat units during the growing season and the early frost have caused some very real problems this year.

Soybeans in the northeast quarter of the state in many cases failed to mature resulting in beans that are green and oblong. Generally these beans are dead but could possibly be cleaned out with the right equipment. The pictures below illustrate some of the poorer seed we have observed. We have done some accelerated ageing tests on low quality beans and surprisingly even when the germination test is low the aged beans do almost as well, for example, germination 70%, accelerated ageing 65%. This tells me that those beans that made it to maturity are of good quality. Seed size is smaller than normal and more variable in size.

Wheat in the northeast quarter of the state has some problems too. The crop in many places was harvested late and the seed wasn't dry. This moist fall hasn't helped any either. Aeration with moist air doesn't bring the moisture levels down. What we are seeing in some cases is seed that is dormant even after we have chilled it to break dormancy. I am hopeful that the dormancy issue will go away as the seed is dried. Scab continues to be a problem but levels are not serious, usually less than five percent.

I haven't seen enough samples of other crops to make any generalizations. I would recommend keeping a close eye on stored seed to prevent deterioration. The best advice I can offer is to **get your seed tested before you make decisions.**



green oblong

normal

brown oblong

Attend the Crop Improvement Association Annual Meeting

You are encouraged to attend the annual meeting of the North Dakota Crop Improvement and Seed Association, February 7 and 8, 2005 in Bismarck.

The NDCl&SA is instrumental in the development, production and distribution of new varieties and actively supports research, extension and educational programs throughout the state. Get involved!

Labeling Seed for Interstate Shipment

Jim Swanson, Seed Regulatory Manager

Labeling seed for interstate shipment often requires more, or different, information than labeling seed to be sold within the state. Seed that is labeled and sold in the same state need only meet the requirements of the state in which it is sold. **Seed that is to be shipped to another state must meet both Federal Seed Act requirements and the requirements of the seed labeling laws of the receiving state.** Seed laws are usually quite similar among states, but there can be differences in test date requirements and noxious or prohibited weed seed requirements.

When submitting seed samples for testing for interstate shipment, request that an "all states noxious" test be conducted on the sample. This will provide information on noxious or prohibited weed seeds that apply in all states. Seed destined for Canada would need to have a "Canadian noxious" test done.

Some states require that the noxious weed statement on the label be represented by a percentage figure or the word "none" even if no noxious weeds are present. Some states require that any presence of noxious weeds be identified, whereas, North Dakota has a trigger level, depending on the type of crop, where the number and kind of noxious weed need to be identified.

The Federal Seed Act requires that any seed shipped interstate be tested within five months plus the month of test prior to the date of shipment. If the seed meets the six month requirement based on the shipping date, the test date is then valid for the length of time the receiving state seed law requires.

Specific information on labeling requirements for interstate shipment of seed can be obtained by contacting the North Dakota State Seed Department.

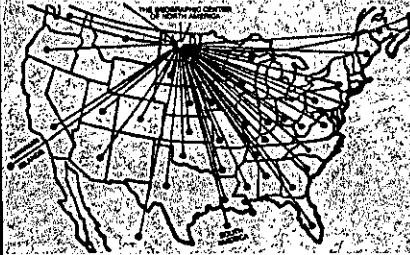
See Other Side

Important

North Dakota Certified

FIRST GRADE

DISTRIBUTION OF N.D. CERTIFIED SEED



Seed Potatoes

PENGAD 800-631-6989

DEPOSITION
EXHIBIT

18

8-31-05 Oosterwijk

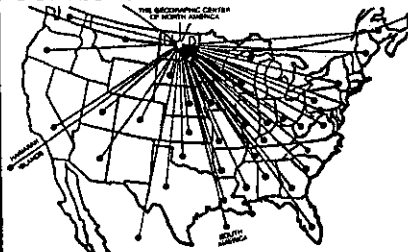
See Other Side

Important

North Dakota Certified

SECOND GRADE

DISTRIBUTION OF N.D. CERTIFIED SEED



Seed Potatoes

PENGAD 800-631-6989

DEPOSITION
EXHIBIT

19

8-31-05 Oosterwijk

LIMITED PROPAGATION
PROHIBITED

NORTH DAKOTA SEED POTATOES
THE USE OF THIS TAG IS FOR INTRA-STATE SHIPMENTS ONLY

PENGAD 800-631-6989

DEPOSITION
EXHIBIT

20

8-31-05 Oosterwijk

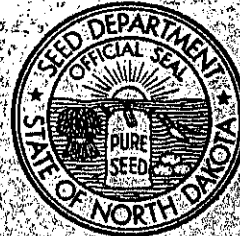
GENERATION

**OFFICIAL BLUE TAG (1st Grade)
NORTH DAKOTA CERTIFIED SEED POTATOES**

(This tag should be securely attached to container.)

LIMITATION OF WARRANTY: Since the use, crop, yields or quality of certified seed potatoes is beyond the control of the producer, the seller, the inspector or the North Dakota State Seed Department, no warranty of any kind, expressed or implied as to the quantity or quality of the crop produced from certified seed or as to certified seed quality beyond the express representation that the seed potatoes were produced, graded, sacked and inspected under the seed certification rules and regulations of the North Dakota State Seed Department (available from the State Seed Department, University Station, Fargo, North Dakota 58105). The Seed Department and inspection service function and serve only in an official regulatory manner.

It is a violation of law (with specific penalties) to use this label or to employ the term "Certified" in any manner in connection with any potatoes which have not been approved by the State Seed Department.



**OFFICIAL YELLOW TAG
NORTH DAKOTA CERTIFIED SEED POTATOES**

(This tag should be securely attached to container.)

LIMITATION OF WARRANTY: Since the use, crop, yields or quality of certified seed potatoes is beyond the control of the producer, the seller, the inspector or the North Dakota State Seed Department, no warranty of any kind, expressed or implied as to the quantity or quality of the crop produced from certified seed or as to certified seed quality beyond the express representation that the seed potatoes were produced, graded, sacked and inspected under the seed certification rules and regulations of the North Dakota State Seed Department (available from the State Seed Department, University Station, Fargo, North Dakota 58105). The Seed Department and inspection service function and serve only in an official regulatory manner.

It is a violation of law (with specific penalties) to use this label or to employ the term "Certified" in any manner in connection with any potatoes which have not been approved by the State Seed Department.



**OFFICIAL WHITE TAG GRADE FOR
INTRA-STATE SHIPMENT ONLY**

(This tag should be securely attached to container.)

LIMITATION OF WARRANTY: Since the use, crop, yields or quality of certified seed potatoes is beyond the control of the producer, the seller, the inspector or the North Dakota State Seed Department, no warranty of any kind, expressed or implied as to the quantity or quality of the crop produced from certified seed or as to certified seed quality beyond the express representation that the seed potatoes were produced, graded, sacked and inspected under the seed certification rules and regulations of the North Dakota State Seed Department (available from the State Seed Department, University Station, Fargo, North Dakota 58105). The Seed Department and inspection service function and serve only in an official regulatory manner.

It is a violation of law (with specific penalties) to use this label or to employ the term "Certified" in any manner in connection with any potatoes which have not been approved by the State Seed Department.



**Testimony on HB 1124 to the House Judiciary Committee
January 23, 2006**

Chairman DeKrey and committee members my name is Duane Boehm and I am here to give testimony for HB 1124. I farm and ranch in Stark County with my family.

In reading this bill I notice that there are many definitions, except for the term "vendor." HB 1124 seems to disclaim warranty from everyone, except the vendor, therefore it is critical that this term be defined.

Research and Extension have long recommended using certified seed to assure variety and quality of seed as a means to improve crop production. Adopting the proposed language on page 5, lines 14 – 30, on page 6, lines 8-12, and on page 8, line 27 – page 9, line 4 in this bill seems to devalue the meaning of "certified seed."

As any crop producer I believe buying certified seed a valuable way to plant quality seeds. Research has shown the variety and quality of seed used is critical to successful crop production. If there is no warranty to the information provided with state certified seed, it has no value to me and I would not continue to purchase the seed.

I respectfully ask you to oppose SB 2128. Thank you.

Duane Boehm
8475 40th St SW
Richardton, ND
701-974-3914



"Watchdogs of the Prairie"
Organizing North Dakotans Since 1978

Dakota Resource Council • PO Box 1095 • Dickinson, ND 58602
Phone: 1-701-483-2851 • Fax: 1-701-483-2854

Testimony on HB 1124 to the House Judiciary Committee January 23, 2006

Chairman DeKrey and committee members my name is Barb Price and I am an organizer for Dakota Resource Council. DRC is an independent membership-based grassroots organization that has been working with North Dakotans since 1978 for the purpose of protecting their interests and rights. About half our members are active farmers or ranchers. I am submitting brief testimony on behalf of DRC member farmers.

"Farmers face enough uncertainty today without having to worry about poor quality seed. When you plant ND certified seed you know you are planting seed that has been tested for germination, disease and analyzed for purity. Certified seed is conditioned to standards that ensure you are getting the best seed available."

This is a radio ad running now through February 28, 2007. This ad is being run for the ND State Seed Commission. (See attachments)

Members of DRC are concerned that the statements in the ad will no longer ring true with the passage of this bill. As DRC members read the bill they believe that the farmers and seed vendors will be taking all the risk while the State Seed Commission is relieving itself from all liability even though the label will claim state seed certification.

Farmer members of DRC believe that ND State Commission certification labels on crop seeds and seed potatoes will no longer have any value. The proposed new language on page 1 states that "Certified" . . . does not mean or constitute any warranty or representation that the seed is the variety or selection identified on the label, is disease-

free, fit for a particular purpose.” Similar statements are made again on page 5, lines 14 – 30, on page 6, lines 8-12, and on page 8, line 27 – page 9, line 4.

This bill pushes the liability back on those who have even less responsibility and capacity than the ND State Seed Commission to assure seed purity, namely the farmers and (if every local seed dealer is a "vendor,") the vendors. It is the ND State Seed Commission has the expertise and ability to test for quality, disease and purity of crop seed.

What good is a certification label that that does not certify the contents of the package? Farmers have come to trust “certified seed” to produce quality crops. If farmers can no longer depend on the labels, they will go outside the state to buy their seed from vendors where the labels actually can be trusted to represent the quality and purity of seed, which the ads from the ND State Seed Commission claim.

DRC believes there could be substantial negative effects to ND economy due to the loss of our seed markets when ND farmers along with farmers outside our state (as pointed out in the Dickinson Press article by Lawrence Schmieding, an Arkansas business owner who currently buys potatoes from ND) stop buying ND certified seed. Why should a farmer take on a risk when the state will not stand behind their certification labels?

The term “vendor” is not defined in this bill and we would recommend that it would be essential that a definition for “vendor” be added to 4-09-01. This is important since the seed vendors will be held liable by this proposed bill.

DRC believes that this issue has not been well thought out and we respectfully ask the committee for a “no” vote on HB 1124.

Thank you.

KQDY ☐ KSSS ☐ KBMR ☐ KFYY ☒ KYYY ☐ KXMR ☐ SALES BY:

CLEAR CHANNEL RADIO

Account ND STATE SEED Annr JAY Length 30

Salesperson JEFF G Today's Date 01/19/07 Co-op Yes Cart# 3856

Start Time 00:00:00 Start Date 01/22/07 End Time 23:59:59 End Date 02/28/07
Archive Time 23:59:59 ArchiveDate 03/31/07 Erase Time 23:59:59 Erase Date 03/31/07

FARMERS, LOOKING FOR SUPERB EMERGENCE, GREAT PLANT VIGOR, FEWER WEEDS AND YIELDS? YOU GET ALL THAT AND MORE WITH NORTH DAKOTA CERTIFIED SEED. ITS FIELD INSPECTED, LAB ANALYZED, AND PROPERLY CONDITIONED. ITS CERTIFIED. SIMPLY PUT, ITS THE BEST SEED AVAILABLE FOR BIGGER YIELDS WITH LESS DISEASE AND WEEDS. SEE YOUR LOCAL NORTH DAKOTA CERTIFIED SEED DEALER TODAY. REMEMBER CERTIFIED SEED DOESN'T COST, IT PAYS.

ATTN: BARB PRICE

KQDY ☐ KSSS ☐ KBMR ☐ KFYZ ☒ KYYY ☐ KXMR ☐ SALES BY:

CLEAR CHANNEL RADIO

Account ND STATE SEED Annr JAY Length 30
Salesperson JEFF G Today's Date 01/19/07 Co-op Yes Cart# 3855
Start Time 00:00:00 Start Date 01/22/07 End Time 23:59:59 End Date 02/28/07
Archive Time 23:59:59 ArchiveDate 03/31/07 Erase Time 23:59:59 Erase Date 03/31/07

STATISTICS FROM STUDIES NATIONWIDE PROVE THAT CERTIFIED SEED PERFORMS BETTER THAN BIN RUN SEED. CERTIFIED SEED IS FIELD INSPECTED, LAB TESTED AND PROPERLY CONDITIONED TO ENSURE THE HIGHEST POSSIBLE QUALITY, AND EVERY FARMER KNOWS HIGH QUALITY SEED GERMINATES BETTER AND EMERGES MORE UNIFORMLY FOR A BETTER STAND. AND BETTER STANDS MEAN BETTER YIELDS. SIMPLY STATED, QUALITY SEED MORE THAN PAYS FOR ITSELF EVERY YEAR. THE COST OF SEED IS A MINOR PART OF YOUR TOTAL FARMING EXPENSES SO MAKE SURE YOU BUY THE BEST SEED POSSIBLE. BUY NORTH DAKOTA CERTIFIED SEED.

ATTN: BARB PRICE

KQDY ☐ KSSS ☐ KBMR ☐ KFYZ ☒ KYYY ☐ KXMR ☐ SALES BY:

CLEAR CHANNEL RADIO

Account ND STATE SEED

Annecr JAY

Length 30

Salesperson JEFF G

Today's Date 01/19/07

Co-op Yes

Cart# 3857

Start Time 00:00:00

Start Date 01/22/07

End Time 23:59:59

End Date 02/28/07

Archive Time 23:59:59

ArchiveDate 03/31/07

Erase Time 23:59:59

Erase Date 03/31/07

FARMERS FACE ENOUGH UNCERTAINTY TODAY WITHOUT HAVING TO WORRY ABOUT POOR QUALITY SEED. WHEN YOU PLANT NORTH DAKOTA CERTIFIED SEED YOU KNOW YOU ARE PLANTING SEED THAT HAS BEEN TESTED FOR GERMINATION, DISEASE AND ANALYZED FOR PURITY. CERTIFIED SEED IN CONDITIONED TO STANDARDS THAT ENSURE YOU ARE GETTING THE BEST SEED AVAILABLE. FIND OUT HOW CERTIFIED SEED CAN BOOST YOUR YIELD AND YOUR PROFITABILITY. CALL YOUR NORTH DAKOTA CERTIFIED SEED DEALER TODAY.

ATTN: BARB PRICE

KQDY ☐ KSSS ☐ KBMR ☐ KFYZ ☒ KYYY ☐ KXMR ☐ SALES BY:

CLEAR CHANNEL RADIO

Account ND STATE SEED Anncr JAY Length 30
Salesperson JEFF G Today's Date 01/19/07 Co-op Yes Cart# 3854
Start Time 00:00:00 Start Date 01/22/07 End Time 23:59:59 End Date 02/28/07
Archive Time 23:59:59 ArchiveDate 03/31/07 Erase Time 23:59:59 Erase Date 03/31/07

SUCCESSFUL FARMING DEMANDS CAREFUL PLANNING. START WITH THE BEST
INPUTS FOR YOUR FARM. SELECT THE BEST GENETICS THEN BUY THE BEST
SEED. CHOOSE SEED THATS BEEN PREPARED TO BE SEED. NOT JUST SOME BIN
RUN GRAIN. CERTIFIED SEED HAS BEEN GROWN TO BE SEED. ITS FIELD
INSPECTED ADN LAB TESTED TO MEET STRICT QUALITY STANDARDS.
CAREFULLY HARVESTED AND CONDITIONED, CERTIFIED SEED IS THE BEST
SEED AVAILABLE. PLAN FOR SUCCESS THIS YEAR....PLAN ON USING NORTH
DAKOTA CERTIFIED SEED. TALK TO YOUR NORTH DAKOTA CERTIFIED SEED
DEALER TODAY.

ATTN: BARB PRICE



North Dakota State

NDSSD

Seed Department

1313 18th St. N., P.O. Box 5257
Fargo, ND 58105-5257
Phone: (701) 231-5400
Fax: (701) 231-5401
Web: ndseed.com

Kenneth J. Bertsch
State Seed Commissioner

Testimony

House Bill 1124 Senate Agriculture Committee

March 16, 2007

Good morning Chairman Flakoll and members of the Senate Agriculture Committee. For the record, my name is Ken Bertsch and I serve as State Seed Commissioner and administrator of the State Seed Department based on the campus of NDSU in Fargo. I am before you today to provide information and background on HB 1124, which originated as an agency bill.

In its present form, engrossed HB 1124 provides for some technical revisions to definitions and labeling language primarily related to potato certification programs of the Seed Department. In its original form, the bill contained language that altered the warranty disclaimer statements which shield the agency from litigation for issues beyond the scope or control of our certification programs. Nearly all of this language was removed in the House. This explanation is only important in that one disclaimer type statement does remain in HB 1124, which I will point out in the course of explaining the remaining amendments.

HB 1124: Overview

Section 1

Page 1, line 2. Defines the term "certified" in Chapter 4-09. A version of this definition previously existed in Chapter 4-10, and has now been replicated in 4-09. We were advised by the Attorney General in the original draft to create clear language referencing certification rules and the functions of seed certification. All of the amendments in HB 1124 are for this purpose, including the definitions in Sections 1 and 2.

Page 4, line 12. The amendment creates a definition for the term "selection", whose meaning is becoming more important in both rule and statute. While the term is more important in potato certification, where selections of true varieties are commonly certified nationwide, in some cases it may apply to crops certified in our Field Seed Programs that are primarily governed by Chapter 4-09.

Section 2

Page 5, line 10. The amendment contains revisions to the existing definition of the term "certified". The addition of the term "at the time of inspection" is important, in that the code should note that the Department only views (either in field or laboratory inspections) a seed crop for short periods of time, and cannot control the handling or care of the crop throughout its duration.

Page 5, line 30. This amendment replicates the term "selection" in Chapter 4-10, which pertains to certification of seed potatoes.

Section 3

Page 6, line 28. The amendments create new language regarding grade inspection and labeling of potatoes. The intent of the section is to clearly state the labeling process for potatoes only, and is modeled to a large extent upon language in Chapter 4-09-14, a prohibitions section dealing with the labeling of field crops. As with the definitions contained in Sections 1 and 2, we have attempted to create consistency between Chapters 4-09 and 4-10.

Section 4

Page 7, line 8-9. The amendment simply adds the term "representations" to the warranty disclaimer language that exists in Chapter 4-42. This term was added by House Judiciary in the process of amending HB 1124, and is somewhat consistent with Chapter 4-10 warranty disclaimer statements, where the term representations is used as a part of the disclaimer language governing potato programs.

This concludes my explanation of amendments to HB 1124. I will be happy to answer any questions Committee members may have.