

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

AGRICULTURE COMMITTEE

Tuesday and Wednesday, April 24-25, 2012
North Dakota State University
Fargo, North Dakota

Senator Robert Erbele, Chairman, called the meeting to order at 1:00 p.m.

Members present: Senators Robert Erbele, Bill Bowman, Tim Flakoll, Oley Larsen, Larry Luick, Philip M. Murphy, Curtis Olafson, Donald Schaible, Gerald Uglen; Representatives Tom Conklin, Joyce Kingsbury, Phillip Mueller, John D. Wall

Members absent: Representatives Michael D. Brandenburg, Dennis Johnson, Wayne Trottier

Others present: Ken Bertsch, Willem Schrage; Fargo

Ron Guggisberg, State Representative, Fargo

Representative Al Carlson, member of the Legislative Management, was also in attendance.

The committee toured the North Dakota State University Agricultural Experiment Station Research Greenhouse Complex, the Beef Cattle Research Complex, Waldron Hall, Harris Hall, and the State Seed Department.

Chairman Erbele recessed the meeting at 5:00 p.m. and convened on Wednesday, April 25, 2012, at 9:00 a.m.

It was moved by Senator Flakoll, seconded by Representative Mueller, and carried on a voice vote that the minutes of the meeting on January 24-25, 2012, be approved as distributed.

At the request of Chairman Erbele, Mr. Ken Bertsch, Seed Commissioner, State Seed Department, Fargo, presented testimony ([Appendix A](#)) regarding the State Seed Department and the seed potato certification program. He also distributed a document ([Appendix B](#)) entitled *Fact Sheet: North Dakota State Seed Department*.

SEED POTATO CERTIFICATION

[13.0029.01000]

Chairman Erbele said he will review those notes that reference issues in the bill draft; ask for comments by Mr. Bertsch and Mr. Willem Schrage, Director, Potato Programs, State Seed Department, Fargo; and allow for committee discussion, questions, and suggestions, as appropriate.

Section 1 - Amendment of North Dakota Century Code Section 4-10-01

Chairman Erbele said Title 3 deals with agents and agency. He said, because it is not terminology that needs an additional definition, it is recommended that the redundant definition be deleted.

Chairman Erbele said the bill draft includes a new definition of "certification," parallels the definition of "certified" that is found in Section 4.1-53-01(5), and in order to remain consistent with previously rewritten chapters, removes the definition of "commissioner" and references the "Seed Commissioner" within the individual sections.

In response to a question from Senator Erbele, Mr. Bertsch said the United States Department of Agriculture (USDA) Food Safety and Inspection Service imposes inspection requirements by means of policies and letters of guidance, as well as through rules. He said there is a manual that governs inspections.

Chairman Erbele said the bill draft defines a label as a tag or device attached to a container, stamped or printed information on a container, and documentation accompanying a container, which sets forth the grade, condition, quality, weight, variety, or class of the container's potatoes. He said the committee is asked to review the six items that are included on a label.

Mr. Bertsch said it should be determined whether "and" or "or" is appropriate on line 7 of page 2.

Chairman Erbele said in this bill draft the references to "produce" have been removed, in order to allow a focus on seed potatoes. He said it will be necessary to determine which of the requirements should be extended to produce and whether the requirements should be placed in a separate chapter.

In response to a question from Committee Counsel, Mr. Bertsch said the only nonpotato inspection that is currently conducted involves onions.

In response to a question from Senator Flakoll, Committee Counsel said radio frequency tags used to track containers are included within the references to "devices" on line 6 of page 2.

In response to a question from Senator Uglen, Mr. Bertsch said, occasionally, a produce inspection is requested. He said a load of lettuce might be shipped to a grocery store and there is a concern about the product's quality. He said when those requests come in, the first determination is whether the inspection staff at the State Seed Department is trained to provide the inspection. He said acquiring the necessary licenses or certification takes time. He said in most instances the USDA's regional office will provide the inspection. He said that is a more preferable outcome. He said this chapter should reference only seed potatoes.

In response to a question from Committee Counsel, Mr. Bertsch said he does not believe that there needs to be a separate chapter providing for the inspection of onions. He said, however, it is necessary that the State Seed Department have the authority to participate in cooperative programs with the federal government. He said if there is appropriate training and authority to provide inspections under the auspices of the federal government, it is not necessary to include a separate chapter for onions.

Chairman Erbele said the Century Code references Irish potatoes and white potatoes. He said the definition has been standardized to reference Irish potatoes.

Mr. Schrage said this is an appropriate way of distinguishing between white potatoes and sweet potatoes.

Chairman Erbele said a "selection" is defined as a subgroup of a potato variety and includes clones, lines, strains, and sports.

In response to a question from Senator Erbele, Mr. Bertsch said those are commonly used terms to describe the same thing. In essence, he said, clones, lines, strains, and sports are all the same, i.e., offshoots of the true variety.

Mr. Schrage said a line refers to origin. He said one would not be able to see a difference in lines. He said there may be a physiological difference in strains. He said, sometimes, people are tempted to reference different varieties when in fact they should be referencing different strains. He said selection covers all of them.

Committee Counsel said the bill draft defines a variety as a plant group that is found within a single botanical taxon of the lowest-known rank, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, can be distinguished from any other plant grouping by the expression of at least one characteristic, and can be considered as a unit with regard to the suitability of the plant grouping for being propagated unchanged. She said Section 4.1-53-01(24) defines a variety as a subdivision of a kind that can be differentiated by one or more identifiable morphological, physiological, or other characteristics from other varieties of the same kind; has describable variations in essential and distinct characteristics; and will remain unchanged in its essential and distinct characteristics and uniformity when reproduced or reconstituted, as required by the different categories of varieties. She said it would be preferable to reconcile the definitions.

Mr. Bertsch said it would be appropriate to use the definition of a variety, as set forth in Section 4.1-53-01(24).

Section 2 - Amendment of Section 4-10-01.1

Chairman Erbele said it is recommended that this section be removed. He said if sections of the Century Code clearly state the duties of the Seed

Commissioner and the State Seed Department, it is not necessary to include a broad statement of responsibility.

Section 3 - Amendment of Section 4-10-02

Committee Counsel said this section sets forth a variety of duties that are assigned to the Seed Commissioner. She said many of them parallel references in other chapters administered by the Seed Commissioner. She said it would be redundant to reiterate those duties in every chapter administered by the Seed Commissioner and yet, without doing so, there is confusion regarding the nature and scope of the articulated duties. She said one approach might be to parallel that which was done for the North Dakota Stockmen's Association in bill draft [\[13.0058.01000\]](#) and create a separate chapter setting forth general provisions and those powers and duties that transcend all the chapters for which the Seed Commissioner has administrative responsibility.

Chairman Erbele said the proposal should be drafted and presented to the committee for its review at the next meeting.

Chairman Erbele said current law states that the Seed Commissioner shall provide for the promotion of quality and assist in the promotion and advertising of seed potatoes. He said if the Seed Commissioner is to promote "quality and assist in the promotion and advertising of seed potatoes," it would be helpful to know whom is he to assist, in what manner, and whether expenditures are permitted to achieve this directive.

In response to a question from Senator Uglem, Mr. Bertsch said with respect to the State Seed Department's promotional efforts, generally dollars are not spent. He said usually assistance is provided. He said he is concerned about addressing this issue in statute because he does not believe that it should be a requirement. On the other hand, he said, there is always a concern about the legitimacy of an activity if it is not specifically authorized in statute.

In response to a question from Representative Mueller, Mr. Bertsch said the administrative rules do not include any references to promotion. He said that has historically been within the purview of the grower groups. He said even if the statutory reference were to be removed, the promotional practices would probably continue. He said many years ago there was an administrative rule requiring that a specified percentage of their budget be used for the promotion of certified seed. He said that rule was removed because it was viewed as being too restrictive.

In response to a question from Senator Flakoll, Committee Counsel said it would be appropriate to authorize promotional activities within the section setting forth powers of the Seed Commission. She said, in so doing, the commission would be authorized to engage in promotional activities but not required to engage in the activities. In addition, she said, it would remove any question about the legality of such activities.

Mr. Bertsch said he would support the recommendation.

Chairman Erbele said it is the consensus of the committee that the matter be addressed as recommended by Committee Counsel.

Chairman Erbele said current law directs the Seed Commissioner to establish potato grades. He said the question is: If potato grades are established by the USDA, what is the intended role of the Seed Commissioner?

Committee Counsel said lines 10 through 14 on page 6 set forth the various designations that may be used in the grading of potatoes. She said it appears that the reference on page 4 is duplicative of the language on page 6.

Mr. Bertsch said the Seed Commissioner needs the authority to establish additional designations. However, he said, the standard grades are established by the USDA.

Chairman Erbele said current law provides that fees for the cost of performance of these duties must be established by the Seed Commission with the approval of the directors of the North Dakota Seed Potato Growers Association.

Section 4 - Amendment of Section 4-10-03

Chairman Erbele said this section authorizes the Seed Commissioner to adopt rules. He said because this authority already exists under Chapter 28-32, it is not necessary to reiterate the authority.

Chairman Erbele said in rewriting other Century Code chapters pertaining to the Seed Commissioner, the requirement that specific information be published in certain bulletins was removed. He said nothing precludes the Seed Commissioner from publishing the information in whatever form or format he deems appropriate. Furthermore, he said, with the growing availability of and reliance on electronic dissemination, it was deemed prudent not to statutorily name a specific printed format.

In response to a question from Senator Flakoll, Committee Counsel said Chapter 28-32 pertains to administrative rules and practices for all agencies. She said, because of the chapter's applicability, it is not necessary to reiterate the authority in this or any other chapter.

Section 5 - Amendment of Section 4-10-04

Chairman Erbele said this section contains some self-explanatory language that does not need to be retained.

Committee Counsel said on line 9 of page 6, at the recommendation of State Seed Department personnel, the reference to unclassified grades was removed. She said on line 4 of page 7, there is still a reference to "unclassified lots." She said the terminology needs to be reconciled.

Mr. Bertsch distributed a copy ([Appendix C](#)) of a bulk certificate for North Dakota certified seed potatoes. He said if potatoes have not had a shipping point inspection, they cannot be graded. However, he

said, they may still be certified seed potatoes by virtue of being in compliance with the requirements for certification. He said, if the tubers have not been inspected, they should be listed as "No Grade." He said, if potatoes fail to meet the standards for other grades, they might need to be termed unclassified. He said these too would fall into a "No Grade" designation. He said this could be achieved through a statutory explanation or, he believes, through the phrase on line 14 of page 6, which allows for other designations by the Seed Commissioner.

In response to a question from Representative Mueller, Mr. Bertsch said the bulk certificate is a label. He said any seed that has passed certification is eligible to be labeled as certified seed. He said potatoes have a perishability issue that is not present with other crop seeds. He said before seed potatoes can be sent outside of this state they must be grade inspected. He said if they are being transported for sale within this state, there is no requirement for a shipping point inspection.

In response to a question from Representative Mueller, Mr. Bertsch said the department is currently trying to establish limits for the amount of damage that can be tolerated within the white tag designation. He said any potatoes that exceed the tolerance would be considered an unclassified lot. He said they may still be certified, they just have a lower quality. He said they can be used in this state but not shipped outside of this state.

In response to a question from Representative Mueller, Mr. Bertsch said the cleanest way to handle this is it to remove the reference to "unclassified" lots and work under the language as proposed on line 14 of page 6. He said that would allow the Seed Commissioner to designate grades or nongrades in a way that works for the industry and that will continue to meet the industry's needs into the future.

In response to a question from Committee Counsel, Mr. Bertsch said the unclassified designation is a grade. He said he believes that the reference to "white tags" came into being so that a lower quality tuber could still be shipped out of state as certified seed potatoes.

In response to a question from Senator Flakoll, Mr. Bertsch said the proposed language would allow the Seed Commissioner to accommodate any changes or additions to the federal grades. He said there has always been a North Dakota certified seed grade.

In response to a question from Senator Flakoll, Mr. Bertsch said the commercial grade is not used for seed potatoes. He said the commercial grade is a designation imposed on a product through the USDA grading system. He said when State Seed Department inspectors inspect a commercial product, as opposed to seed potatoes, they are functioning as USDA inspectors, in accordance with the terms of a cooperative agreement. He said when they are inspecting seed potatoes, they are doing that under the aegis of this state. He said when they are

inspecting potatoes for commercial purposes--at Cavendish or at Simplot--they are functioning under USDA licensure, with the authority of North Dakota to perform such inspection.

Section 6 - Amendment of Section 4-10-05

Chairman Erbele said, as rewritten, this section states that every container of potatoes must be labeled if the potatoes were grown in this state, are transported or shipped into this state, or are offered for sale or consignment in this state. He said it is important that the circumstances under which potatoes must be labeled are described accurately. He said if potatoes that are grown in this state have to be labeled, and if potatoes that are transported or shipped into this state have to be labeled, why is it necessary to reference the third category, i.e., potatoes that are offered for sale or consignment in this state? He said those potatoes would appear to have come under one of the first two provisions.

Senator Luick said perhaps the section could simply require every container to be labeled.

Mr. Bertsch said all seed potatoes leaving this state have to be labeled.

Committee Counsel said this section appears to require that the potatoes be labeled from the time they are harvested until their final use.

Mr. Bertsch said there is a section that exempts potatoes destined for consumption or processing. He said it has been his belief that if the potatoes are destined for anything other than use as seed, there is no labeling requirement. He said this includes farmer's markets and grocery stores.

In response to a question from Senator Erbele, Mr. Bertsch said, although there is an assumption that seed potatoes are not sold at a farmer's market, the reality is that seed potatoes are often available for sale at such places and at grocery stores. He said it is generally garden seed. He said that is a different concern than the certified seed potato business.

Senator Flakoll said this section has not been a problem, so perhaps we should just leave it as is.

Committee Counsel said, if this committee cannot read the section and be certain of how it is to be administered or who it is to affect, how can the public be expected to have due notice of the law? She said if the law states that every container has to be labeled, then every container has to be labeled, and people are going to be in violation of the law if their containers are not labeled. She said if the law is not to apply across the board that should be made clear.

Chairman Erbele said this section is intended to apply to seed potatoes for commercial growers.

Committee Counsel said if that is the case, then that should be clearly stated in the statute.

Representative Mueller said it was his recollection that a size requirement was inserted for agricultural seed.

In response to a question from Senator Luick, Mr. Bertsch said the smallest amount sold for

commercial purposes is a hundredweight. He said generally seed potatoes are sold in 600-pound totes.

Mr. Bertsch said there are labeling requirements governing relatively small amounts of seed. He said that is not the intent in the seed potato chapter.

Mr. Schrage said the smallest quantity of seed potato that a grower ships to Gurney's Seed & Nursery Company is 50 pounds. He said Gurney's will then repackage the seed potatoes, but will not put a label on the smaller packages.

Chairman Erbele requested Committee Counsel to work with Mr. Bertsch on this subsection.

Chairman Erbele said subsection 2 provides that a label must be plainly printed in English, indicate the net weight when packed, indicate the correct grade designation, and meet any other criteria established by the Seed Commissioner. He said State Seed Department personnel had indicated concern about the requirement that the label must indicate the correct grade designation.

Mr. Bertsch said this also addresses the issue of the State Seed Department instituting a "No Grade" designation.

Committee Counsel said subdivision c currently requires the label to indicate the correct grade designation. She said it would appear that by inserting the word "or," the State Seed Department would be able to require either a grade or a designation such as "No Grade."

Mr. Bertsch said he is in agreement with that suggestion.

Chairman Erbele said it is the consensus of the committee that the subsection be amended to include the word "or."

Committee Counsel said this section needs to be compared with the definition of a label, as found in Section 1. She said this section requires the weight **and** grade. She said the definition appears to require that a label include the grade, condition, quality, weight, variety, **or** class.

Mr. Bertsch said grade and condition can be determined only through an inspection. He said if those are required to be on a label, then, in effect, there is a requirement that all seed potatoes be inspected. He said one could statutorily add "when applicable" or eliminate the requirement for the grade and condition or quality to be on the label.

Committee Counsel said perhaps the definition section could focus on the physical aspect of a label, i.e., that it is a tag or device attached to a container, stamped or printed information on a container, or documentation accompanying a container. She said the actual label requirements could be addressed within the applicable sections.

Mr. Bertsch said that is a better alternative. He said the agency looks at definitions a lot to ensure that the agency is functioning in accordance with its statutory directive.

Committee Counsel said if there is consensus regarding the definition, then subsection 2, as proposed, would be acceptable.

Mr. Bertsch said this same approach was used with agricultural, flower, and vegetable seeds during the prior biennium.

Chairman Erbele said it is the consensus of the committee that the definition of a label reference its physical characteristics and that the appropriate statutory sections set forth the content of a label.

Chairman Erbele said subsection 3 provides that the Seed Commissioner may waive the inspection and labeling requirements if the shipment originates in a town or station at which regular inspection service is not maintained and cannot be rerouted to a town or station at which regular inspection service is maintained or if there are unforeseen circumstances that make inspection impossible.

Committee Counsel said State Seed Department personnel have recommended that this subsection be deleted. She said, even in its revised version, it is problematic.

Chairman Erbele said it is the consensus of the committee that the subsection be deleted.

Chairman Erbele said State Seed Department personnel have recommended that the remaining subsections in this section be deleted as well.

Mr. Bertsch said the State Seed Department employs five inspectors. He said they are not sited in a way that allows them to make inspections conveniently all the time. He said mileage fees are charged if an inspector has to travel more than 20 miles. He said the siting language is irrelevant statutorily. He said the charge given to the State Seed Department is that the inspections, if required, must be done.

Mr. Bertsch said lines 4 through 9 on page 9 represent a separate issue. He said current law states:

After the grade inspection of the potatoes has been completed, if the official inspector finds that they are labeled properly according to the provisions of this chapter, the inspector shall furnish to the shipper or owner of the potatoes a signed certificate indicating that the shipment of potatoes is correctly labeled.

Mr. Bertsch said this section was not written by Committee Counsel and did not have any input from the State Seed Department. He said in the 2007 legislative session the State Seed Department had introduced a bill to address the existing warranty language. He said the bill was removed from the House Agriculture Committee and assigned to the House Judiciary Committee. He said the Judiciary Committee crafted this language on its own. He said the Judiciary Committee did not realize that what they required by this section cannot be accomplished by the State Seed Department. He said the State Seed Department may or may not do a grade inspection. He said if they do not do a grade inspection, they most certainly cannot provide a certificate to the

shipper or owner indicating that the potatoes have been properly graded. Furthermore, he said, the only thing that the inspectors can sign is the federal shipping point form. He said they do not sign off on the label because the label is the responsibility of the producer. He said because this language creates an impossibility of performance, he has asked that it be removed.

Senator Flakoll said the language should be removed.

Senator Olafson said he supports removal of the language as well.

In response to a question from Representative Mueller, Senator Luick said using the word "may" rather than "shall" would in effect provide more flexibility to an inspector.

Mr. Bertsch said "may" would not help at all because grade inspections are not done in all instances.

Chairman Erbele said, as part of the title rewrite, this committee has the responsibility to make the Century Code workable. Therefore, he said, it is the consensus of the committee that subsection 4 be removed. He said, because subsection 5 references subsection 4, it too should be removed.

Chairman Erbele said subsection 6 states that a person may not sell, offer for sale, transport for sale, or store with intent to sell certified seed potatoes that are not labeled in accordance with this chapter. He said State Seed Department personnel have recommended that this subsection be removed as well.

Committee Counsel said lines 12 through 14 on page 9 merely reiterate that which was already stated in the amendment of Section 4-10-05(1).

Mr. Bertsch said it would be appropriate to remove the redundancy.

In response to a question from Senator Flakoll, Committee Counsel said the final section of the bill draft sets forth the criminal and civil penalties.

Section 7 - Amendment of Section 4-10-06

Chairman Erbele said subsection 1 requires the Seed Commissioner to make investigations and grade inspections and determine compliance with the provisions of this chapter. He said, even as revised, State Seed Department personnel recommend that the subsection be removed.

Mr. Bertsch said it would be very difficult for the State Seed Department to investigate and inspect every transaction and movement in order to determine statutory compliance. He said if the State Seed Department becomes aware of noncompliance, it will act.

Chairman Erbele said if the subsection requires something that cannot be done, it should be removed.

Chairman Erbele said subsection 2 adds a provision that would allow the Seed Commissioner not only to enter upon real property and access any structure and personal property for inspection,

sampling, and testing purposes, but also to inspect records for compliance.

Committee Counsel said this subsection would be placed with the general language that was already crafted for the chapter pertaining to agricultural seed. She said that language contained the broad authorization addressing both physical access and record inspection.

Mr. Bertsch said by placing the general authority of the State Seed Department in a separate chapter that is applicable to all of the State Seed Department's regulatory and administrative functions, any existing concerns about the extent of the authority is eliminated.

Section 8 - Amendment of Section 4-10-06.1

Chairman Erbele said this section provides that a person may not plant seed potatoes in lots of one acre or more, for the purpose of selling the crop, unless the potatoes have been certified. He said he wonders if a more preferable alternative might not be to prohibit the planting of all seed potatoes that have not been certified and provide an exception for "personal use."

Mr. Bertsch said that is essentially what is being done right now. He said potatoes being planted for commercial production or for seed have to be certified. He said there are a couple of exceptions noted later in this bill draft. He said if this is to be rewritten as a prohibition that would be all right. However, he said, the certified seed requirement was contentious when first introduced and therefore, he recommends that any rearranging of this section be done very carefully.

Chairman Erbele said subsection 2 states that the Seed Commissioner shall permit a North Dakota grower to plant uncertified potatoes grown by the grower, if the grower is within 12 months of having the grower's own certified parent seed potatoes. He asked whether it would be appropriate to use the word "may" rather than "shall."

Mr. Bertsch said even though "may" would be preferable from his perspective, he believes that the industry would be reluctant to make this provision discretionary. He said the same applies to subsection 3.

Chairman Erbele said the two subsections refer to "North Dakota growers." He said the statute is not clear with respect to the definition of a "North Dakota grower."

Mr. Bertsch said he has interpreted it to be dependent on the location of the farm and not the residency of the grower.

In response to a question from Representative Mueller, Mr. Bertsch said if North Dakota growers plant seed potatoes in Minnesota, what they do comes under Minnesota laws.

Chairman Erbele said subsection 4 provides that if the Seed Commissioner determines that seed potatoes meeting the requirements of this section are not available in sufficient quantities to fulfill planting needs, the Seed Commissioner may permit the

planting of seed potatoes with a higher disease content, provided that bacterial ring rot is not present and that a serious disease threat is not posed.

Mr. Bertsch said whether or not a disease threat is "serious" is a determination in the eye of the beholder. He said it is appropriate to leave the responsibility with the Seed Commissioner. However, he said, should this situation ever arise, the Seed Commission would be very involved in making all requisite determinations.

Section 9 - Amendment of Section 4-10-06.2

Chairman Erbele said this section provides that any producer who plants more than one acre of seed potatoes shall maintain records indicating the acreage, varieties, and source of all seed potatoes planted. The producer shall retain the records for a period of two years from the completion of planting and make the records available to the Seed Commissioner upon request. He said current law does not indicate when the two-year period begins. He said the rewrite proposes that the period begin upon the completion of planting. He said that proposal is acceptable.

Section 10 - Amendment of Section 4-10-06.3

Chairman Erbele said current law requires that all seed potatoes entering this state for planting purposes be accompanied by a grade certification or a health certificate. He said State Seed Department personnel have indicated that this should be both a grade certificate and a health certificate. He said this change has been made, subject to the approval of the committee.

In response to a question from Senator Flakoll, Mr. Bertsch said the jurisdictional issue came into effect several sessions ago because other jurisdictions had import requirements that were stricter than those of this state. He said the Canadians were the prime focus. He said their inspection system was not as thorough as that of this state.

Senator Olafson said it is important to ensure that the requirements not apply to seed potatoes on a truck just traveling through this state.

Mr. Bertsch said we do not worry about potatoes just passing through. We worry only about those destined for planting purposes.

Senator Luick said current law could also be read to include seed potatoes passing through this state for eventual planting in another state.

Committee Counsel said the first question concerns use of the phrase "for planting purposes." She said current law references all "seed potatoes entering this state for planting purposes." She said it would appear that seed potatoes are those destined for planting purposes. Therefore, she said, one could reference "seed potatoes entering this state" or "potatoes for planting purposes." She said both references are not needed.

Representative Mueller said we do need to make clear that the reference is to planting purposes "in this state."

Senator Olafson said another extraneous phrase is "from any state, territory, or country." He said if seed potatoes are entering this state, it does not matter from where they came.

Section 11 - Amendment of Section 4-10-06.4

Chairman Erbele said this section requires that all seed potatoes leaving this state must be accompanied by a grade certificate and, if required by the receiving jurisdiction, a health certificate indicating that the seed potatoes were field inspected by the State Seed Department. He said this is not yet in an acceptable form. He said the purpose of a health certificate is not to certify or indicate that the seed potatoes were field inspected, but rather to certify that a field inspection has been conducted and that the seed potatoes have been found to be disease free.

Mr. Bertsch said this section could be significantly simplified by just referencing a health certificate and omitting that which must be addressed on the certificate. He said a North American health certificate, which is used by all certifying agencies, indicates that the potatoes are certified and also includes other information that is used for labeling. He said there is no mention in the Century Code about potatoes being disease free.

In response to a question from Committee Counsel, Mr. Bertsch said the detail regarding what must be indicated on the health certificate is appropriate on lines 8 through 10 of page 12. He said that section addresses seed potatoes coming into this state. He said we are not that concerned about seed potatoes going to other states.

Section 12 - Amendment of Section 4-10-06.5

Chairman Erbele said this section can be removed because Section 4-10-06.2 already places the requirement for record retention on every person who plants "potatoes," regardless of origin, on more than one acre.

Section 13 - Amendment of Section 4-10-07

Chairman Erbele said it appears that the intent of this section is to require the Seed Commissioner to designate the location of official potato shipment inspection points. He said the Seed Commissioner is given broad authority to designate the inspection points. He said the section authorizes, but does not require, the Seed Commissioner to refuse a designation based on volume and expense. He said the section is rewritten to require that the Seed Commissioner consider volume and expense in determining the location of all inspection points.

Mr. Bertsch said this is the section that directs the designation of inspection points. He said inspectors are stationed in certain locations. He said if there is a request to do a shipping inspection or a grade inspection at any location other than where the

inspectors are, the inspections are still provided, but charges are made for expenses incurred by the inspectors.

In response to a question from Committee Counsel, Mr. Bertsch said the inspection points are in effect the location of the inspectors, with a radius of approximately 20 miles. He said they have not officially written down the inspection points.

In response to a question from Senator Erbele, Mr. Bertsch said anything outside of the 20-mile radius is subject to mileage charges. He said they are flexible with respect to when charges are imposed. He said he would prefer the authority to charge fees, rather than the mandate to charge fees.

Section 14 - Amendment of Section 4-10-09

Chairman Erbele said it appears that the intent of this section has been addressed in the previous section. Therefore, he said, it is recommended that this language be deleted.

Section 15 - Amendment of Section 4-10-10

Chairman Erbele said this section appears to conflict with Section 4-10-05. He said both sections require potatoes to be labeled. He said Section 4-10-05 makes an exception for potatoes that are to be processed or repackaged, and Section 4-10-10 provides that the potatoes may be labeled in accordance with the laws of this state or those of the originating jurisdiction.

Committee Counsel said she will work with Mr. Bertsch to articulate the intent of this section and provide a version for the committee to consider at its next meeting.

Section 16 - Amendment of Section 4-10-12

Chairman Erbele said this section provides that a certificate of inspection is prima facie evidence that the potatoes described in the certificate were of the grade, quality, and condition indicated on the certificate at the time of inspection. He said this chapter has already referenced grade certificates and health certificates. He asked if there are multiple certificates or varying ways of referring to certain certificates.

Mr. Bertsch said a certificate of inspection means a grade inspection. He said the only other signed certificate is one issued upon completion of a field inspection. He said that is part of the larger certification process. He said this is a section that appears to be out of place.

Committee Counsel said when the next draft is prepared, the sections will be treated as new language and will be moved to provide a logical flow.

Section 17 - Amendment of Section 4-10-12.1

Chairman Erbele said this section parallels the liability language found in Section 4.1-53-59, with the exception that this section specifically states there is

no warranty with respect to varietal identity or selection identity.

Committee Counsel said she is not certain why the wholesale potato dealers are referenced in the section.

In response to a question from Representative Mueller, Mr. Bertsch said similar language was part of the 2009-10 rewrite effort. He said those changes recognized that which the State Seed Department could and could not warranty.

In response to a question from Representative Mueller, Committee Counsel said the warranty language has been taken from the middle of the section and placed at the beginning to make the section more readable.

Section 18 - Amendment of Section 4-10-14

Chairman Erbele said this section lists activities that are prohibited. He said the rewrite provides alternative language that parallels Section 4.1-53-51.

In response to a question from Senator Luick, Mr. Bertsch said the intent of this chapter is to address seed potatoes. He said there are some references to commercial uses in current law.

Chairman Erbele said the proposed language is an improvement and should be used. He said the committee would like to have the proposed language reference "seed" potatoes and not just potatoes.

Mr. Bertsch said there is no statutory requirement to label commercial potatoes.

Section 19 - Amendment of Section 4-10-15

Committee Counsel said current law provides that potatoes may be seized and held until they are graded and reconditioned to meet the requirements of their label or until they are labeled in accordance with the official report or certificate. She said she was uncertain about the reference to an "official" report.

Mr. Bertsch said the section should provide that the potatoes must meet the claims on their label, not on a certificate. He said a certificate references the graded inspection. He said this section is an operational mess and not accurate in current law. He said a seizure issue comes into play if potatoes are not in compliance with the information on their label. He said this section needs to be worked on and revised for the committee's consideration at a future meeting. He said if this section were ever needed, it is important that the wording be accurate.

Section 20 - Amendment of Section 4-10-17

Chairman Erbele said this section's deletion is explained in the note.

Section 21 - Amendment of Section 4-10-18

Chairman Erbele said the fee language will be consolidated in the upcoming draft.

Section 22 - Amendment of Section 4-10-19

Chairman Erbele said this section requires the Seed Commissioner to hold a hearing if he believes that there has been a violation of the chapter. He said the question is whether "shall" is appropriate. He said the committee is asked to determine whether a mandated hearing is the intent.

Committee Counsel said Section 28-32-22 authorizes an administrative agency to informally dispose of any adjudicative proceeding. She said Mr. Bertsch could literally call offending parties into his office and address any violations that may have occurred.

Mr. Bertsch said whenever there is a violation in any of the program areas, the first attempt is always to resolve the matter informally. He said this is permitted in the other chapter. However, he said, the current law mandates a formal hearing in this section. He said he would appreciate having the "shall" changed to "may."

Section 23 - Amendment of Section 4-10-20

Chairman Erbele said it is recommended that this section be deleted. He said whether it is appropriate to commence legal proceedings and prosecute a person for an alleged violation of this chapter is a matter of prosecutorial discretion. He said it should not be a statutory mandate. He said, during the 2011 regular legislative session, the Attorney General sought removal of language in Chapter 4.1-57, which would have "required" that he or a state's attorney prosecute violations of that chapter.

Section 24 - Amendment of Section 4-10-21

Chairman Erbele said it is recommended that this section be deleted.

Committee Counsel said it is not appropriate that the statute compel an individual to provide assistance in a criminal matter.

Section 25 - Amendment of Section 4-10-22

Chairman Erbele said the rewrite suggests insertion of the word "willfully" so that there is some required level of intent on the part of the violator.

Committee Counsel said the change is subject to committee approval. She said, in the past, this committee has elected to require intent on the part of a violator, rather than to consider any violation to be a strict liability offense. She said she is not satisfied with the verbiage in the penalty section and with the committee's approval, would like to rework the language.

SEED POTATO CONTROL AREA

[\[13.0104.01000\]](#)

Chairman Erbele said this bill draft pertains to the creation of seed potato control areas.

In response to a question from Chairman Erbele, Mr. Bertsch said approximately 50 to 60 years ago, a group of growers in the Cando area wanted to create

an isolated seed potato growing area. He said they wanted to delineate an area and disallow the planting of commercial potatoes and the planting of seed potatoes that were under a particular level of quality with respect to disease. He said Chapter 4-26 tried to establish an orderly process for creating such an area. He said, to the best of his knowledge, there has never been another attempt to create a seed potato control area.

Mr. Bertsch said while it could be argued that this concept does not need to be in the Century Code, there might be a time in the future when there is a desire to create an isolated growing area for the production of low generation seed.

Mr. Bertsch said there is only one potato grower in the area. Therefore, he said, there is no committee, as required by this chapter. He said perhaps we could remove the outdated language and authorize the Seed Commissioner to assist in the establishment of a growing area that promotes isolation.

Mr. Schrage said even though there is only one grower in the seed potato control area right now, there are many individuals who depend on the 1,000-plus acres of seed potatoes that he produces.

Senator Luick said he wonders if this infringes upon the right of other farmers in the area to grow potatoes on their own property.

Mr. Bertsch said when the seed potato control area was formed, it was done in compliance with the Century Code. He said the landowners in the area at the time agreed to its formation. He said now there are different landowners and they might feel differently about the control area.

Senator Luick said this appears to be approaching a perpetual easement.

In response to a question from Representative Mueller, Mr. Bertsch said the Seed Commission has seen the bill drafts and is aware of the rewrite. He said when the next draft is completed the Seed Commission will be a lot more involved.

Representative Mueller said he wonders if this needs to be in the Century Code. He said private agreements might suffice.

Mr. Schrage said, while the Cando area is unique in North Dakota, the concept of restricted growing areas is found throughout the world. He said it is a method of preventing areal contamination. He said the verbiage is needed to ensure that no one abuses the seed control area.

Senator Olafson said while this does prevent another grower from planting commercial potatoes in the area, it does not prevent a grower from planting seed potatoes, as long as the grower meets the quality standards applicable to the control area.

In response to a question from Senator Uglem, Mr. Bertsch said the seed potato control area is approximately three townships in size. He said within the boundary there must be adherence to the seed quality standards established by the statutory committee. He said there is no buffer zone. He said in the potato world viruses are carried by insects.

Therefore, he said, potato growers would prefer that there not be another grower within 15 miles to 20 miles.

Senator Flakoll said this discussion is about changing policy. He said we can keep the general concepts or let individual legislators think about carrying a bill that proposes substantive changes to this chapter.

Chairman Erbele said this chapter could take a lot of work and very likely look vastly different.

Senator Olafson said he would not be in favor of the potato control area providing one individual an exclusive right to grow seed potatoes. However, he said, from an industry perspective, there is a need to preserve an isolated area and as long as it does not preclude another individual from planting exactly the same thing, he does not see the continuation of a potato control area as a problem.

In response to a question from Senator Luick, Chairman Erbele said a grower could plant the same quality of seed for commercial use, but it would be very costly. He said that would not make economic sense.

Mr. Bertsch said anybody wanting to raise potatoes within the control area would have to abide by the restrictions that are in place. He said he believes that it would be very difficult to get a potato control area formed today.

Mr. Bertsch said the current chapter is outdated and unworkable. He said he believes it would be relatively easy to simplify the creation of the control area. He said the challenge will be in drafting the grant of authority to prescribe the seed quality. He said the Seed Commissioner would need to work with the participating parties. He said the chapter also requires an orderly method for dissolution of the control area.

In response to a question from Senator Flakoll, Chairman Erbele said it appears that the committee wants to maintain the concept of a control area, from the perspective of its creation and assurance of its integrity.

Senator Flakoll said individuals who purchase land in a control area have a responsibility to know about restrictions on the land.

Committee Counsel said it is a covenant running with the land. She said she would be willing to meet with Mr. Bertsch and draft workable language addressing the creation, governance, and dissolution of a seed potato control area.

In response to a question from Senator Olafson, Mr. Bertsch said it would be beneficial to share the next bill draft with members of the North Dakota Seed Potato Growers Association.

OTHER MATTERS

Chairman Erbele said the committee was given a bill draft [\[13.0058.01000\]](#) pertaining to livestock branding, estrays, and the licensing of livestock dealers and wool dealers. He said this bill draft will be addressed at the next meeting of the committee.

No further business appearing, Chairman Erbele adjourned the meeting at 3:00 p.m.

L. Anita Thomas
Committee Counsel

ATTACH:3