

**1999 HOUSE AGRICULTURE
HB 1185**

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1185

House Agriculture Committee

Conference Committee

Hearing Date 1-15-99

Tape Number	Side A	Side B	Meter #
ONE HB 1185		x	01.0 to 19.2
Committee Clerk Signature <i>Arline Hanson</i>			

Minutes:

Summary of bill: relating to rabies control.

Michael Mullen, Dept of Health: Explained the bill and stated there was an amendment offered by the DOH at the end of his testimony. See attached testimony

Larry Schuler, DVM: State Vet. Testified, testimony attached.

Gerald Bucholz: ND Vet Medical Assoc. Testified in favor

Keith Johnson: ND Public Health Assoc testified in favor.

Jesse Walker: Captain Mandan Police testified in opposition to the bill. Suggested one amendment changing the word "shall" to "may" in section 1, chapter 23-36-05, line 5. .

Testimony attached.

Chairman Nicholas: I will appoint a sub-committee and would you come back Mr Walker and meet with them.

Dick Heck: Police Officers assoc would like to be at the meeting too.

Page 2

House Agriculture Committee

Bill/Resolution Number Hb 1185

Hearing Date *Click here to type Hearing Date*

Duane Boltnsack: ND Pet Industry, opposed to bill Would prefer law be taken care of a local level.

Mike Dannenfelzer: N.D. Fraternal Order of Police. Opposed to bill.

Dick Peck: ND Police Officer Assoc. Oppose to bill.

Committee action: 2-04-99 tape #2 meter 10 to 18.

Larry Schuler, DVM, St Vet.. Presented the amendments to this bill. Attached.

Motion by Rep Froelich for a DO PASS on HB 1185 Second by Rep Renner.

Motion carried: vote total Yes: 14 NO: 0 Absent: 1

Carrier: Rep Renner

Re-referred to Agriculture Committee to correct the amendments. Mike State Health Dept

When amendments were passed and then went to the Legislative council something was missing.

All we need to do is include two or three words in and then its ok.

Rep Renner: This bill would go back to the way it was in 1997.

Mike..... Yes the 1997 bill will be wiped out.

Rep Mueller: Who is going to serve in the capacities of the Sheriff and others.

Mike: Prior to 1997 the law didn't mandate who serves the papers to get a rabied animal. You don't have to mandate that. They just do it.

Rep Berg moved to reconsider our actions whereby HB 1185 was passed earlier. Second by Rep Brusegaard. Motion carried.

Rep Berg moved to adopt the amendments as presented. Sec by Rep Warner motion carried.

Motion by Rep Renner for a do pass as amended. Second by Rep Brusegaard. Motion carried

Rep Renner to carry the bill on the floor.

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: HB 1185 Amendment to: _____

Requested by Legislative Council Date of Request: 1-4-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

Narrative:

This bill changes current rabies statute to provide the Health Officer or the Health Officer's designee discretion to seize, quarantine, impound or test a wild animal if there is probable cause to believe that the animal has bitten, scratched or otherwise exposed a person to the rabies virus. Under current law, any animal, other than a domestic cat or dog, must be seized, humanely killed and examined for rabies. This bill provides flexibility in assessing each wild animal exposure case on an individual basis.

Fiscal impact is less than \$5,000.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:	-0-	-0-	-0-	-0-	-0-	-0-
Expenditures:	< \$5,000	-0-	< \$5,000	-0-	< \$5,000	-0-


3. What, if any, is the effect of this measure on the appropriation for your agency or department:

- a. For rest of 1997-99 biennium: < \$5,000
- b. For the 1999-2001 biennium: < \$5,000
- c. For the 2001-03 biennium: < \$5,000

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
	-0-			-0-			-0-	

If additional space is needed, attach a supplemental sheet.

Signed 

Typed Name Robert A. Barnett

Department ND Department of Health

Phone Number 328-2392

Date Prepared: 1-7-99

Proposed Amendments to House Bill 1185, the Rabies Act [by DoH]

Page 1, after line 20, insert:

“6. ‘Emergency’ means a situation in which an immediate search and seizure of an animal is necessary and authorized by section 8 of article I of the Constitution of North Dakota and the Fourth Amendment to the Constitution of the United States because of a risk of death or serious bodily injury to a human or another animal.”

Page 2, line 5, remove “inspected and approved by a”

Page 2, remove line 6

Page 2, line 7 remove “or a law enforcement officer”

Page 2, line 8, after “no” insert “reasonable”

Page 4, line 3, remove “Upon” and insert the following underlined words and the words with a ~~strikethrough~~:

If a warrant is issued under section 23-36-04, then upon written request of the state department of health, the game and fish department, the state veterinarian, ~~the department of agriculture~~ *the wildlife services program of the United States department of agriculture, animal and plant health inspection service,* ~~any county sheriff's office, or any city police department~~ shall provide assistance to the department in any action to seize, impound, quarantine, or test an animal suspected of having rabies or that has possibly exposed an individual to rabies, and carry out any other preventive measures the department requests. For purposes of this section, a request from the department means only a request for assistance as to a particular and singular suspicion of exposure to rabies and does not constitute a continuous request for assistance.

Vet amendment [NDVMA]

On page 2, after line 9, insert:

“ ‘vaccinated animal’ means an animal that has been vaccinated in compliance with the compendium of animal rabies control issued by the national association of state public health veterinarians”

Game and Fish Department Amendment

On page 4, at the end of line 10, insert:

“The duty of the game and fish department to cooperate and provide assistance under this section is limited to cases involving a wild mammal and is applicable only if no other agency is available for law enforcement or animal control services.”

Re-number accordingly

VR
2/8/99

F House) AMENDMENTS TO HOUSE BILL NO. 1185

Page 1, after line 20, insert:

"6. "Emergency" means a situation in which an immediate search and seizure of an animal is necessary and authorized by section 8 of article I of the Constitution of North Dakota and the fourth amendment to the Constitution of the United States because of a risk of death or serious bodily injury to a human or another animal."

Page 1, line 21, replace "6" with "7"

Page 2, line 1, replace "7" with "8"

Page 2, line 3, replace "8" with "9"

Page 2, line 5, replace "9" with "10" and remove "inspected and approved by a"

Page 2, remove line 6

Page 2, line 7, remove "or a law enforcement officer"

Page 2, line 8, after "no" insert "reasonable"

Page 2, after line 9, insert:

"11. "Vaccinated animal" means an animal that has been vaccinated in compliance with the compendium of animal rabies control issued by the national association of state public health veterinarians."

Page 2, line 10, replace "10" with "12"

Page 4, line 3, replace "Upon" with "If a warrant is issued under section 23-36-04 and upon written"

Page 4, line 4, after the third comma insert "the wildlife services program of the United States department of agriculture animal and plant health inspection service,"

Page 4, after line 10, insert "The duty of the game and fish department to cooperate and provide assistance under this section is limited to cases involving a wild mammal and is applicable only if no other agency is available for law enforcement or animal control services."

Renumber accordingly

Date: 2-16-99
Roll Call Vote #: /

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1185

House AGRICULTURE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Reconsidered
Do pass amended

Motion Made By Renner Second By Warner

Representatives	Yes	No	Representatives	Yes	No
Eugene Nicholas, Chaiman	✓		Bob Stefonowicz	✓	
Dennis E. Johnson, Vice Chm	✓				
Thomas T. Brusegaard	✓				
Earl Rennerfeldt	✓				
Chet Pollert	.				
Dennis J. Renner	✓				
Michael D. Brandenburg	✓				
Gil Herbel	✓				
Rick Berg	✓				
Myron Koppang	✓				
John M. Warner	✓				
Rod Froelich	✓				
Robert E. Nowatzki	✓				
Phillip Mueller	✓				

Total (Yes) 14 No 0

Absent 1

Floor Assignment Renner

Done 2-8

REPORT OF STANDING COMMITTEE

HB 1185: Agriculture Committee (Rep. Nicholas, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (14 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1185 was placed on the Sixth order on the calendar.

Page 1, after line 20, insert:

"6. "Emergency" means a situation in which an immediate search and seizure of an animal is necessary and authorized by section 8 of article I of the Constitution of North Dakota and the fourth amendment to the Constitution of the United States because of a risk of death or serious bodily injury to a human or another animal."

Page 1, line 21, replace "6" with "7"

Page 2, line 1, replace "7" with "8"

Page 2, line 3, replace "8" with "9"

Page 2, line 5, replace "9" with "10" and remove "inspected and approved by a"

Page 2, remove line 6

Page 2, line 7, remove "or a law enforcement officer"

Page 2, line 8, after "no" insert "reasonable"

Page 2, after line 9, insert:

"11. "Vaccinated animal" means an animal that has been vaccinated in compliance with the compendium of animal rabies control issued by the national association of state public health veterinarians."

Page 2, line 10, replace "10" with "12"

Page 4, line 3, replace "Upon" with "If a warrant is issued under section 23-36-04 and upon written"

Page 4, line 4, after the third comma insert "the wildlife services program of the United States department of agriculture animal and plant health inspection service,"

Page 4, after line 10, insert "The duty of the game and fish department to cooperate and provide assistance under this section is limited to cases involving a wild mammal and is applicable only if no other agency is available for law enforcement or animal control services."

Renumber accordingly

1999 SENATE AGRICULTURE

HB 1185

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1185

Senate Agriculture Committee

Conference Committee

Hearing Date 3/11/99

Tape Number	Side A	Side B	Meter #
1	X		5278-END
1		X	0-1572
2		X	2230-2474
Committee Clerk Signature <i>Tricia Jorgensen</i>			

Minutes:

Senator Wanzek called the meeting to order, roll call was taken, all were present.

Senator Wanzek opened the hearing on HB 1185.

Michael Muller from the Department of Health spoke in support of the bill. Testimony enclosed.

Senator Kinnoin: In the case of a domestic animal biting a person it says you put them into a 10 day quarantine area, we had an incident that happened to us when my son was 6, a neighbors dog bit our son, we asked to have the dog put away but they wouldn't do it so we put him in quarantine, the doctor then said our son had to go through shots. What could be done in a case like that?

Mike Muller: From a legal standpoint we don't have authority to seize and force the testing of a dog or cat.

Rod Gilmore from the Department of Health spoke in support of the bill. Testimony enclosed.

Rod Gilmore: In that situation we would recommend waiting 10 days for the quarantine period to expire before starting shots.

Senator Sand: How many ways can rabies be spread?

Rod Gilmore: Through saliva either by a bite or if an animal should lick any cuts or in the mouth. Vets are told to wear gloves when working with animals with rabies because the virus is located in the brain.

Senator Urlacher: In reference to a child getting bit and you put the animal in quarantine and do not start treatment on the child, where is the window of opportunity to protect that child in those ten days.

Rod Gilmore: The recommendations we have are from the Centers of Disease Control and Public Health Veterinarian, they know that the virus takes a time period to activate itself in the system. Normally 3-4 weeks before it starts to show up, can go up to 3 months. We know we have a time period of 12-14 days before starting treatment.

Senator Mathern: Can you enlighten me as to the animals that can't be rabid.

Rod Gilmore: Any mammal is susceptible to rabies.

Senator Sand: Can an animal be a carrier and be immune?

Rod Gilmore: Not immune, the animal has to have the infection if they are going to pass it on.

Senator Klein: I noticed a skunk patrol around my area, was that the health department?

Rod Gilmore: No.

Senator Urlacher: It can be transferred by saliva, how long is that saliva active?

Rod Gilmore: Not very long, a matter of minutes. It is killed by exposure to air and sun.

Senator Klein closed the hearing on HB 1185.

Page 3
Senate Agriculture Committee
Bill/Resolution Number Hb 1185
Hearing Date 3/11/99

Discussion was held.

Senator Klein made the motion for a Do Pass.

Senator Mathern seconded.

ROLL CALL: 7 Yes, 0 No

CARRIER: Senator Klein

Date: 3/11
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1185

Senate Agriculture Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Klein Seconded By Mathern

Senators	Yes	No	Senators	Yes	No
Senator Wanzek	✓				
Senator Klein	✓				
Senator Sand	✓				
Senator Urlacher	✓				
Senator Kinnoin	✓				
Senator Kroepflin	✓				
Senator Mathern	✓				

Total (Yes) 7 No 0

Absent _____

Floor Assignment Senator Klein

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

REPORT OF STANDING COMMITTEE (410)
March 11, 1999 5:24 p.m.

Module No: SR-44-4624
Carrier: Klein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1185, as reengrossed: Agriculture Committee (Sen. Wanzek, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Reengrossed HB 1185 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY
HB 1185

Testimony
on
HB 1185, The Rabies Control Law
before the
House Agriculture Committee
by
Murray G. Sagsveen, State Health Officer

January 15, 1999

Thank you for the opportunity to outline the Department's position in support of House Bill No. 1185, a complete revision of the Rabies Control Act. Let me highlight some of the key features of this legislation:

- The Department is required to seek to a search warrant from a judge, except in an emergency, before seizing an animal that is located on private property;
- The State Health Officer is given discretion to choose the appropriate action necessary to protect the public health if an animal has bitten a person; routine euthanasia and testing of such an animal for rabies is not mandated.
- Cities and counties are given explicit authority to enforce their animal ordinances.

In addition, since introduction of the bill, the Department of Health has developed amendments to define "emergency" in a narrow way that conforms to decisions of the North Dakota and United States Supreme Court limiting the circumstances in which property may be seized without a search warrant; and the amendments further specify that the Department will formally *request* the assistance of a law-enforcement agency to seize an animal *only if* a judge has issued a search warrant authorizing that seizure.

Mr. Chairman, we have put a great deal of effort into the development of this bill. We met with and considered the views of many interested groups. We have tried to develop a bill that is fair to animal owners while still protecting public health; we have tried to address every reasonable concern regarding the Department's rabies control program. I believe this is a good bill and I hope it will receive your favorable consideration. I would now like to call on Mike Mullen of the Department who will give you a detailed explanation of the legislation.

Testimony
on
HB 1185, The Rabies Control Law

before the
House Agriculture Committee

by
Michael J. Mullen, State Department of Health

January 15, 1999

Good morning, Mr. Chairman and members of the Committee. I am Michael J. Mullen, Senior Advisor for Health Care Policy, State Department of Health. I am pleased to present the Department's testimony in support of House Bill No. 1185, which as explained by the Health Officer, is a complete revision of the Rabies Control Act.

Background on Enforcement of the Rabies Law

Before I outline in more detail the provisions of HB 1185, let me briefly discuss some recent history relating to the Department's rabies control program. In 1997, because of a reasonable and good faith belief that it was necessary to have more expeditious procedures for the seizure of an animal in a suspected rabies case, the Department of Health proposed, and the Legislative Assembly approved, legislation to amend the Rabies Control Act.

The 1997 legislation has proven to be impractical and inflexible as it is applied to potential rabies exposure cases. In addition, significant concern has been raised regarding the procedures under which the Department of Health is authorized to seize an animal that has bitten a person — possibly exposing them to rabies. To address these concerns, the Department has proposed a complete revision of the Rabies Control Act — that we believe is reasonable, balanced, and proportionate to the potential risk of human exposure to rabies. With that background, let me now turn to the key elements of the legislation.

The New Rabies Law

The most significant changes in the Rabies Control Act are:

- First, in contrast to current law, the Health Officer (or the Health Officer's designee) is given *discretion* to seize, quarantine, impound, or test (after humanely killing) a *wild mammal* if there is probable cause to believe that the animal has bitten, scratched, or otherwise exposed a person to rabies. See proposed Section 23-36-04(2), ("the [D]epartment ...*may* promptly seize ..."). In contrast, under current law, any animal, other than a domestic dog or cat, "*must be* seized [humanely killed] **and** examined for rabies", **even if** :
 - ◆ the animal is a species (such as a garter snake or a rabbit) that cannot be, or is unlikely to be rabid;
 - ◆ the Division of Disease Control of the Department of Health, the CDC, and the State Veterinarian all recommend against an examination of the animal for rabies because that is unnecessary under the circumstances; or
 - ◆ the bite victim voluntarily agrees to receive the postexposure rabies vaccine treatment.

Under proposed section 23-36-04, the Health Officer may consider the recommendations of relevant experts, as well as the views of the bite victim and the bite victim's physician in reaching a judgement on what action is reasonable and necessary to protect the public health when a wild animal has bitten or scratched a person.

- Second, the Department of Health is required to obtain an administrative search warrant in any case in which it seeks to seize, quarantine, impound, or examine an animal, unless there is an *emergency* requiring immediate action. An emergency would be considered to exist, if, for example: (1) an animal is running loose; (2) the facility in which the animal is confined is not secure; (3) the animal's owner is threatening to release the animal; or, (4) the animal is acting in a vicious manner that is threatening people or other animals, or is otherwise exhibiting signs of

rabies. Placing this requirement in the Rabies Control Act will give greater assurance to animal owners, and greater direction to the Department of Health, game wardens, and law enforcement officers when they are seeking to seize an animal that is located on private property.

- Third, the class of animals *not subject to routine testing* for rabies is broadened from domestic dogs and cats to include domestic livestock. Under the Rabies Control Amendments, (unless there is some symptom of illness) only an unvaccinated wild mammal (one not vaccinated with an approved vaccine) would be potentially subject to humane killing and testing for rabies. Generally, domestic dogs, cats, and livestock would be subject to only quarantine or impoundment for a specified time. Such an animal's brain would be subject to an examination for rabies only if there were circumstances indicating probable cause to believe that the animal might be rabid.
- Fourth, the Rabies Control Act amendments do not explicitly prohibit a court from enjoining an action under the Act. But, the amendments also do not require a full-blown judicial hearing before the Department is granted a warrant authorizing its agents to seize an animal. Indeed, the proposed section 23-36-09, allowing the owner of an animal to bring an action for damages (limited to the replacement cost of the animal) if the Department has recklessly and without lawful authority seized or tested the animal, *implicitly assumes* that such a seizure may have taken place before the owner has contested this action. Given the scientific and medical recommendations for prompt action — ideally within 24 hours of an animal-bite [and possible exposure to rabies], a post-seizure remedy is constitutional.¹ *Compare*, 50 C.F.R. § 12.11 (if wildlife has been seized without a warrant, the owner must be notified “as soon as practical” *after* the seizure.)

¹ Lawrence H. Tribe, American Constitutional Law, §10-14, at 721 (2nd ed. 1998)(“[The Supreme Court has not] compelled prior hearings where summary action has been necessary to protect public health and safety”) (citations omitted). See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (upholding *ex parte* seizure of a yacht allegedly used for marijuana smuggling); Gross v. Lopez, 419 U.S. 565, 582-83 (1975) (upholding removal of disruptive student prior to a hearing); and Hewitt v. Helms, 459

- Fifth, the amendments confirm the authority of a local government to establish a rabies control program and enforce this Act, or its own rabies control ordinance.
- Sixth, the amendments also include: (1) penalties for (a) the failure to carry out an order to quarantine or impound an animal, (b) the failure to produce an animal subject to seizure, or (c) any interference with enforcement of the Rabies Control Act; (2) the continuation of an animal owner's right to recover damages for the wrongful seizure of an animal; and, (3) a new provision imposing liability on an animal owner for the cost of impoundment, veterinary services, the testing of an animal, and the cost of any postexposure treatment received by an individual possibly exposed to rabies, *if* (a) the animal is not licensed or registered as required by any state or local law or rule applicable to that species, or (b) the animal is not confined or vaccinated as required by any state or local law or rule applicable to the species.
- Finally, the Rabies Control Act amendments create a new chapter of the Century Code consisting of ten sections in contrast to the current law which consists of only two sections. It is believed that separately enumerating each significant element of the Rabies Control Act, including subsections and subdivisions of important sections, will give greater guidance and understanding of the Act to the Legislative Assembly, the Department of Health, other state agencies, the courts, local agencies, including law enforcement officials, *and to* animal owners, and the general public.

Law Enforcement Issues

Concern has been raised regarding the requirement that a law-enforcement officer must, if requested by the Department of Health, provide assistance by serving a search warrant and assisting in the seizure of an animal. There are really two issues here: first, the

U.S. 460 (1983) (upholding administrative segregation of a disruptive inmate involved in a riot prior to a hearing on misconduct charges). *See also*, Raynor v. Md. Dept. of Health, 676 A.2d 978 (Md. App. 1996).

potential liability of a law-enforcement officer for serving a warrant that is subsequently determined to be invalid; and, second the physical and technical limitations on a law-enforcement officer's ability to assist in the seizure of a large carnivorous animal, such as a mountain lion, grizzly bear, or Bengal tiger.

With regard to liability in connection with serving a search warrant, it should be noted that a leading treatise on police misconduct states:

A search conducted pursuant to a warrant generally may not be challenged unless the lack of probable cause was so apparent that the officer should have known it was absent. If it is proved that the defendant purposely falsified material aspects of the warrant, his conduct may be subject to a § 1983 suit.

Michael Avery, David Rudovsky, and Karen M. Blum, Police Misconduct: Law and Litigation, § 2:20, at page 2-40 (3rd ed., West Group 1998)(citations omitted). The leading case is Franks v. Delaware, 438 U.S. 154 (1978). *Franks* applies only where an omission is made with intent to mislead on an issue critical to the finding of probable cause. Mays v. City of Dayton, 134 F. 3d 809 (6th Cir. 1998). *See also* Liston v. County of Riverside, 120 F.3d 965 (9th Cir. 1997)(substantial showing of deliberate falsehood or reckless disregard for the truth and establishing that, but for the dishonesty, a warrant would not have issued).

There have been no specific claims against law enforcement relating to a search warrant issue, at least since sovereign immunity was abolished, according to Jo Zschomler, the director of the state office of risk management. Moreover, under section 32-12.2, the State Tort Claims Act, provides that the state will indemnify and hold harmless employees acting within the scope of their employment. So, unless there is a determination by the Attorney General that the act was outside of the scope of employment, the Risk Management Fund would provide a defense and pay any judgment.

While the concern of the law-enforcement community about potential liability for serving a warrant under the Rabies Control Act is understandable, it is important to bear in mind that under the bill, they are “required” to serve a search warrant only if it has been issued by a judge. And, if a law-enforcement officer has a serious doubt about a search warrant, or the affidavit filed in support of that warrant, they have the right to confer with the person who signed the affidavit and whose personal knowledge of the facts supported the application for the warrant. I am confident that the Department of Health will be able to satisfy any reasonable concerns about whether there is a lawful basis for a search warrant. Bear in mind, the recent concern about the rabies control program arose out of an *administrative order* for seizure; not a seizure conducted under the authority of a search warrant issued by a judge.

With respect to the tactical and logistical capacity of a law enforcement agency to provide assistance, the Department is pleased to note that we are working on a memorandum of understanding with The Game and Fish Department to provide assistance primarily related to a wildlife. In addition, we have prepared an amendment to this bill, HB 1185, to add the federal “Wildlife Services Program” of the United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA-APHIS) to the agencies that will provide assistance in an animal seizure case.

Mr. Louis E. Huffman, State Director for the North Dakota - South Dakota office of the USDA-APHIS Wildlife Services Program, (which was previously known as APHIS’ Animal Damage Control Program) is present and is prepared to present testimony or answer questions about the animal control services provided by his agency. Thus, the Department of Health will seek assistance from local law enforcement only to serve a search warrant and to pick up household pets and small animals, which they do on a routine basis at the present time. They will not be *required* to tranquilize, load, and transport large carnivorous animals. (But, they may be asked to provide *voluntary assistance* if, for example, a troupe of lions from a circus breaks free.)

Additional Law Enforcement Concerns

Let me briefly comment on two other law-enforcement concerns. First, there is a concern that if law-enforcement agencies are required to provide assistance, they may become overburdened with animal seizure cases. In fact, the Department estimates there will probably be only one or two seizure cases per year initiated by the Department in the entire state. Nor are these infrequent cases likely to cause any significant financial burden beyond the amount already budgeted for animal control activities by local law-enforcement agencies.

Second, some concern has been expressed about how a law-enforcement agency will recover the fees charged if an animal is impounded at a veterinary facility. Most likely the fee will be recovered from the animal owner by payment to the enforcement agency before that agency issues a "release" that the owner must present to the veterinary facility before obtaining custody of the owner's animal. In any event, we are considering only one or two cases per year, and these are cases which would still be the responsibility of the local law agency if the state Department of Health had not assumed any role in the situation.

Scientific and Policy Issues

Considerable discussion has occurred regarding whether the "off label use" — use a rabies vaccine on an animal species for which the vaccine has not been approved — precludes the necessity to test such an animal if it has bitten a person. According to the new 1999 recommendations of the Advisory Committee on Immunization Practices (ACIP), "skunks, raccoons, foxes, and most other carnivorous animals" are "regarded as rabid unless animal [sic] proven negative by laboratory tests." 48 MMWR, No. RR-1, at 7 (Table 4) (Jan. 8, 1999).

Meanwhile however, Dr. Robert Miller, of USDA-APHIS has, as of Jan. 7, 1999, received documentation regarding the effectiveness of rabies vaccine in wolves and wolf hybrids. It is estimated that USDA will make a decision regarding the effectiveness of

the rabies vaccine in these animals within the next six months. If the results are favorable, this will remove one issue from controversy.

Findings

The Department included “findings” in its draft bill, but they are not in HB 1185, the final version. Nevertheless, the Department stands behind those findings (which are based on the recommendations of the National Association of State Public Health Veterinarians, Inc.; the federal Advisory Committee on Immunization Practices; the American Academy of Pediatrics; and reports published by the Centers for Disease Control and Prevention [CDC]), and believes they are the cornerstone of the rabies control doctrine and enforcement policy. They are:

- That any wild mammal or bat that bites, or otherwise possibly exposes a person to rabies, promptly be humanely killed and its brain tested for rabies, unless the animal has been vaccinated for rabies with a vaccine approved for that species;²
- That the only conclusive test that can determine to a reasonable degree of medical certainty whether an animal is rabid is the immunofluorescence test of the animal’s brain tissue;³
- That if a carnivorous wild animal has bitten or otherwise possibly exposed a person to rabies, the animal should be humanely killed at once and its brain tested for rabies⁴ in order to avoid the inconvenience, risk, and cost of postexposure

² Rabies Prevention – United States, 1991 Recommendations of the Advisory Committee on Immunization Practices (ACIP), 40 MMWR, No. RR03, at 4 (March 22, 1991).
<http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/0041987.htm>

³ Human Rabies – Texas 1990, 40 MMWR, No. 8, at 132-33 (March 1, 1991) (On June 5, 1990, patient had uncontrolled oral secretions and a temperature of 107° F, but CDC tests of cerebrospinal fluid and serum tested negative. On, June 5 patient died. *Postmortem* samples of *brain tissue* were positive for rabies by the direct immunofluorescence antibody test.).

⁴ Recommendations of the Advisory Committee on Immunization Practices, *supra* n. 27, at 4.

rabies vaccine treatment because no treatment is required if negative tests results are obtained;⁵ and

- That postexposure rabies vaccine treatment “should begin as soon as possible after exposure, ideally within 24 hours.”⁶

State Enforcement Authority

Finally, some have suggested that the Department should have not enforcement authority; its role should be solely advisory. This position may be based on a concern about possible differences between the Department and a local agency concerning the best course of action in a particular rabies situation. But, this problem is no different than a case involving a bank robbery or illegal drug use in which federal and state authorities must determine which agency will exercise primary jurisdiction.⁷ In the recent past, several local law enforcement and public health units have asked the Department to take the lead in rabies incidents involving a wild animal, while local agencies generally handle routine dog bites.

Let me state as clearly as I can the reason for maintaining State Health Department authority for enforcing the Rabies Control Law. First, Arizona, Montana, South Dakota, and many other states place responsibility for the rabies prevention and control in the state health department. See Ariz. Rev. Stat. § 11-1002; Mont. Code Ann. § 50-23-103(2); S.D. Codified Laws § 40-12-5. Second, the State Department of Health handles more almost 150 animal bite/possible rabies exposure cases each year, and the Department’s public health laboratory (the Division of Microbiology) conducts over 400 tests of animal brain tissue for rabies each year. The Department has the experience and

⁵ American Academy of Pediatrics: *Section 3: Summaries of Infectious Diseases – Rabies*, in 1997 Red Book: Report of the Committee on Infectious Diseases, Table 3.50, n. †, at 438 [24th ed., 1997].

⁶ *Id.*, at 439.

⁷ See: *Principles of Federal Prosecution: Initiating and Declining Charges – Prosecution in Another Jurisdiction*, United States Attorneys’ Manual, § 9-27.240 (U.S. Dept. of Justice, Sept. 1997) (setting forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: (1) The strength of the other jurisdiction’s interest in prosecution; (2) The other jurisdiction’s ability and willingness to prosecute effectively; and, (3) The probable sentence or other consequences if the person is convicted in the other jurisdiction).

sees the big picture and sees the trends in the incidence of rabies. Third, uniformity. The Department provides uniform advice to health care providers, local public health officials, and law enforcement agencies. Even if there has been some understandable concern about the procedures used to enforce the Rabies Control Act — such as the use of a search warrant — they are corrected in this bill, and the Department's role in rabies control and prevention should continue.

* * *

Mr. Chairman, this completes my prepared testimony. I would be pleased to answer any questions you or other members may have about this legislation.

Proposed Amendments to House Bill 1185, the Rabies Act [by DoH]

Page 1, after line 20, insert:

“6. ‘Emergency’ means a situation in which an immediate search and seizure of an animal is necessary and authorized by section 8 of article I of the Constitution of North Dakota and the Fourth Amendment to the Constitution of the United States because of a risk of death or serious bodily injury to a human or another animal.”

Page 2, line 5, remove “inspected and approved by a”

Page 2, remove line 6

Page 2, line 7 remove “or a law enforcement officer”

Page 2, line 8, after “no” insert “reasonable”

Page 4, line 3, remove “Upon” **and insert the following underlined words:**

If a warrant is issued under section 23-36-04, then upon written request of the state department of health, the game and fish department, the state veterinarian, the department of agriculture, any county sheriff's office, or any city police department shall provide assistance to the department in any action to seize, impound, quarantine, or test an animal suspected of having rabies or that has possibly exposed an individual to rabies, and carry out any other preventive measures the department requests. For purposes of this section, a request from the department means only a request for assistance as to a particular and singular suspicion of exposure to rabies and does not constitute a continuous request for assistance.

On page 4, line 4, remove “the department of agriculture” **and insert** “the wildlife services program of the United States department of agriculture, animal and plant health inspection service”

January 15, 1999

Captain Jesse E. Walker
Director of Support Services
Mandan Police Department
205 1 Avenue NW
Mandan, North Dakota 58554
701 255-7689 Home
701 667-3250 Work
e-mail jwalker@btigate.com

North Dakota House Agriculture Standing Committee Representatives
Eugene Nicholas Chairman; Dennis E. Johnson-Vice Chairman; Rick Berg; Michael D. Brandenburg; Thomas T. Brusegaard; Rod Froelich; Gil Herbel; Myron Koppang; Phillip Mueller; Rogert E. Nowatzki; Chet Pollert; Dennis J. Renner; Earl Rennerfeldt; Bob Stefonowicz, and John M. Warner

Subject: HB1185 A Bill relating to Rabies Control

Mr. Chairman, Mr. Vice Chairman and representatives:

I am opposed to HB1185.

1. I personally take exception to Section 1, chapter 23-36-05, line five, and specifically the word "Shall." The word shall in this section takes away any discretionary power from the assisting agencies.
2. I question why this agency of state government wishes to conduct its own investigations and exercise authority over the Law enforcement agencies named in the bill.

I support Rabies legislation, but I also believe that exposure to rabies or animal bites should be investigated and handled at the local level where those agencies exist that have the resources and can comply with the law and standards set by the legislators.

I question the need to use the word "Shall" and give the State Health Department the power to dictate what assistance they need or require in this bill. If the employees of the Health Department are not licensed Police Officers, it is they who should be assisting law enforcement, when seeking and serving a search and seizure warrant.

They should present their facts to the local law enforcement agency, who then would present it to the local States Attorney and seek a complaint or warrant. The local Officer would then present the probable cause to a district judge and if granted, serve the paper work received.

This process has worked for many years, and I see no short cuts when dealing with 4th amendment constitutional rights of the people.

Recent history involving the State Health Department, and members of the Attorney General Office, which received a generous amount of publicity in the Bismarck Tribune, clearly shows that not everyone looks at the US Constitution's 4th amendment from the same view point.

I have been assured that those persons involved in that incident are no longer there. I have been told there is a new leadership. I am pleased to see that steps were taken to correct a problem. I do not feel comfortable exposing myself as a law enforcement Officer, to possible litigation and/or Federal Charges that could lead to my arrest for civil rights violations, based upon someone else's probable cause. In my thirty-three years of law enforcement I have refused to serve many search and seizure warrants, and in each instance, found discretion was the better part of valor.

If the State Health Department must have the power to investigate rabies bite cases, in those areas where their assistance is requested, I would suggest that they use the State Crime Bureau. Let that agency obtain the complaint or warrant and serve it. This would leave the responsibility with the state, one State Agency assisting another State Agency and all the civil and criminal liabilities that go with it.

The reasons I have given for opposing this bill would go away by Changing the "Shall" to "May," which would give the Sheriff and Chief's of Police in this state the opportunity to analyze the situation, look at the options and use discretionary power before committing officers.

Thank you for permitting me to express my opinion.

Respectfully Yours,

Jesse E. Walker

**Testimony of Larry A. Schuler DVM
State Veterinarian
Executive Officer of State Board of Animal Health
House Bill 1185
January 15, 1999
10:00 A.M. CST
House Agriculture Committee
Peace Garden Room**

Chairman Nicholas and Committee members, my name is Larry Schuler. I am the state veterinarian and executive officer of the State Board of Animal Health. I am here to testify in support of HB 1185.

The rabies virus produces a disease in all warm-blooded animals and man. It causes a fatal central nervous system disease that evokes fear in many people. For these reasons control of rabies should be a very high priority.

There is a great deal of knowledge about the disease and its control. This bill allows the North Dakota Department of Health to use this knowledge to control rabies in humans without causing undue pain or hardship upon animal owners. It allows the North Dakota Department of Health to make decisions of testing based on the circumstances surrounding the exposure.

Chairman Nicholas and Committee members, I urge you to support the passage of HB 1185. I would be glad to answer any questions you may have.

PROPOSED AMENDMENTS TO **ENGROSSED** HOUSE BILL NO. 1185
[revised by MJM DOH 2/15/99 1:33 PM; 2/16/99 7:08 AM]

Page 4, line 11, after the first comma remove "the department of agriculture,"

Page 4, line 12, remove the comma and remove "any county sheriff's"

Page 4, line 13, remove "office, or any city police department"

Re-number accordingly
98175.0101ZZZZZ????
Title.0200XXXXXX?????
Adopted by the Agriculture Committee
February _____, 1999
Page No. 1 98175.0101

Prepared by Michael J. Mullen, Dept. of Health

Phone 8.3406 or 8.2372

Testimony
on
HB 1185, The Rabies Control Law
before the
Senate Agriculture Committee
by
Michael J. Mullen, State Department of Health

March 11, 1999

Good morning Mr. Chairman and members of the Committee. I am Michael J. Mullen, Senior Adviser for Health Care Policy, State Department of Health. I am pleased to present the Department's testimony in support of House Bill No. 1185, which is a complete revision of the Rabies Control Act.

Background on Enforcement of the Rabies Law

Before I outline in more detail the provisions of HB 1185, let me briefly discuss some recent history relating to the Department's rabies control program. In 1997, because of a reasonable and good faith belief that it was necessary to have more expeditious procedures for the seizure of an animal in a suspected rabies case, the Department of Health proposed, and the Legislative Assembly approved legislation to amend the Rabies Control Act.

The 1997 legislation has proven to be impractical and inflexible as it is applied to potential rabies exposure cases. In addition, significant concern has been raised regarding the procedures under which the Department of Health is authorized to seize an animal that has bitten a person -- possibly exposing them to rabies. To address these concerns, the Department has proposed a complete revision of the Rabies Control Act -- that we believe is reasonable, balanced, and proportionate to the potential risk of human exposure to rabies. With that background, let me now turn to the key elements of the legislation.

The New Rabies Law

The most significant changes in the Rabies Control Act are:

- First, in contrast to current law, the Health Officer (or the Health Officer's designee) is given *discretion* to seize, quarantine, impound, or test [after humanely killing] a *wild mammal* if there is probable cause to believe that the animal has bitten, scratched, or otherwise exposed a person to rabies. See proposed Section 23-36-04(2) ("the [D]epartment ...*may* promptly seize ..."). In contrast, under current law, any animal, other than a domestic dog or cat, "*must be* seized [humanely killed] **and** examined for rabies", **even if** –

- the animal is a species [such as a garter snake or a rabbit] that cannot be, or is unlikely to be rabid;
- the Division of Disease Control of the Department of Health, the CDC, and the State Veterinarian all recommend against an examination of the animal for rabies because that is unnecessary under the circumstances; or
- the bite victim voluntarily agrees to receive the postexposure rabies vaccine treatment.

Under proposed section 23-36-04, the Health Officer may consider the recommendations of relevant experts, as well as the views of the bite victim and the bite victim's physician in reaching a judgement on what action is reasonable and necessary to protect the public health when a wild animal has bitten or scratched a person.

- Second, the Department of Health is required to obtain an administrative search warrant in any case in which it seeks to seize, quarantine, impound, or examine an animal, unless there is an *emergency* requiring immediate action. An emergency would be considered to exist, if, for example: [1] an animal is running loose; [2] the facility in which the animal is confined is not secure; [3] the animal's owner is threatening to release the animal; or, [4] the animal is acting in a vicious manner that is threatening people or other animals, or is otherwise exhibiting signs of rabies. Placing this requirement in the Rabies Control Act will give greater assurance to animal owners, and greater direction to Department of Health, game wardens, and law enforcement officers when they are seeking to seize an animal that is located on private property.

- Third, the class of animals *not subject to routine testing* for rabies is broadened from domestic dogs and cats to include domestic livestock. Under the Rabies Control Amendments, [unless there is some symptom of illness] only an unvaccinated wild mammal (one not vaccinated with an approved vaccine) would be potentially subject to humane killing and testing for rabies. Generally, domestic dogs, cats, and livestock would be subject to only quarantine or impoundment for a specified time. Such an animal's brain would be subject to an examination for rabies only if there were circumstances indicating probable cause to believe that the animal might be rabid.
- Fourth, the Rabies Control Act Amendments do not explicitly prohibit a court from enjoining an action under the Act. But, the Amendments also do not require a full-blown judicial hearing before the Department is granted a warrant authorizing its agents to seize an animal. Indeed, the proposed section 23-36-09, allowing the owner of an animal to bring an action for damages (limited to the replacement cost of the animal) if the Department has recklessly and without lawful authority seized or tested the animal, *implicitly assumes* that such a seizure may have taken place before the owner has contested this action. Given the scientific and medical recommendations for prompt action – ideally within 24 hours of an animal-bite [and possible exposure to rabies], a post-seizure remedy is constitutional.¹ *Compare*, 50 C.F.R. § 12.11 (if wildlife has been seized without a warrant, the owner must be notified “as soon as practical” *after* the seizure.)
- Fifth, the Bill confirms the authority of a local government to enforce this Act, or its own rabies control ordinance.

¹ Lawrence H. Tribe, American Constitutional Law, §10-14, at 721 (2nd ed. 1998) (“[The Supreme Court has not] compelled prior hearings where summary action has been necessary to protect public health and safety”) (citations omitted). See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (upholding *ex parte* seizure of a yacht allegedly used for marijuana smuggling); Gross v. Lopez, 419 U.S. 565, 582-83 (1975) (upholding removal of disruptive student prior to a hearing); and Hewitt v. Helms, 459 U.S. 460 (1983) (upholding administrative segregation of a disruptive inmate involved in a riot prior to a hearing on misconduct charges). See also, Raynor v. Md. Dept. of Health, 676 A.2d 978 (Md. App. 1996).

- Sixth, the Amendments also include: (1) penalties for [a] the failure to carry out an order to quarantine or impound an animal, [b] the failure to produce an animal subject to seizure, or [c] any interference with enforcement of the Rabies Control Act.; (2) the continuation of an animal owner's right to recover damages for the wrongful seizure of an animal; and, (3) a new provision imposing liability on an animal owner for the cost of impoundment, veterinary services, the testing of an animal, and the cost of any postexposure treatment received by an individual possibly exposed to rabies, *if* [a] the animal is not licensed or registered as required by any state or local law or rule applicable to that species, or [b] the animal is not confined or vaccinated as required by any state or local law or rule applicable to the species.

- Finally, the Rabies Control Act Amendments create a new chapter of the Century Code consisting of 10 sections in contrast to the current law which consists of only two sections. It is believed that separately enumerating each significant element of the Rabies Control Act, including subsections and subdivisions of important sections, will give greater guidance and understanding of the Act to the Legislative Assembly, the Department of Health, other state agencies, the courts, local agencies, including law enforcement officials, *and to* animal owners, and the general public.

Law Enforcement Issues [Removed & resolved by House amendment.]

Concern was raised regarding the requirement of the original bill that a law-enforcement officer must, if requested by the Department of Health, provide assistance by serving a search warrant and assisting in the seizure of an animal. There are really two issues here: first, the potential liability of a law-enforcement officer for serving a warrant that is subsequently determined to be invalid; and, second the physical and technical limitations on a law-enforcement officer's ability to assist in the seizure of a large carnivorous animal, such as a mountain lion, grizzly bear, or Bengal Tiger. *The bill was amended by the House to remove this "law enforcement" requirement from the bill.* But, it still may be useful to discuss this matter because of the concern raised about it.

With regard to liability in connection with serving a search warrant, it should be noted that a leading treatise on police misconduct states:

“A search conducted pursuant to a warrant generally may not be challenged unless the lack of probable cause was so apparent that the officer should have known it was absent. If it is proved that the defendant purposely falsified material aspects of the warrant, his conduct may be subject to a § 1983 suit.”

Michael Avery, David Rudovsky, and Karen M. Blum, Police Misconduct: Law and Litigation, § 2:20, at page 2-40 (3rd ed., West Group 1998)(citations omitted). The leading case is Franks v. Delaware, 438 U.S. 154 (1978). *Franks* applies only where an omission is made with intent to mislead on an issue critical to the finding of probable cause. Mays v. City of Dayton, 134 F. 3d 809 (6th Cir. 1998). *See also* Liston v. County of Riverside, 120 F.3d 965 (9th Cir. 1997)(substantial showing of deliberate falsehood or reckless disregard for the truth and establishing that, but for the dishonesty, a warrant would not have issued).

There have been no specific claims against law enforcement relating to a search warrant issue, at least since sovereign immunity was abolished, according to Jo Zschomler the director of the state office of risk management. Moreover, under section 32-12.2, the State Tort Claims Act, provides that the state will indemnify and hold harmless employees acting within the scope of their employment. So, unless there is a determination by the Attorney General that the act was outside of the scope of employment, the Risk Management Fund would provide a defense and pay any judgment.

While the concern of the law-enforcement community about potential liability for serving a warrant under this Act is understandable, it is important to bear in mind that under the *original bill*, they *were* “required” to serve a search warrant only if it has been issued by a judge. And, if a law-enforcement officer has a serious doubt about a search warrant, or the affidavit filed in support of that warrant, they have the right to confer with the person who signed the affidavit and whose personal knowledge of the facts supported the application for the warrant. I am confident that the Department of Health will be able to satisfy any reasonable concerns about whether there is a lawful basis for a search warrant.

Bear in mind, the recent concern about the rabies control program arose out of an *administrative order* for seizure; not a seizure conducted under the authority of a search warrant issued by a judge. **And, as I previously mentioned, the House removed this law enforcement provision from the bill.**

With respect to the tactical and logistical capacity of a law enforcement agency to provide assistance, the Department is pleased to note that we are working on a memorandum of understanding with The Game and Fish Department to provide assistance primarily related to a wildlife. In addition, we have prepared an amendment to this bill, HB 1185, to add the federal "Wildlife Services Program" of the United States Department of Agriculture, Animal and Plant Health Inspection Service [USDA-APHIS] to the agencies that will provide assistance in an animal seizure case.

We met recently with Mr. John Paulson, District Supervisor, of the North Dakota office of the USDA-APHIS Wildlife Services Program, [which was previously known as APHIS' Animal Damage Control Program] discussed how we can coordinate the animal control services provided by his agency with the rabies control program. The Department of Health will seek assistance from local law enforcement only to serve a search warrant and to pick up household pets and small animals, which they do on a routine basis at the present time. They will not be *required* to tranquilize, load, and transport large carnivorous animals. (But, they may be asked to provide *voluntary assistance* if, for example, a troupe of lions from a circus breaks free.)

Additional Law Enforcement Concerns

Let me briefly comment on two other law-enforcement concerns. First, there is a concern that if law-enforcement agencies are required to provide assistance they may become overburdened with animal seizure cases. In fact, the Department estimates there will probably be only one or two seizure cases per year initiated by the Department in the entire state. Nor are these infrequent cases likely to cause any significant financial burden beyond the amount already budgeted for animal control activities by local law-enforcement agencies.

Second, some concern has been expressed about how a law-enforcement agency will recover the fees charged if an animal is impounded at a veterinary facility. Most likely the fee will be recovered from the animal owner by payment to the enforcement agency before that agency issues a "release" that the owner must present to the veterinary facility before obtaining custody of the owner's animal. In any event, we are considering only one or two cases per year, and these are cases which would still be the responsibility of the local law enforcement agency *even if* the state Department of Health had not assumed any role in the situation.

Scientific and Policy Issues

Considerable discussion has taken place regarding whether the "off label use" -- use of a rabies vaccine on an animal species for which the vaccine has not been approved -- precludes the necessity to test such an animal if it has bitten a person. According to the new, 1999 recommendations of the Advisory Committee on Immunization Practices (ACIP) "skunks, raccoons, foxes, and most other carnivorous animals" are "regarded as rabid unless animal [sic] proven negative by laboratory tests." 48 MMWR, No. RR-1, at 7 (Table 4)(Jan. 8, 1999).

Meanwhile however, Dr. Robert Miller, of USDA-APHIS has, as of Jan. 7, 1999, received documentation regarding the effectiveness of rabies vaccine in Wolves and Wolf hybrids. It is estimated that USDA will make a decision regarding the effectiveness of the rabies vaccine in these animals within the next six months. If the results are favorable, this will remove one medical-scientific issue from controversy.

Findings

The Department included "findings" in its draft bill but they are not in HB 1185, the final version. Nevertheless, the Department stands behind those findings (which are based on the recommendations of: the National Association of State Public Health Veterinarians, Inc.; the federal Advisory Committee on Immunization Practices; the American Academy of Pediatrics; and, reports published by the Centers for Disease Control and Prevention

[CDC],) and believes they are the cornerstone of the rabies control doctrine and enforcement policy. They are:

- That any wild mammal or bat that bites or otherwise possibly exposes a person to rabies promptly be humanely killed and its brain tested for rabies, unless the animal has been vaccinated for rabies with a vaccine approved for that species;²
- That the only conclusive test that can determine to a reasonable degree of medical certainty whether an animal is rabid is the immunofluorescence test of the animal's brain tissue;³
- That if a carnivorous wild animal has bitten or otherwise possibly exposed a person to rabies, the animal should be humanely killed at once and its brain tested for rabies⁴ in order to avoid the inconvenience, risk, and cost of postexposure rabies vaccine treatment because no treatment is required if negative tests results are obtained;⁵ and
- That postexposure rabies vaccine treatment "should begin as soon as possible after exposure, ideally within 24 hours."⁶

State Enforcement Authority

Finally, some have suggested that the Department should have not enforcement authority; its role should be solely advisory. This position may be based on a concern about possible differences between the Department and a local agency concerning the best course of action in a particular rabies situation. But, this problem is no different than a case involving a bank robbery or illegal drug use in which federal and state authorities

² Human Rabies Prevention – United States, 1999 Recommendations of the Advisory Committee on Immunization Practices (ACIP), 48 MMWR, No. RR-01, at 4 (Jan. 8, 1999).
<http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/0041987.htm>

³ Human Rabies – Texas 1990, 40 MMWR, No. 8, at 132-33 (March 1, 1991) (On June 5, 1990, patient had uncontrolled oral secretions and a temperature of 107° F, but CDC tests of cerebrospinal fluid and serum tested negative. On, June 5 patient died. *Postmortem* samples of *brain tissue* were positive for rabies by the direct immunofluorescence antibody test.).

⁴ Recommendations of the Advisory Committee on Immunization Practices, *supra* n. 2, at 4.

⁵ American Academy of Pediatrics: Section 3: Summaries of Infectious Diseases – Rabies, in 1997 Red Book: Report of the Committee on Infectious Diseases, Table 3.50, n. †, at 438 [24th ed., 1997].

⁶ Id., at 439.

must determine which agency will exercise primary jurisdiction.⁷ In the recent past, several local law enforcement and public health units have asked the Department to take the lead in rabies incidents involving a wild animal, while local agencies generally handle routine dog bites.

Let me state as clearly as I can the reason for maintaining State Health Department authority for enforcing the Rabies Control Law. First, Arizona, Montana, South Dakota, and many other states place responsibility for the rabies prevention and control in the state health department. See Ariz. Rev. Stat. § 11-1002; Mont. Code Ann. § 50-23-103(2); S.D. Codified Laws § 40-12-5. Second, the State Department of Health handles more almost 150 animal bite [possible rabies exposure] cases each year and the Department's public health laboratory (the Division of Microbiology) conducts over 400 tests of animal brain tissue for rabies each year. The Department has the experience and sees the big picture and sees the trends in the incidence of rabies. Third, uniformity. The Department provides uniform advice to health care providers, local public health officials, and law enforcement agencies. Even if there has been some understandable concern about the procedures used to enforce the Rabies Control Act -- such as the use of a search warrant approved by a judge -- those issues are corrected in this bill and the Department's role in rabies control and prevention should continue.

* * *

Mr. Chairman, this completes my prepared testimony. I would be pleased to answer any questions you or other members may have about this legislation.

#

⁷ See: *Principles of Federal Prosecution: Initiating and Declining Charges – Prosecution in Another Jurisdiction*, United States Attorneys' Manual, § 9-27.240 (U.S. Dept. of Justice, Sept. 1997) (setting forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: (1) The strength of the other jurisdiction's interest in prosecution; (2) The other jurisdiction's ability and willingness to prosecute effectively; and, (3) The probable sentence or other consequences if the person is convicted in the other jurisdiction).

Explanation of
House Amendments to HB 1185, the Rabies Control Act
[Adopted by ND House on February 10 and 17, 1999]

1. The First Amendment defines "emergency" as a situation in which an *immediate* seizure of an animal is necessary because of a serious risk of death or bodily injury to a human or another animal, **AND** is a "warrantless search" authorized by the Fourth Amendment of the Constitution, which protects citizens against an unreasonable search and seizure.

This amendment is intended to protect against any abuse of the authority to seize an animal without a judicially issued search warrant.

2. The second amendment removes unnecessary language from the definition of "quarantine" -- so that the **definition** does not require the property at which an animal is confined to be inspected and approved by a law enforcement officer. As a practical matter, a law-enforcement officer will make an inspection of the property to determine if in animal may be safely confined at the owner's residence. So, it is unnecessary to include that language in the bill; and, including the language in the bill could result in the unintended liability being imposed upon a law-enforcement officer in the event an animal escapes from quarantine.

3. The third amendment consists of three parts. --

- a. First, the state Department of Health may seek assistance to seize an animal **ONLY IF** a *warrant* to seize the animal has been issued by a district court judge.

This amendment addresses a serious concern about the proper legal procedure that should be followed if an animal located on private property is seized because the animal has bitten another person -- possibly exposing that person to rabies. ***This amendment assures that an agency has a duty to provide assistance to the Department of Health ONLY IF a district court judge has issued a search warrant authorizing the seizure of a particular animal.***

- b. This amendment clarifies that a principal agency that will provide assistance in connection with the seizure of an animal is the "Wildlife Services Program" of the United States Department of Agriculture, Animal Plant and Inspection Service, an agency that has wildlife specialists and equipment and is regularly engaged in predator control -- making it well qualified to assist in the seizure of an animal in a potential rabies exposure situation.
 - c. This amendment deletes reference to a "*County sheriff's office, or any city police department*" -- so that law-enforcement agencies are no longer **REQUIRED** to provide assistance in an animal seizure situation. This was a matter of great concern to law-enforcement agencies, and the amendment returns the law (with respect to the **DUTY** of a law-enforcement agency to provide assistance) to the same status that existed from at least 1959 until 1997 -- a period of almost 40 years.
-

The Department of Health is satisfied that if it coordinates its efforts with local law enforcement agencies and obtains a search warrant from a District Court Judge, the Department will be able to effectively enforce the Rabies Control Act.

It is important to note that most animal bite cases -- those involving domestic dogs and cats -- are handled by local law-enforcement agencies and are not the subject of any formal action by the Department of Health. In general, the Department of Health becomes formally involved in a rabies exposure situation, ***only if*** it involves a wild, carnivorous mammal – *owned as a pet* -- that has not been vaccinated with an approved vaccine. This occurs only once or twice a year in North Dakota.

4. The fourth amendment defines the term “vaccinated animal” as an animal that has been vaccinated in compliance with the Compendium Of Animal Rabies Control issued by the National Association Of State Public Health Veterinarian's. This organization publishes an annual *booklet* listing the approved vaccines for different species of animals, and other instructions for the administration of the rabies vaccine. It sets the standards for veterinary practice with respect to the rabies vaccine.

5. The Fifth Amendment clarifies that the duty of the Game and Fish Department to ***Provide Assistance*** in connection with the seizure of an animal “is limited to cases involving a **WILD MAMMAL** and is applicable ***only if NO OTHER AGENCY*** is available for law-enforcement or animal controls services.”

This amendment is intended to reinforce the policy that the Department of Health will first seek the assistance of a local law-enforcement agency to serve a search warrant, and will first seek the services of the USDA Wildlife Services Program if it is necessary to seize an animal that cannot be picked up by a local law-enforcement agency.

2/4/99 3:48 PM

Testimony
on
HB 1185, The Rabies Control Law
before the
Senate Agriculture Committee
by
Rod Gilmore, State Department of Health

March 11, 1999

Rabies is a *zoonotic* disease (a disease that can be transferred from an animal to a human) and is a statewide public health concern.

For case management, the Department ensures that every individual who came into contact with a possibly rabid animal is:

1. Notified that the animal they came in contact with was rabid;
2. Questioned as to the type of contact they had with the animal;
3. Briefed on what constitutes an exposure and how that relates to this person's contact with this animal; and
4. Advised to discuss any potential exposure with their regular primary care physician.

It is not unusual in the case of a rabid puppy:

1. To have the puppies exposed to rabies while in the owner's possession, and the owner not know about that exposure to rabies.
2. Have the puppies sold or given away, and then have one of the puppies show up positive for rabies.
3. End up in a situation in which the Disease Control Division of the Department of Health is tracking down people (both in-state and out-of-state) who have purchased or been given litter-mates of the rabid puppy that are at risk for developing rabies.

In 1997, the Division of Disease Control staff were involved in 80 potential rabies cases. In 1998, the Division was involved in 138 potential rabies cases.

Rabies testing in North Dakota is carried out by the NDSU Diagnostic Laboratory and the Department of Health Microbiology Laboratory. In 1998, a total of 668 animals were tested at the two laboratories. Of this number, 155 (23 percent) tested positive for rabies.

Of the animals that tested positive for rabies, 116 were skunks. Other animals that tested positive for rabies were horses, cattle, dogs, cats, raccoons, elk, and bison.

Even in limited exposure cases, *case management* requires a significant amount of work. One case involving a rabid horse involved approximately 11 individuals who were potentially exposed to rabies. It took approximately a week of staff time to contact and interview all the individuals potentially exposed to rabies.

Another major case handled by the Department involved a rabid puppy brought to the Edgeley elementary school. At least four staff were dedicated to handling the situation, and some of the Division of Disease Control staff were sent to the area hospital to work with the ER staff in screening patients as they came in for post-exposure rabies treatment. In this case, approximately 110 individuals received the post-exposure rabies vaccine.

**Testimony of Larry A. Schuler DVM
State Veterinarian
Executive Officer of State Board of Animal Health
House Bill 1185
March 11,1999
10:00 A.M. CST
Senate Agriculture Committee
Roosevelt Room**

Chairman Wanzek and Committee members, my name is Larry Schuler. I am the state veterinarian and executive officer of the State Board of Animal Health. I am here to testify in support of HB 1185.

The rabies virus produces a disease in all warm-blooded animals and man. It causes a fatal central nervous system disease that evokes fear in many people. For these reasons control of rabies should be a very high priority.

There is a great deal of knowledge about the disease and its control. This bill allows the North Dakota Department of Health to use this knowledge to control rabies in humans without causing undue pain or hardship upon animal owners. It allows the North Dakota Department of Health to make decisions of testing based on the circumstances surrounding the exposure.

Chairman Wanzek and Committee members, I urge you to support the passage of HB 1185. I would be glad to answer any questions you may have.