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Agriculture Committee
October 14, 2016

[LR498 LR612]

The Committee on Agriculture met at 10:00 a.m. on Friday, October 14, 2016, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR612. Senators present: Jerry Johnson, Chairperson; Dave Bloomfield; Ernie Chambers; Burke Harr; Merv Riepe; and Ken Schilz. Senators absent: Mark Kolterman and Tyson Larson.

SENATOR JOHNSON: If I could have your attention, we will begin our hearing. Good morning. Welcome to your State Capitol and welcome to the Ag Committee hearing this morning. My name is Jerry Johnson. I'm from Wahoo and I represent District 23 in the Legislature and I'm Chair of the Ag Committee. I will start by introducing the other members of the committee that are here. We have some missing and I've heard from most of them as to what their situation is. First of all to my right, Senator Ken Schilz from Ogallala; to my left is Senator Dave Bloomfield from Hoskins; and to his left is Senator Ernie Chambers from Omaha. Senator Larson from O'Neill is absent; he's in Chicago or on his way there on a family situation. And Senator Mark Kolterman, Vice Chair of the committee, is absent because of a family situation. I know that there's a couple of senators that are involved in another hearing this morning, and so Merv Riepe being one of those, and I'm not sure, I've not heard from Senator Burke Harr. But that makes up our committee. Sitting to my right is Rick Leonard; he's fiscal analyst, research analyst for the committee; committee clerk is Laurie Vollertsen and she is training Mason today for committee clerk; and our page is the one we've had during the session, Brianne Hellstrom, and we thank her for being here today. First of all, as a reminder, turn off your cell phones, put them on vibrate while we're in the hearing room. If you need to take a call or need to visit, I'd ask that you leave and then return. Also remind you, the audience, that the committee does not allow any outburst or demonstrations in support or opposition to any of the testimony given or remarks made by members of the...testifier...for the testifier or the committee. The agenda posted on the wall will be followed. It's simple. There's one item on the agenda today. As Chair of the Ag Committee, I will introduce LR612 and make just a few opening comments. And as I speak, Senator Burke Harr enters the room. Thank you for being here, Senator. With the Brand Committee's approval, and we have discussed this, we have received a lot of correspondence which has been presented to the committee and in their packets, people within the brand inspection system in different capacities. And since some of them are here today, we will open up about a half hour of

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

testimony. At the close of the presentation by the Brand Committee, for their comments. Their comments are to be based on things that they heard today about the audit and if they have any concerns that it's not being covered, or we want to talk primarily about the audit in their testimony. At that point, we will ask the Brand Committee if they want to make any comments and then I will close the hearing. We truly hope to be out of here somewhere between 12 and 12:30 today as we do have another hearing this afternoon. The Brand...the committee, there's four of the five committee members here. When you are to speak the first time, ask that you say your name and spell your name. After that because of us needing to record everybody's testimony, I think Chairman Kuenning is going to announce who is speaking next and we should be able to move through that. But I'll have to pause a little bit to make sure Laurie gets the names put in there appropriately. If you're going to testify, those that have submitted material in the past want to testify, there's sheets in the back for you to fill out to make...and make known to the committee your standing and put your first and last name there. With that, we will open the hearing. LR612 is a resolution that allows us to study issues within the jurisdiction of the Ag Committee. The Brand Inspection Program is under the jurisdiction of the Ag Committee, so LR612 is kind of an umbrella that can cover subjects that come up during the interim between sessions. And so that's the purpose of...that's the reason for this being labeled LR612. That's my opening. I will...anything else we need to cover? Okay. We will begin the hearing and the testimony. I'll ask Jerry Kuenning, Chairman of the Brand Committee, for his opening. [LR612]

JERRY KUENNING: (Exhibit 1) Jerry Kuenning, J-e-r-r-y K-u-e-n-n-i-n-g, Imperial, Nebraska. Gentlemen and Senators, I appreciate you and the committee appreciates you letting us speak and answer questions to the audit. It's our goal today to be as transparent and forthright as we can be. And we're not going to spend a lot of time today talking to you. We want you to ask us questions that pertain to the audit. And if...and we'll answer those as we see and needed to and as clear as we can. If the questions haven't covered topics of the audit, at the end we will discuss them and bring those points up that we feel that you need to also know. It's been our goal and one of the objectives of this committee, which is by the way much different than what we have seen in past committees, we're going to run this as a business. We're going to have people accountable. We're going to have inspectors that aren't going to be able to have time wasted. There's going to be accountability. You're going to see in the testimonies and the answers that we give you today that there's been some major hurdles crossed by this committee, one of them

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

being the hiring of Nebraska Interactive and getting us up to technology speed. Literally, we have been antiquated by a paper system. We just came from a meeting less than an hour ago with Nebraska Interactive. I'm excited of what they're offering us and what it's going to do for us in the field and in the office. Literally, the basement is filled with boxes and boxes of just paper and no way of tracking or sorting out information. The other thing you're going to see, and it hasn't happened since 1973, Jaclyn and her work committee has gone through the policy and statute changes and not only paragraph by paragraph, sentence by sentence, word by word. And there's...those questions are kind of an overview. Those two things are going to be a large overview of what are going to be resolutions for the audit. With that, I'm going to ask that you guys ask questions of us. I am going to ask because Jaclyn Wilson here from Lakeside is flying to New Zealand today. She needs to be leaving here at 11:45, so any questions pertaining to the statute and policy concerns be moved up front, if we could, to allow her to get on her way and she's representing the International Beef Alliance. So it's quite an honor for her to be there. She's going to spend a week representing Nebraska beef producers. With that, if there's any questions let's please ask them, ask the hard ones. We want to answer them. I'm going to stop here just a little bit. Thank you, John. Jaclyn has put a notebook that you've all been given. I'm going to ask her to give you a little bit of an overview of that, how it's structured and how it's laid out. It's the three-ringed binder notebook that you guys can kind of follow along and see the audit issues and that. So, Jaclyn, please explain that for us. [LR612]

JACLYN WILSON: (Exhibit 2) Thanks, Jerry. My name is Jaclyn, J-a-c-l-y-n, Wilson, W-i-l-s-o-n, a cow-calf producer from Lakeside and just finishing up my first year on the committee. So the book in front of you has a couple of different sections. You look under Section 1, that is actually a full copy there of the audit. Following the audit right there within that same section is our responses to the audit and some of the concerns that we had within there, plus supporting material to talk about why we made some of the decisions that we did. Section 2 is the addendum that discusses the technology plan that has been approved. Section 3 is the legislative bill that we will be planning on introducing this coming session. Followed by...there's actually two bills within that. The first will be the one coming from the Brand Committee. And the second is one that we're recommending that the dairy association bring forward. The fourth part would be some of the new policy, interim policy that has been passed and approved to kind of get you an understanding of what we're doing with it in terms of the policy. The fifth part goes

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

into salaries of all of our workers, and finally the sixth talks about the things that we've accomplished within the last year within the committee. [LR612]

JERRY KUENNING: Jerry Kuenning. Any questions about the notebook or structure of it? Okay. Let's go into questions. We're going to try to answer this and remedy the audit in the form of questions. [LR612]

SENATOR JOHNSON: The first question that I have and maybe these others can look at the policy book. I appreciate that. It's a great reference material, I'm sure. We'll need some time to go through that, but I'm sure we'll discuss most of that. I want to talk about the one that...the question that I have and the question that's been asked of me most, not only by members within the brand system but also the public, just read a statement here: At the August meeting, you voted to accept Shawn Harvey's resignation as executive director, but appointed him to a position described as "interim chief investigator and director of fields operations." It is an interim position, but can you describe duties, the responsibilities of this new position, and how it compares to the duties that he formerly had, how it might be different, and maybe how you see that moving forward as you hire a new executive director. [LR612]

JERRY KUENNING: Thank you, Senator Johnson. And you certainly have brought the elephant out of the room that the press has identified and we've had lots of comments on and would be happy to speak to it. Number one, we go back in history a little bit. We had an individual by the name of Steve Stanec who had been a longtime director of 17 years, I believe. He came to the committee and asked that we look at opening a position for assistant director. We did that with the attitude of that individual would become the director when Steve Stanec decided to retire. At the time of Steve's retirement, we opened it up for interviews. The committee at that time made a decision that we wanted a little bit different direction and we did not hire the assistant...the person that had been assistant director. We hired Shawn Harvey. I'm going to take a little blame here for the situation that occurred. The committee was faced with a budget crisis. As you remember, we had a bill before you of which you guys helped sponsor and carry and passed. The bill to raise the fees from \$.75 to \$1.10. We gave Shawn direction that that was his first priority and he had to get that accomplished before the session was over, of which he did. With that workload, he was not in the office as much as he probably should have been early on at the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

learning curve. As time progressed, we felt that there was some discretion (sic) between the two men. One of them resigned. The next meeting, August 8 in North Platte, Nebraska, Shawn elected to resign. The committee visiting with him asked if he would come back on and be what Jerry, or Senator Johnson described, as interim director of field operations and chief executive officer. Shawn has a tremendous amount of ability in dealing with inspectors and dealing with investigators out in the field. He also knows that you can't handle the people and the management at the Scottsbluff sale barn the same as you handle those in the Ogallala sale barn or the Valentine or up and down the road or Highway 20 corridor people. He has an ability. He will be the first to admit--and I'm not putting words in his mouth--he said it. His office skills and his CEO skills are probably not as strong as our committee wanted. Shawn, we hired him back as an interim. He is in a position that we created and to be honest with you, we needed to have somebody that could man our ship. And that...we made that decision. I'm going to lean on the other committee members if they have anything to follow up that I've missed or not covered, I'm going to ask that you speak to it. [LR612]

JACLYN WILSON: One of the issues of...Jaclyn Wilson. One of the issues, of course, that has constantly come forth is...was talking about the salary pay. So if you could turn to the fifth tab within your book and go to the fourth page of that and you'll see the base salary of the assistant director and the following page is the base salary of the executive director. Nebraska Brand Committee is really unique in the fact that it pays out based on time served. And so each person can advance in payment every year that they serve within the committee. So we had a really tough decision in front of us when we moved Shawn into the interim head of field operations of what to pay. So if you would look at the executive salary positions, currently Shawn's over...and we'll go to September 1, 2016, column, currently he was that second row down, he made \$6,044 a month which annually was about \$72,528. He served his second year as an executive director. So we wanted to credit him with those two years that he served in executive director. So we credited him with those, moved him back to the assistant director scale, and moved him into as an assistant director III, which set a salary, \$6,044 a month; \$72,528 a year. So it just happened to be the same amount in terms of salary, but we felt that he needed to be credited those years that he had served as an executive director. The difference is--and this is one thing usually the media fails to report--is that because of the fact that he was moved back to the assistant director salary scale is that he will retain that salary a year longer than if he would have remained in the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

executive director position. So his executive director scale would have moved up. As of January 1, he would have moved up to the executive director level three, but since we moved him scales, he'll actually remain as an assistant director III for almost another year and a half. So it was a real challenging discussion that we had in order to come to that decision, but we felt that it was very fair to credit him for the years that he served. [LR612]

JERRY KUENNING: Jerry Kuenning. Would you speak to the misinformation in the press of being \$107,000? [LR612]

JACLYN WILSON: Sure. Jaclyn Wilson. One of the stories that first came out in the media was that he was being paid over one hundred and some thousand. What it went back when we started really digging into that, what that was, is that was Shawn's current salary which at that time was just a little...is just a little under \$70,000 plus what we had to pay for the buyout of Steve Stanec, which was a little over \$40,000. And we...\$60,000 plus \$40,000 equals one hundred and some thousand. So it was just a misprint in the media to say that he was making that much money when actually at that time he wasn't even making over \$70,000. [LR612]

SENATOR CHAMBERS: I have a question. I'm trying to understand based on what was just said, who...to whom was this buyout money paid? [LR612]

JACLYN WILSON: The buyout money, the \$40,000-some and the buyout money was paid to the past executive director, Steve Stanec. [LR612]

SENATOR CHAMBERS: And where does Harvey come, fit into that, that you're talking about? [LR612]

JACLYN WILSON: Harvey took over Steve Stanec's position as executive director. [LR612]

SENATOR CHAMBERS: But what you said about this previous guy had nothing to do with Harvey and what he received as pay? [LR612]

JACLYN WILSON: Correct. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: Okay. [LR612]

JERRY KUENNING: Good. Any...John, do you have a question, comment? [LR612]

JOHN WIDDOWSON: Yes. John Widdowson, J-o-h-n W-i-d-d-o-w-s-o-n. To touch base a little bit with the Shawn Harvey and give you a little more background, we had the audit and Chairman Kuenning and I sat in on the audit and discussed things. The one thing I want to make clear is that all the things that dealt in the audit with Shawn Harvey, whether it's the vehicle usage or those kind of things, we as the committee could not speak anything about that because it's a personnel issue. So we make decisions based upon the information, the due diligence, the facts that we have and we are not able to explain those facts or communicate those things to people because it's a personnel issue. At this point in time, we now have the ability or the authority to speak on those personnel issues which then makes the story much clearer based upon how we made those decisions. A little more background, our assistant director resigned the morning of July 26. At noon, the audit came out public. Then we had our meeting to address the audit as a committee and we get the resignation from Shawn Harvey on August 8. So July 26 our assistant director resigns, then on August 8 we have our executive director who has just now given us our resignation. So you have an agency with 100-plus employees and your two key people are just now...have resigned. So from that time prior to the 26th when the audit came out, we as a committee were well aware of a lot of these things in the audit and we also did our research and our background checks. And at the point in time, we had not felt like there was any criminal things that Mr. Harvey had done. Now we still have the right...this has been handed over to the Attorney General's Office and we're full well aware that whatever that ruling is we're going to abide by and we're going to go with that. But our decisions as a committee, we analyzed all those things in the audit and we felt like there was not criminal intent. There was mistakes made, but we didn't feel like there was mistakes at the level that somebody needs to be terminated. Mr. Harvey has been with the Brand Committee for 19 years. Those experiences, that knowledge, we felt like that it had significant value to the committee. [LR612]

SENATOR CHAMBERS: Excuse me. May we ask questions as you go along so we won't have to try to remember too much? When you said there was no criminal intent, were you aware of his misuse of the state vehicle? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOHN WIDDOWSON: I'll pass that on to chairman. [LR612]

JERRY KUENNING: Absolutely was aware of it. He, in that instance he called...I had a phone call at 10:00 in the morning from another committee member who is no longer on the committee, saying that we needed to fire Shawn. And I said, time out, what's this about? What's going on? He explained the situation. As you learn in life, there's two sides to the story. Many times there's three, somewhere in the middle, is the story you want to go with. I did not call Shawn that day. The next morning he called me. He said, Jerry, I made a mistake and I said, what's that? I'm well aware of what had went on but I didn't let Shawn know. He said, I got tied up at the office at the school, drove home and instead of going on home and grabbing my personal vehicle, I pulled into the parking lot and drove maybe in excess of 150 yards, stopped at the school after I drove in, coached his basketball team--his freshman girls' basketball team at the Morrill Elementary School. He told me, I said, okay, you made a mistake. What are we going to do to rectify it? He said, I'm writing a letter to all employees about what the statute and the policy is on state use of vehicles, and I'm not going to use a state vehicle to go to and from work any longer. And I said as long as that's abided by and we take action on it in the next committee, at which we did, those policies I think we can...we'll have to live with it. [LR612]

SENATOR CHAMBERS: Okay. So I won't get too far behind. Was there another instance where he drove into Wyoming or somewhere, using the state vehicle and said that he had not, that he'd gotten a ride with the school bus? And it's kind of convoluted, but the impression that I got was he, in fact, drove that vehicle into Wyoming, or wherever it was, for a nonstate purpose. Was that true? [LR612]

JERRY KUENNING: I want to discuss that and, Senator Chambers, I appreciate you bringing that elephant out, too, because that does need to be clarified. What happened there, we have...I'll just lay it out to you. He drove to Cheyenne, Wyoming, to visit with the director of Wyoming Brand Committee, the same counterpart position that he has in Nebraska. We have phone documents from the cell phone towers that he left Morrill and there's in your book...it's in the audit portion. That on his trip there were cell phone logs when he left Morrill and as he progressed west kept picking up towers. We picked up towers, signals from the cell phone tower in Cheyenne, which matched the time that he said he was there. He turned around and come back

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

and we have the phone logs as you see as his trip come back. I quizzed Shawn very hard on this. As Chairman I said, Shawn, we got to have proof on this one. He gave me a list of six coaches and one of those being a bus driver and those names and numbers are in your book too. I got a... [LR612]

SENATOR CHAMBERS: Well, let me ask what I want to find out so that you don't have to explain more and take too much time on my question. [LR612]

JERRY KUENNING: Okay. [LR612]

SENATOR CHAMBERS: Did you say that he had indicated that he was going to meet with the Wyoming livestock official? [LR612]

JERRY KUENNING: Yes. [LR612]

SENATOR CHAMBERS: He said that. But that official said that did not happen. [LR612]

JERRY KUENNING: Shawn made a mistake. He did not... [LR612]

SENATOR CHAMBERS: No, but here's what I need to find out. You're characterizing it a certain way but I just want the fact. He made a statement as to what he was going for and the facts show that that's not what he went for. The person he said he was to meet with said that that meeting never occurred. Is that factual or is what I'm saying incorrect? [LR612]

JERRY KUENNING: I believe it's incorrect. [LR612]

SENATOR CHAMBERS: Okay, well, how is it incorrect? Did...let's take it a step at a time. [LR612]

JERRY KUENNING: Okay. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: Did he say he was going there to meet with a Wyoming livestock professional? [LR612]

JERRY KUENNING: With Steve True, that's the name of the individual. Yes, he did say that. [LR612]

SENATOR CHAMBERS: Then that official said that meeting never occurred. Is that true or false? [LR612]

JERRY KUENNING: I have tried to call Steve True on six times and have not got any response back from him, getting him to answer me personally. The audit called, said they talked to him, said he did not. Steve says that he did. And I've talked to the bus drivers. He rode the bus from Morrill to...or excuse me, Mitchell...from Mitchell to the Burns, Wyoming. Five of the six bus drivers said...or coaches, pardon me, said that he was on that bus. One of them said, I can't prove it, but I'm 98 percent sure he was. He said he rode the bus to Burns and back, but to say why Steve True from Wyoming stock board saying he did not meet, I don't know. [LR612]

SENATOR CHAMBERS: Do you have...when I say you, the committee, retain on staff, legal counsel? Is there legal counsel retained? [LR612]

JERRY KUENNING: Yes, I'm going to ask that Jaclyn for that. There has been a change there and that's one of the improvements we have made. Jaclyn. [LR612]

SENATOR CHAMBERS: And that is not authorized by law, is it? [LR612]

JACLYN WILSON: No, it is. [LR612]

SENATOR CHAMBERS: It is authorized. [LR612]

JACLYN WILSON: It is, yes. [LR612]

SENATOR CHAMBERS: What did the audit say about retaining that counsel? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JACLYN WILSON: Jaclyn Wilson. So in previous years the Brand Committee has done a monthly retainer for \$125 for an attorney that was across the street from the office by the name of Terry Curtiss and that was legal counsel that was in place. Terry in the audit, it showed that he had not filed the correct documents with the Attorney General's Office, which it was a longstanding contract and he didn't know that he needed to. He has since, of course, received approval from the Attorney General's Office to do that. Also since that time... [LR612]

SENATOR CHAMBERS: But here's what I want to know. Was counsel retained by the committee as the audit said, or was counsel not retained and the audit was wrong? [LR612]

JERRY KUENNING: It's retained. [LR612]

JACLYN WILSON: It was retained. [LR612]

SENATOR CHAMBERS: Okay. So the audit was right. That was not authorized by law when it was occurring, was it? [LR612]

JACLYN WILSON: No. [LR612]

SENATOR CHAMBERS: All right. That was the question. See, I wish you all would just answer the question because I don't want to be argumentative. I want to get the facts, but it seems that you all are being very defensive. I'm not going to waste my time or your time. I'm going to listen to what you say. I'm going to compare it to what's in the audit. I will draw my own conclusion. But here's a question I want to ask. There was a listing of inappropriate or unjustified actions. What kind of oversight does this committee exercise that should have let them see that these kind of things were going on? [LR612]

JERRY KUENNING: Could I back up, Senator Chambers? [LR612]

SENATOR CHAMBERS: Sure. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: We did have...we had always retained legal counsel. We just didn't have it in the policy written the way that it should have been so that...and the audit found that policy infraction, but we had done it since 1941, had legal counsel. Terry, I believe, had been with us for more than 30 years. But yes, the audit did their job and it was an infraction because it wasn't in policy. [LR612]

SENATOR CHAMBERS: So here's the question I'm asking now. I'm not going to hold you a long time on one issue. What kind of oversight does the committee exercise? In order for all these things to have occurred, and the committee either didn't know or the committee knew and chose not to do anything about it. Which was it? If you exercise oversight, how could you miss all of these things that the Auditor's Office found? [LR612]

JACLYN WILSON: Senator, Jaclyn Wilson. One of the things that we found is when we started to really question the oversight part, we went back, the Brand Committee has been around for 75 years, and we started looking back. None of the stuff had been addressed before. A lot of the concerns in the audit were the same things that previous audits have been...have brought forward. So the vehicle usage is a prime example of this and you will see in this, we rewrote the vehicle usage policy. We had no state vehicle usage policy within our policy book. [LR612]

SENATOR CHAMBERS: But there's a state law and you had a lawyer. [LR612]

JACLYN WILSON: Right, there's a state law, but the thing that we're starting to realize talking to the TSB Board is that our vehicles, the committee owns those vehicles. So it...they fall within a different category than usual state government vehicles and they're also classified as special use vehicles because the people that drive those minus one of our vehicles are all certified law enforcement. So there's some give and take there with what we were able to do within policy but there was no policy on it. [LR612]

SENATOR CHAMBERS: Why didn't the committee look at this situation so that it wouldn't develop in the way that it did? That's what I'm trying to find out. It seems to me there was no oversight by the committee. This is an independent agency. The Governor appoints four or five people. The Secretary of State is a member, but nobody is looking at anything. I think I heard the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

gentleman say that this Harvey person resigned and there was some things he did which were not as they should and that's why he resigned. Is that correct or incorrect? [LR612]

JERRY KUENNING: There was mistakes made but none of them, as John said, were criminal. [LR612]

SENATOR CHAMBERS: Well, you call them mistakes, but...okay. And then you hired him after he resigned to what position? [LR612]

JERRY KUENNING: Chief executive of field operations. [LR612]

SENATOR CHAMBERS: And when you said you hired him for that, you said you needed somebody to captain the ship during that period. Is that true? [LR612]

JERRY KUENNING: Yes. [LR612]

SENATOR CHAMBERS: Well, if you had a person serving as captain and the ship foundered on the rocks under that guy's direction, why would you appoint him to captain the ship when the ship's in trouble because of what he did or didn't do, that he ought to have done or ought not to have done? What sense does that make? I'm trying to understand and I don't right now. [LR612]

JERRY KUENNING: John, I'm going to let you take a shot at that. [LR612]

JOHN WIDDOWSON: Mr. Chambers, you're exactly right. We realized that Mr. Harvey was not the person that needed to lead the Brand Committee from the top position as executive director. That's why he resigned and that's why we are currently trying to...we're in the process of having a new executive director, the application process and all that. We are going to find the right person to run this committee. We as a committee, we oversee the executive director. The executive director then has the assistant director and the chief investigator, all those people. We do not micromanage the employees. It is our job to have oversight over the executive director, and we felt like some of the infractions, that Mr. Harvey doesn't need to leave. That's why we are at the point today where we are finding a new executive director to lead the ship. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: Okay. [LR612]

JOHN WIDDOWSON: Mr. Harvey is now an interim chief investigator. And when the new executive director gets hired, he will then address what Mr. Harvey's position will or won't be. We cannot hire anybody as a committee other than the executive director, but we can make somebody an interim position and that's what we did. [LR612]

SENATOR CHAMBERS: Did you have to hire Mr. Harvey? Were you required to hire him in the position he's holding now? [LR612]

JOHN WIDDOWSON: No, that was a decision we made. [LR612]

SENATOR CHAMBERS: Do you think that this committee ought to be placed...it should be taken out of that independent status and placed more directly under state control? Because it doesn't seem to function very well and I'm going to make an admission, I don't know a lot about the Brand Committee. I don't know what they do. But I can read and when I read that there's certain responsibilities that are to be discharged and they're not, that principle would apply whether we're talking about the Brand Committee, a military operation, or any other thing because it says that the description of this job indicates that the person holding it should do one, two, three, four, five, and the person did not. And if those who exercise oversight did not do something about that, the person who failed to do the job is responsible; but there's a responsibility on the part of those who were to exercise the oversight. And I don't see any of that having occurred. So let me ask this question and maybe it will clarify something for me when you answer it. These things that were mentioned in the audit were things I knew nothing about and had no idea that they were occurring. So, as Will Rogers had said, all I know is what I have read. [LR612]

JOHN WIDDOWSON: Sure, sure. [LR612]

SENATOR CHAMBERS: Were you all who are on the Brand Committee aware of these things that appeared in the audit report as being inappropriate? Were you aware of them prior to the audit report being released? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOHN WIDDOWSON: Mr. Chambers, this is John Widdowson again. A large, large portion of the items in the audit we were aware and we were currently taking actions to resolve a lot of those things. Those solutions just don't happen overnight. Now I'll give you an example. The ammunition deal that got brought up in the audit. I had no idea about that, but in our opinion as a committee, the audit is not correct. We got wrote up for the ammunition deal and we are by statute have to provide that ammunition. So we have a statute saying we have to buy the ammunition in order to get our guys trained, but then we get wrote up in an audit because we don't own a firearm that matches the ammunition. [LR612]

SENATOR CHAMBERS: Well, why don't you? The ammunition was for a person's private firearm. [LR612]

JOHN WIDDOWSON: No, sir. [LR612]

SENATOR CHAMBERS: That's not true? What firearm was the ammunition for? [LR612]

JOHN WIDDOWSON: He had to purchase the ammunition to take to Grand Island so that he could get his certification. We are required by the Grand Island State Patrol to bring the ammunition needed for those guys to get certified with. We don't own the firearm, but we're required to purchase the ammunition and take it to the certification. [LR612]

SENATOR CHAMBERS: Who owned the firearm? [LR612]

JOHN WIDDOWSON: I'm making an assumption here, but I would assume the Grand Island State Patrol. [LR612]

SENATOR CHAMBERS: So it was not a situation where it was the individual's private firearm? [LR612]

JOHN WIDDOWSON: No, sir. No, sir. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: So the ammunition was purchased because it was required by the agency where the certification would occur, you have to bring your own ammunition. [LR612]

JOHN WIDDOWSON: That's correct. [LR612]

SENATOR CHAMBERS: Everything then...let me...instead of saying everything, nothing in this transaction dealt with a firearm owned by the individual who is seeking certification. [LR612]

JOHN WIDDOWSON: Not to my knowledge, not to...I'd speak on that... [LR612]

SENATOR CHAMBERS: And you've looked into that, so what you're saying is what the situation is now. [LR612]

JOHN WIDDOWSON: Absolutely, yes, sir. [LR612]

SENATOR CHAMBERS: And I'll accept that. And this will be a matter of record and if the Auditor's Office looks at it and they disagree, it's for them to do that. I'm just trying to get some clarification on what was in the audit report. This question that I ask you, do you think this ought to remain a private...I meant an independent agency? Do the people who serve on it have the time to provide the oversight that would be required? [LR612]

JOHN WIDDOWSON: Absolutely. I mean, it is a...it's been a much bigger undertaking or time allocation or responsibility than when I applied for the position, but we're all producers, Mr. Chambers. We understand the value. We understand the people that this benefits. You know, this is a producer-run program and all four of us here and our other committee member are producers. We admit as a committee there was some lack of execution. [LR612]

SENATOR CHAMBERS: Okay. So we won't get too far, you said it's a producer-orientated agency. Are you aware that there are some feedlot operators who felt that because of the amount of the fees being imposed, they were subsidizing producers? Are you aware of that complaint being out there? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOHN WIDDOWSON: Yes, sir. Absolutely. [LR612]

SENATOR CHAMBERS: Had you investigated it before it was raised in the audit? [LR612]

JACLYN WILSON: Absolutely. [LR612]

JOHN WIDDOWSON: Yes, sir. [LR612]

JERRY KUENNING: That issue... [LR612]

SENATOR CHAMBERS: Are you going to make any changes or you feel that was the correct thing to do and it will continue in that manner? [LR612]

JERRY KUENNING: Senator Chambers, I don't believe that the feedlot were in the audit. [LR612]

SENATOR CHAMBERS: Say it again. [LR612]

JERRY KUENNING: The feedlot...registered feedyards were not addressed in the audit. [LR612]

SENATOR CHAMBERS: I thought I saw where they had complained about... [LR612]

JERRY KUENNING: I'm going to challenge you on that and it's not in the audit. [LR612]

SENATOR CHAMBERS: Well, then let me ask it aside from the audit. You're aware of that complaint though, aren't you? [LR612]

JERRY KUENNING: Okay. Absolutely, and we have addressed it and there is statute change in your notebook where we are writing asking for new statute to be written to address that issue. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: But let's talk about what is now. [LR612]

JERRY KUENNING: Okay. [LR612]

SENATOR CHAMBERS: The feedlot owners apparently have raised a legitimate issue. And what they complained about, apparently, was accurate. If it wasn't, then why would you ask for a change in the law? Are you saying that the feedlot owners' complaint had no merit? Is that what you're telling me? [LR612]

JERRY KUENNING: No, I'm not saying that at all. [LR612]

SENATOR CHAMBERS: So then if it had merit... [LR612]

JERRY KUENNING: What we did as a committee, we voted to leave the feedlots at 75 cents when we moved the fee and moved the rest of the industry to \$1.10. The AG's Office came back to us and said that was unconstitutional, that we had to treat everybody and charge everybody the same fee. [LR612]

SENATOR CHAMBERS: So that proves you know exactly what I'm talking about, don't you? [LR612]

JACLYN WILSON: Senator Chambers, one of the things that you need to realize here is that three of the five committee members have been appointed within the last year. And so we are aware of the stuff that's going on. Concerning the feedlot thing, that came up...myself and Mr. Widdowson were appointed in September...well, August of last year. We voted on that at our January of 2016 meeting to make that fee separation. We were told we couldn't. Of course, session is already going, we don't have time to bring legislation forward. Section 3, you'll see the legislative bill that we're planning on bringing forward this session. There is that change in there. I have personally met with the feedlots as has Mr. Widdowson. We also incorporated them into our task force to make these changes. This isn't the previous committee. This committee has just occurred within the last year. So we're trying...this committee is taking steps necessary to get this

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

done. That's been an ongoing debate for over a decade but we're making the changes on that.
[LR612]

SENATOR CHAMBERS: Now when people were being introduced, I didn't...what is your role?
[LR612]

JACLYN WILSON: So I serve on the committee. I was appointed last August and I also serve as our chair of our policy and statutory working group. So I oversee the working group that has made this legislative bill statutory changes that were then approved by the committee and also rewriting the policy book for the committee. [LR612]

SENATOR CHAMBERS: Do you think it ought to remain an independent entity? [LR612]

JACLYN WILSON: I do. And the reason being, is because the western part of the state is a long ways from Lincoln and there's a lot different dynamics out there than there is here in the Capitol. I'm a cow-calf producer. I live five and a half hours away from the Capitol. We have a good understanding of what's going on. And within the last year, as you'll see, we have made a lot of changes to correct a lot of the issues that have occurred in the past. [LR612]

SENATOR CHAMBERS: My final question, because I don't want to prolong the hearing and I don't want to take too much of the time. There are employees who have quit and maybe at least one official. Would they be in a position whether they knew or not, would they be in a position to know as much about what's going on as you all know, or they were not in a position to know? In your opinion. I'm...just give me your opinion. If you think no, then say no. [LR612]

JERRY KUENNING: They don't have the information, know the knowledge...have the knowledge of what was going on that we did. No, they did not. [LR612]

SENATOR CHAMBERS: Okay, and although I have questions, that's all that I'm going to ask.
[LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: Senator Chambers. If I could, Senator Johnson, I'm going to address a little bit more about whether you think that there needs to be an oversight committee for the Brand Committee. It is true, we are self-funded. We don't collect taxpayer money. We fund our own operation--3,500,000 cattle that were inspected last year--we charged \$1.10 for all those, except for the registered feedyards which were charged a one-time capacity. So to have an oversight committee, we're managed and owned by the owners of the business. Go ahead. [LR612]

SENATOR JOHNSON: This information that I'm aware of, I know you have worked recently with the Department of Ag and that direction from them and some assistance and you've asked for that which would be the closest tie to a state agency, but not under direct jurisdiction, is that correct? That you...getting some information through them? [LR612]

JERRY KUENNING: If I could expand on that and ask for the other committee's help if I miss something, but yes, we use them in formulating the budget this year. Bob Storant and his expertise and we've put the budget together. Greg Ibach has been attending our meetings now, has been very helpful with his expertise in some personnel matters and with his field staff what works there in relaying that to us. Also we're using Carolyn Collier in the process of hiring our new director. I might say, we've had 14 applications total for our new director. As numbers fall, some of those are really good, some of them aren't, probably applicants that we want; but we're using there to do the process of asking the questions and that. So, yes, we are. And also we've...Jaclyn, if you'd comment to our legal counsel, our new legal counsel hire. [LR612]

JACLYN WILSON: Absolutely. With Senator Chambers' question earlier about legal counsel, we talked about the retention that we've had of the legal counsel across the street. Well, also within the last couple of months we've hired Rembolt Ludtke. Mark Fahleson has also been doing legal counsel for us and so we really appreciate Mark's help on things and in dealing with the Attorney General's Office. Plus, he's also present at every meeting and is really helping us work on public notice laws. That's something that had severely lacked in the past with the committee and something that this committee is determined to change. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: Okay, let me make one introduction. Senator Riepe joined us some time back. We appreciate you being here. I know you were in another hearing. And I recognize Senator Davis, who is not on the committee but has attended. Thank you for coming here. Senator Harr. [LR612]

SENATOR HARR: Thank you. I want to clarify the record a little bit. First of all, you said you don't use any taxpayer dollars. I'm going to disagree with you there because the owner of those cattle don't have a choice and you are giving your money through statute. So we, as a state, say how much you can and can't get, so it is tax dollars. It may not go through a general fund and filter back through you, but it is money collected that we say you can or cannot collect and the person on the receiving end doesn't have a choice whether they pay it or don't pay it. So it is a tax. You ask any rancher and they'll tell you, it's a tax. So I'm going to disagree with you there a little bit. [LR612]

JERRY KUENNING: It is producer money. It's not a tax fund money. If you sell one head, you're charged \$1.10. If you sell 110 head, you're charged \$1.10 of the producer's money that doesn't go through and routed through a tax fund. [LR612]

SENATOR JOHNSON: I think it's...I think you're both right. Technically by statute, it...because it's a required. [LR612]

SENATOR HARR: All I can say to you, good luck not paying it. Okay. (Laughter) [LR612]

JERRY KUENNING: It's mandated...yes, you're right. I'll tell you, you're absolutely right, Senator Harr. But it is producer funded. [LR612]

SENATOR HARR: Well, it's a fee, it's a fee. [LR612]

JERRY KUENNING: It's a user fee. [LR612]

SENATOR HARR: And, you know, that's always a debate we have whether a fee is a tax or not and we go back and forth on that, so I'll agree with you to a certain degree. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: And I'll agree with you, too, sir. [LR612]

SENATOR HARR: So you...I heard earlier you used to have an assistant director that you guys did not retain, is that correct? Have you guys...board, when I say you guys, I apologize, that's a generic term. Has the board spoken with that director regarding Mr. Harvey about what was known and not known within? Have you had an internal audit after you had an external audit done by the Auditor's Office? Have you guys done an internal audit and talked to this individual? And if so, what have you learned? [LR612]

JACLYN WILSON: Senator, I'll address that. We, after he submitted his resignation, we did not continue communication with the past assistant director as within a half hour after leaving the office, we started receiving media calls. And he had plenty to say about the committee within the media that we overall privileged to read. Before that time, we had numerous executive sessions that we participated in where he voiced his concerns and issues that he had and had already even had discussions with both of them to put them on probation until they could resolve their differences. It was an issue that we were aware of, had been made aware of, and when that...at the end of the day, we feel that the appropriate action, even with his resignation, was very satisfactory to the committee. [LR612]

SENATOR HARR: Was he asked for his resignation or did he submit it without being asked? [LR612]

JACLYN WILSON: Legal counsel actually asked him. I was present in the office that morning. He had tipped me off the day before that he would be submitting his resignation. We had two committee members in the office that morning with the then-executive director, Harvey. Legal counsel was on the phone and asked him three times if he would be submitting his resignation. The third time he said, yes, I will give you what I want. I will be submitting it and stormed out of the office. We had a discussion... [LR612]

SENATOR HARR: So it sounds like it was rather acrimonious. [LR612]

JACLYN WILSON: I'm sorry. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR HARR: Did it sound like there was...I don't know how to say this...tension when this was submitted? [LR612]

JACLYN WILSON: Yes, it was. [LR612]

SENATOR HARR: So there wasn't a chance for an exit interview. [LR612]

JACLYN WILSON: No, no, Senator, that would not have been a possibility. [LR612]

SENATOR HARR: Okay. If you haven't spoken with the former assistant director, have you spoken with other employees to see if you can garner more information about how you can improve on what you are already doing? [LR612]

JACLYN WILSON: Senator, we had. We had numerous discussions before he resigned on the issues that were concerning the position and the relationships within the office, not only on him, the past investigator that resigned. He actually submitted information to us in written form of some of the concerns that he had. We have since addressed those concerns also. Past office staff member, she quit. She would send me multiple e-mails talking about her concerns within the office. I made the other committee members aware of them. Yes. The overall aura of personnel at that time has improved. The past history of the committee has always promoted within and that is one of the steps that this committee has changed is that now anytime we're looking for outside employment, whether it be an investigator or somebody of the executive director position, we're starting to open those out to the outside, because we feel that it's really necessary to get the right people in for the job instead of just promoting within as causing some of that tension that has occurred and to some point continues to occur until we can get everything in the mode that we wanted to. [LR612]

SENATOR HARR: Okay. So, again, like Senator Chambers, I'm an outsider. I'm an hour from Lincoln, probably six and a half hours from you. All I can do is read the audit. The audit to me seems critical of Mr. Harvey, and I think mistakes were made, whether they were intentional or not, mistakes were made through omission. Maybe not co-mission, but omission. And I'm having a tough time figuring out how...it seems as though the assistant director has taken the fall. Mr.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

Harvey has been asked to resign, but he's been given a pretty soft landing. So can you explain to me from the outside why that has occurred? [LR612]

JERRY KUENNING: If I could attempt to answer that. Another good question. Assistant director was in charge of the bookkeeping and the accounts and the late checks. And if you look at the audit, probably, and I'm estimating here, probably 14 to 12 of the issues raised in the audit fell under the assistant director's responsibility. [LR612]

SENATOR HARR: So who... [LR612]

JERRY KUENNING: All of the book...if you look at the audit issues, all those again, I repeat, pertain to accounting, and delayed checks fell under his responsibilities. And deposits. [LR612]

SENATOR HARR: Why did Mr. Harvey feel he had to resign? [LR612]

JERRY KUENNING: Mr. Harvey did not resign. He...excuse me. The assistant director resigned because there was other issues that we addressed with him. The other five or six issues fell under Shawn Harvey's responsibility. [LR612]

SENATOR HARR: So then why would...did Mr. Harvey feel he needed to be reassigned? [LR612]

JOHN WIDDOWSON: Senator Harr, Shawn has a deep passion for the Brand Committee. If you worked there for 19 years, you've got a deep passion for it. And when he came to us as the committee, he basically wanted to take the weight and the stuff that was going on in the media off of our plates and not have to deal with it. He said it would be a lot easier for you as a committee if I wasn't around. Somebody needs to be the fall guy, and it's probably best if I just take one for the team here, then you guys don't have to deal with that. There was conversations, Mr. Harr, prior to that that his strength was probably not the executive director's portion. We talked about that already. So Mr. Harvey was willing to do that to take pressure off so that we could get the ship righted again. We as a committee knew that by retaining Mr. Harvey we would have a lot of questions to answer. But we felt like what was best for the producers, what was best

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

for the committee is keeping him on board and being able to put him in areas where his talents and his abilities could be used and take him out of situations where he was going to fail or not be as successful. That was our job as a committee. We felt like if you lose the assistant director on July 26 and you lose Shawn Harvey on August 8, there would be a large mountain of things that need to be dealt with. And we felt like there was considerable value in putting Shawn in his position. We understood that there was going to be questions about that decision, but we felt like the good, by far, outweighed the negative. [LR612]

SENATOR CHAMBERS: May I just make a point. I'm not overly sensitive and to introduce it, I want to make this comment. Paul Scofield was a famous British actor of screen and stage. He won an academy award in A Man for All Seasons about Sir Thomas More. He was to be knighted by the Queen and he said he didn't need that. That if titles were to be handed out, Mister should be sufficient. Here's what I'm curious about. The gentleman to my right is a Senator. That makes me the gentleman to his left. I'm a Senator. Why did you address me as Mister and him as Senator? I'm just curious. Mister is all right with me, but what difference do you see between me and Senator Harr? [LR612]

JOHN WIDDOWSON: Absolutely none. [LR612]

SENATOR CHAMBERS: So why did you call me Mister? I'm...I'd like to know. Words matter to me. [LR612]

JOHN WIDDOWSON: Absolutely. [LR612]

SENATOR CHAMBERS: Okay. [LR612]

JOHN WIDDOWSON: I'm not a professional speaker. I'm a farmer-rancher producer. I talk to my cows and I talk to the few employees I have, so... [LR612]

SENATOR CHAMBERS: But I hope you're not seeing me as you see your cows. (Laughter) Let me tell you why I say that. Senator Schnoor had posted something on his...whatever you call it that's on the computer, and it said, there is to be a demonstration at this location of Black Lives

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

Matter. And it showed a herd of black cattle. That's what Senator Schnoor did. And I think that's racist and I'm going to deal with it further. But when we both are here and you say that you're a rancher, well, you're the same rancher when you refer to him as Senator that you were when you refer to me as Mister. So I think there was a difference that you saw; and if there wasn't, then I have a responsibility to sensitize you. Because when we as black people are treated differently, in a short period of time, the one who made the distinction had a reason for doing it. You didn't see me in my capacity as a Senator or you would have said Senator Chambers. You said Mister several times. The first time you spoke to that gentleman to my right, it was Senator Harr. I just thought I'd throw that out there and I want it in the record so all these people who come before these committees, you're going to address me the way you address him, or you're going to address him the way you address me, then I say, you're just a person who feels that the title Mister is good enough for everybody. Personally, it should be. But when we're in a professional capacity dealing with each other in that manner, it would be wise to address everybody who is similarly situated in the same way. And you don't even have to pay me for that bit of instruction. And I'm old enough to be your father so you don't have to take offense, Sonny, that I would give you that instruction. [LR612]

JOHN WIDDOWSON: No, but I'll thank you for it. [LR612]

SENATOR CHAMBERS: Okay. [LR612]

SENATOR JOHNSON: Senator Bloomfield. [LR612]

SENATOR BLOOMFIELD: Thank you, Chairman. How many people on the committee now, there's five members of the committee, how many of them have been there more than a couple years? [LR612]

JERRY KUENNING: I'm the oldest on the committee. I'm starting my fifth year. [LR612]

SENATOR BLOOMFIELD: And Ms. Wilson, I think you said less than a year. You're less than a year as well, sir? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: I misspoke. I apologize. I made a mistake. Jerry Meyring, the individual that's not here, has been on longer than I have and he's been...it's in your book also. I believe he's been here...been on the committee six years. I've been on starting my fifth. I misspoke and I apologize. [LR612]

JACLYN WILSON: But yes, Senator, I've been on a year. Mr. Widdowson has been on a year and Mr. Metz has been on less. He was appointed last March. [LR612]

SENATOR BLOOMFIELD: So three of the five members have less than a year's experience on that. [LR612]

JACLYN WILSON: Yes, thank you for noting that. [LR612]

SENATOR BLOOMFIELD: Who is currently handling the day-to-day financial activities of the board? [LR612]

JERRY KUENNING: We have our secretary and staff and I'm also making trips to Alliance as well as... [LR612]

SENATOR BLOOMFIELD: Who is writing the checks? [LR612]

JERRY KUENNING: We don't write any checks. We don't have a checkbook. [LR612]

SENATOR BLOOMFIELD: Who is paying the inspectors? Somebody has got to be writing a check somewhere. [LR612]

JACLYN WILSON: Senator, the state of Nebraska does. It's a state entity. [LR612]

SENATOR BLOOMFIELD: Okay, with that nontax money. Okay. [LR612]

JERRY KUENNING: Donated by the producers. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR BLOOMFIELD: Not donated. Removed from the producers. I still have issues with Mr. Harvey and you told me when you appoint, you told us, when you appoint a new director, it will be at his discretion as to what happens to Mr. Harvey. Why would we not...I understand we have the ship run up on the rocks, as Senator Chambers said. And even though the captain of the ship may run it up on the rocks, he's the only guy that knows where the stern or where the steering wheel is on the thing. I can understand you want to keep him on for a while, but the idea that he may be retained permanently doesn't make a lick of sense to me. So I would hope you would remove that option. [LR612]

JERRY KUENNING: It's stated in our policy that the director hires and fires all the people below him in the staff, including investigators, assistant directors, inspectors, and intermittent inspectors. We are only, as a committee, only responsible for the director, hiring and firing that individual. [LR612]

SENATOR BLOOMFIELD: I believe I would be inclined to make it clear to the director that he was not going to be hired or would be fired if he kept Mr. Harvey around. [LR612]

JERRY KUENNING: That will be a vote taken by this committee. [LR612]

SENATOR BLOOMFIELD: Okay. Have we ever figured out really why he was in Wyoming? Mr. True has showed all kinds of evidence that he wasn't there. I know it's impossible to prove a negative. They're asking a presidential candidate to do that now and it's impossible to do. But there is very little evidence that the man was there, if any, other than he said he was. [LR612]

JACLYN WILSON: Senator, I'll respond to that. And there's also no evidence that he wasn't there because his phone records show that he was in Cheyenne that morning. He himself has said that he had a meeting with the director who walked into the office that day. He saw the director in passing, said a couple of words. The director was preparing for some meetings that week and also some interviews, so he said, he just...they just kind of spoke in passing a couple minutes, he turned around and left. He never signed in on the log book or anything. So we understand...we understand what the story shows. But when we were looking at the phone records, the big part was, why would he have had any other reason to go to Cheyenne except for that meeting? And

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

he himself...he himself has been completely blunt with the board a number of times, voluntarily produced everything that we have asked him to produce including his phone records that show that he did go to Cheyenne that morning. He was back in Mitchell after lunch that afternoon and then was on the school bus that evening to attend a basketball game. So because of the data that we have, we...even from a legal standpoint, if I was an attorney and not a rancher, I couldn't say, you're guilty or you're not guilty based on two gentlemen's differing views. Because the data shows, he was in Cheyenne that morning. He, himself, said he went there for business and the data also shows that he was back in Mitchell that evening. And we contacted the coaches and they said he was on the bus. So data doesn't show different. [LR612]

SENATOR BLOOMFIELD: Okay. So Mr. True, as I understand it, apparently set up a meeting with Mr. Harvey... [LR612]

JERRY KUENNING: No. [LR612]

SENATOR BLOOMFIELD: ...and then was not able, or not able to attend because... [LR612]

JACLYN WILSON: No, there was no meetings that were set up. Shawn was making a courtesy visit. [LR612]

SENATOR BLOOMFIELD: So he was just going to stroll in and say "hello." [LR612]

JACLYN WILSON: It was a courtesy visit to talk about...we do have a relationship with other states in brand department. So it's just a meeting that he went to Cheyenne. Did he make a mistake in not setting up? He himself has said...admitted that if he did the same scenario again that he would call and set an appointment time. [LR612]

SENATOR BLOOMFIELD: Seems like this one individual made a lot of mistakes. [LR612]

SENATOR CHAMBERS: But since I raised that issue, may I ask a question? Didn't he go there to coach a girls' basketball team? Isn't that why he was in Wyoming? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOHN WIDDOWSON: No. [LR612]

SENATOR CHAMBERS: So he did not coach a girls' basketball team while he was in Wyoming on that trip? [LR612]

JACLYN WILSON: No, sir. [LR612]

JERRY KUENNING: No, he did not. He made two trips to Wyoming that day. And I remind you, it's only a 65-70 mile drive. He went to Cheyenne in the morning, not calling ahead, which why somebody would do that I still question. You don't...I don't let people go to town to get a part without calling ahead to see if they have the part. [LR612]

SENATOR CHAMBERS: Then he went to Burns, Wyoming. [LR612]

JERRY KUENNING: He came back home and then took the bus back to Burns to coach a basketball game. [LR612]

SENATOR CHAMBERS: So then if I'm understanding what you're saying, he went to Cheyenne, saw a guy in the hallway and said "hi" and the guy said "hi" to him, then he drove back to Lincoln. [LR612]

JACLYN WILSON: No, Senator, Mitchell. [LR612]

JERRY KUENNING: Mitchell. [LR612]

SENATOR CHAMBERS: Mitchell. And that was in the state car. [LR612]

JACLYN WILSON: That was in the special use vehicle that he has as an investigator. And so because of the fact that he made that trip to Cheyenne, he took the state vehicle that he has. That's a special use vehicle so it's outfitted with sirens and CBs and everything. And then he drove that back to Mitchell and parked that in the garage. And we've called the witnesses that he

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

gave us the numbers to, to make sure it was parked in the garage that evening, and then he went and boarded the bus to Burns, Wyoming, for the basketball game. [LR612]

SENATOR CHAMBERS: And you believe that? [LR612]

JACLYN WILSON: The coaches, we... [LR612]

SENATOR CHAMBERS: No, I'm just asking you, and you believe it, yes, or no? [LR612]

JACLYN WILSON: Yes, I do. [LR612]

SENATOR CHAMBERS: Have you ever heard the word rogue, r-o-g-u-e? [LR612]

JACLYN WILSON: Absolutely, Senator. [LR612]

SENATOR CHAMBERS: Now a rogue is one who practices trickery, deception, or fraud. And people could have differing opinions, but let me ask you this. Did the Auditor state an opinion as to what was going on in this whole situation that led to the belief that he misused that vehicle? He used it for a purpose other than state business. As you read what the Auditor's report was, do you feel that the Auditor arrived at the conclusion that the use by Captain Harvey, who ran the ship aground, the use of that vehicle was not for state purpose? Did you get that as the Auditor's conclusion that was drawn? [LR612]

JACLYN WILSON: Yes, Senator, and I had a different conclusion after doing my due diligence and calling...and Chairman Kuenning calling coaches. [LR612]

SENATOR CHAMBERS: And you drew your conclusion from what Mr. Harvey was saying. [LR612]

JACLYN WILSON: Based on (inaudible) and then following up by finding documentary evidence that proved otherwise. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: But you don't know that he didn't use that vehicle to go where he's going to coach the girls' team, do you? [LR612]

JERRY KUENNING: Yes, we do know that. We feel comfortable we know that. [LR612]

JACLYN WILSON: We feel very comfortable in the decision. [LR612]

SENATOR CHAMBERS: Well, let me ask you this. Did he sell some cattle and a bull to the owner of an operation without having proof of ownership before he approved that sale? Did he do that or did he not? [LR612]

JERRY KUENNING: Senator Chambers, Shawn Harvey did not sell the cattle. [LR612]

SENATOR CHAMBERS: Did he approve of the sale? Do you know the situation that I'm talking about? [LR612]

JERRY KUENNING: Yes, I do and that's a very good...that's another one of the topics that we want to address. [LR612]

SENATOR CHAMBERS: If you know the incident, don't play with me. [LR612]

JERRY KUENNING: Yes, we know about it. [LR612]

SENATOR CHAMBERS: Why would the Auditor make the statement that these cattle were sold without proof of ownership? Is that false? [LR612]

JACLYN WILSON: Senator, they had proof of ownership. They had proof of the ownership on the majority of those cattle. [LR612]

SENATOR CHAMBERS: Not the majority. [LR612]

JACLYN WILSON: Yes, they did. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: So the audit was wrong in that regard. [LR612]

JACLYN WILSON: They had proof of ownership and it says within there, we have the documentation in there that shows all the proof of ownership that was submitted with those cattle. There was a certain couple head, there was 8 cows and 1 bull out of, I believe, his 23 head, that the ownership was proved wrong on. And so since then the paperwork is in here that proves that that ownership was actually correct and that person owns those cattle. [LR612]

SENATOR CHAMBERS: So the Auditor...the audit report was wrong. [LR612]

JACLYN WILSON: The Auditor didn't follow up. We didn't have the information at that time. [LR612]

SENATOR CHAMBERS: Here's what I'm asking you. We don't know about the follow up. We know what's written. Was it written in that report that this sale was made without proof of ownership of the animals that were sold? Was that in the audit? [LR612]

JERRY KUENNING: It was in the audit. And again, we had to do our research to make, to rectify... [LR612]

SENATOR CHAMBERS: Don't get ahead of me. I don't know about your research. I'm talking about the audit. Why do you all not answer the question the way I ask it when I'm trying to get information? I'm going to ask it now. Was it in the audit that these animals, the sale was approved without proof of ownership and they were...the sale involved an individual with a criminal record? Now that was in the audit or was that not in the audit? Are you telling me that what I'm saying is not in the audit or that it was in the audit but it was wrong? What are you telling me? [LR612]

JERRY KUENNING: Senator Chambers, it was in the audit. [LR612]

SENATOR CHAMBERS: Okay. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: But we did our research and Senator...or excuse me, Shawn Harvey made a mistake. He trusted an inspector that said the paperwork is coming. I have it. The producer was being very belligerent and very tough and Shawn tried to do him a favor and he made a mistake. We did our due diligence following up with all the paperwork. The brand papers showed that he, the owner, did indeed own the cattle. [LR612]

SENATOR CHAMBERS: Now how can you say Harvey made a mistake? That's what I'm not understanding. [LR612]

JERRY KUENNING: He should not have released those cattle until the paperwork was in his hand. He trusted an inspector's verbal comment that I have the paperwork, of which that inspector did, and it was mailed later and a week after the incident happened it was rectified. [LR612]

SENATOR CHAMBERS: But you don't know that that paperwork existed at the time of that process, do you? There may not have been the... [LR612]

JERRY KUENNING: We took an inspector's word that said to Shawn Harvey, yes, I have it. Shawn released it. That was the mistake he made. He should have had the paperwork in his hand. [LR612]

SENATOR CHAMBERS: How do you know the paperwork existed at that time when it was subsequent to that that the paperwork showed up? [LR612]

JERRY KUENNING: Because the inspector told us it was. Do we know it? No, we had to do our homework and had to do our research to rectify it. [LR612]

SENATOR CHAMBERS: But we can't go by what's written when Mr. Harvey is involved because he backdated a document that related to an employee, didn't he? [LR612]

JACLYN WILSON: Senator, can I clarify that though, please? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: First answer. Did he backdate a document? [LR612]

JERRY KUENNING: According to the policy, yes. But here's what... [LR612]

SENATOR CHAMBERS: What do you mean, according to the policy? Either he backdated it or he didn't. If he writes...okay. Let's say today is October 14. Tomorrow, two days from now, it's October 16. Something happens October 16, but on the document that relates to what happens on October 16, he writes that it happened on October 14. What does backdating mean to you because maybe we understand it differently? [LR612]

JERRY KUENNING: If I could, I'm going to try to answer this in the form of a question and this is the layout that happened. [LR612]

SENATOR CHAMBERS: Well, if I'm the interrogator, if I'm the interlocutor, you are the one the one being "interlocuted." [LR612]

JERRY KUENNING: If you get an e-mail on October 14, you take action on that e-mail on October 16, what date do you put on it? [LR612]

SENATOR CHAMBERS: I don't use e-mails, unless you mean by e, Ernie mail, and mine is by the post office. But here's what I need to know. Did the audit say that he backdated this document? [LR612]

JERRY KUENNING: Yes, it did. [LR612]

SENATOR CHAMBERS: Did he, in fact, backdate the document? [LR612]

JERRY KUENNING: In our opinion, no. [LR612]

SENATOR CHAMBERS: I don't have anything else. [LR612]

JERRY KUENNING: Okay, and here's the clarification of that. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR CHAMBERS: You don't need to clarify, you don't believe the audit told the truth.
[LR612]

JERRY KUENNING: No. [LR612]

SENATOR JOHNSON: Let me intervene here a little bit. I think we've...there's more to discuss. I think we've pretty well opened up all the cans of worms out there, whatever it is, on Shawn Harvey. There's more answers to come out, I'm sure. What I would like to move on a little bit to how we're going to rectify these situations, part of policy, part of technology. I think one of the questions that Senator Harr, I think, is going to have is a little bit about the process of how you disburse money through the system and how that might be improved or handled now that we look at the new technology. [LR612]

JERRY KUENNING: Can I take just a minute on the backdating. It's pretty essential that it be cleared up. He received a e-mail. He did...which is in the packet. He took an action on that e-mail three days later. He dated it the day he took action, not the date that it came out as an e-mail. [LR612]

SENATOR JOHNSON: Okay. Thank you. [LR612]

JERRY KUENNING: He actually did the state a favor because he delayed it three days, but yes, he should have, according to policy again, he... [LR612]

JACLYN WILSON: But that wasn't...excuse me, Senator. That wasn't why they actually got in the audit for writing up for backdating (inaudible). When the auditors were in office, they requested this paperwork for him to fill out the form on this and he pulled up the e-mail that he had received and in front of the auditors he actually signed it the day that the e-mail had been sent, which is the e-mail here is in the packet. That's why they...and then the auditors wrote him up right there on the spot for backdating that form, which is why that came about. [LR612]

SENATOR JOHNSON: If we could...okay, you want to get your question in and then... [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR HARR: I think it's been answered, but I'm going to just ask since we're (inaudible). So Mr. Harvey released the authorization for the checks when there was no proof of ownership. I think you guys have agreed to that, correct? And you said he made a mistake. Isn't that mistake a violation of our state statute? [LR612]

JACLYN WILSON: There was proof of ownership. It wasn't the correct proof of ownership on a percentage of those animals and that's the issue. [LR612]

SENATOR HARR: Well, I heard a mistake was made, correct? [LR612]

JACLYN WILSON: Correct. [LR612]

SENATOR HARR: So it wasn't the proper ownership by statute, correct? [LR612]

JERRY KUENNING: At that time. [LR612]

SENATOR HARR: So that's a violation of statute, and yet you guys...I don't know this Mr. Harvey from...he could be in this room as far as I know, but I just...I'm having a tough time sitting here listening to what's going on, I'll be honest, because I hear we had to get rid of this assistant. And I don't know this person from Adam, he or she could be in here, I don't know. We had to get rid of this person because there were these violations and that I think the comment was 12 out of the 14 were for this person. I hear misappropriation of dollars and my ears perk up a little. And I hear that this person, Mr. Harvey, was responsible for it and I hear, well, he's been reassigned to something else. I'm having trouble figuring out why one person is a...for lack of a better word, "fireable offense" and why another is a reassignment with no real change, maybe future statutes, or future dollars, but no real change in current dollars. I mean, can you explain to me...I guess my question is going...we're going to work on policy a second, but sell me on Mr. Harvey. Tell me why he's so great. I hear things are different in Ogallala, Valentine, Scottsbluff, I hear that. Sell me on him on why you guys felt you should retain him and why he still has a job today. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JACLYN WILSON: Senator, to clarify real quick. This gentleman over here was not fired, he chose to resign. That was the decision he made. We had...we had a tough decision to make with Harvey and I spent a number of hours in the office the last couple of months. I'm 36 miles away from the office so I'm one of the closest committee members and I spent numerous amount of time within that office and I got to know Harvey very well. He is very, very good in the field. He is very good with inspectors and he knows...he knows brand inspectors. He knows sale barns. He knows the investigator system. He knows that part of it. We had...we recognized that experience. I mean, we recognize Senator Chambers' experience. It's tough to pass up some of that wisdom and that was the tough decision we had to ask. What was important at that time? Was it important that we maintain that wisdom and knowledge that he had while we found the right people for the job of executive director? And to us, it was important to maintain that. And that's why we're searching for an executive director that doesn't fall within those same...those same strengths that Shawn Harvey has. We're looking for somebody who is very business oriented, focus more on personnel, on budgetary, on working within a government entity. Those are our concerns. We've got to put the right people in the right jobs. That's our priority, and we feel that we put Shawn Harvey in a job that he's a right person for. [LR612]

SENATOR HARR: Okay, but you haven't sold me. You've given me conclusions. We think he's great. You know, I think these people are great, reelect all of them. Okay. You have to make an argument. You have to sell me on it and tell me why you made the decision to keep Mr. Harvey. Give me specifics. You say he's great with it. Tell me how he's great. [LR612]

JERRY KUENNING: John, do you care to take a shot at that? [LR612]

SENATOR HARR: What's that? [LR612]

JERRY KUENNING: I was going to ask John to make a comment to that. Excuse me, Senator. [LR612]

JOHN WIDDOWSON: Senator Harr, I was on the phone with the Auditor with Chairman Kuenning and as we're going down through the line items of stuff, my first ever audit, and the question begins to wonder, how did the Auditor find this information? Like the paper not having

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

documentation, how did the Auditor ever come across that? Like the trip to Cheyenne, whether the trip was justified or the time that he spent there with Director True, whether it's a valid trip or not, how did the Auditor even know that? There's multiple, multiple trips by investigators, people throughout the agency that make trips every single day. How does the Auditor know that they actually did the trip that they said they were going to do? So, me being naive, I said to the Auditor, how did you find out...how did you...this don't make sense. How did you find out about it? [LR612]

SENATOR HARR: Well, there's a gas receipt from Burns. [LR612]

JOHN WIDDOWSON: So it proved that he was there. [LR612]

SENATOR HARR: Well, you asked how he found out, that's how he found out. [LR612]

JOHN WIDDOWSON: But why would he look at that specific situation? [LR612]

JACLYN WILSON: We've never seen a gas receipt. [LR612]

SENATOR HARR: I can't answer that, but you asked me a question and I just answered it for you. [LR612]

JOHN WIDDOWSON: And I'm saying...and I'm saying, Senator Harr, there was people within the organization that didn't want Mr. Harvey to succeed. It's the truth. [LR612]

SENATOR HARR: And you want him there and so tell us why you wanted him there? Because if there were people that didn't want him, you guys wanted him, tell me why you want him. Sell me on him, rather than he's great. [LR612]

JERRY KUENNING: He had more experience. [LR612]

SENATOR HARR: Give me the experience. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: Experience of being a brand inspector. [LR612]

SENATOR HARR: But what is that experience? I mean, anyone can be a brand inspector. Why is he a good brand inspector? [LR612]

JERRY KUENNING: No, not anybody can be a brand inspector. Knowing how to read those brands, knowing how to record those brands is a learned experience, just like being a senator. You're not the same senator today that you were four years ago. [LR612]

SENATOR HARR: That's fair. Right. Yeah. [LR612]

JERRY KUENNING: That's the difference, his experience and his talents and his job skills. [LR612]

SENATOR HARR: And what are his job skills? [LR612]

JERRY KUENNING: Being able to get along with people, being able to coordinate things with people, being able to read those brands, being able to call...answer disgruntled producers' questions and being able to get into the dirt and handle the producers that are upset. He can do that and do it very well. [LR612]

SENATOR HARR: Okay. [LR612]

JACLYN WILSON: Not only that but being able to testify in court, work on estray cases, do stop checks. He was...when we asked him to step up and take some over the budgetary items, he was able to do that. He was able to manage meetings. He was able to manage the office staff. He was able to still help run a business even though the second in command had chose to resign. He stepped up and that's why he's still there because the gentleman stepped up. [LR612]

SENATOR CHAMBERS: You know what, at Wells Fargo some of those managers knew all about banking, but they did some things that were violations and they did not say at Wells Fargo, these guys know so much about banking that even though what they did was an actual violation,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

we're going to keep them here because of what they know. So it's like saying, if I work in a bank and I embezzle, I'm going to keep my job because I knew all about banking, but my knowledge of that made it possible for me to embezzle. So I'm going to say, we keep the embezzler because he knows. Some of the things that were done were violations of the statute itself. That's why I was asking some of the questions that I did and that you had a lawyer retained. Misuse of state property is a misdemeanor or a crime. What this man did on occasion was criminal. So for you to tell us that he knew how to get along with people, he knew how to testify in court has nothing to do with what some of us are interested in. And Senator Harr, I'm sorry I interrupted your train, but I couldn't just let that go. [LR612]

SENATOR HARR: So, I guess my question...and maybe this gets at it. Did he have a personnel file? [LR612]

JERRY KUENNING: Yes. [LR612]

SENATOR HARR: Okay. And generally what did...can you...if you can, I don't know if you can or not, can you say how that...what's in that personnel file? [LR612]

JACLYN WILSON: We cannot. [LR612]

SENATOR HARR: Okay. Okay. [LR612]

JACLYN WILSON: He has only granted release since... [LR612]

SENATOR HARR: Yeah, I get that. Yeah, yeah. [LR612]

SENATOR JOHNSON: Senator Schilz is next and then Riepe and then we'll go...Senator Schilz. [LR612]

SENATOR SCHILZ: Thank you, Senator Johnson. As we look at all this, I mean, we could go on about Harvey seems like all day, but I want to ask a broader question. I mean, obviously, we know the law... [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: Excuse me, I can't hear you, sir. There's some conversation. [LR612]

SENATOR SCHILZ: That's okay. Obviously we know that the issues that came about here happened, you know, you lose certain employees and everything like that. My question to you is, first of all, what have you guys done to figure out how you got in the position that you're in and then, I mean, because what it sounds like to me is, you didn't have any other choice. You didn't have anybody else that could do the job and so you kept the guy. That's what I hear. And so that's, I guess I get that, but then the question is, what is the board doing to make sure that this kind of stuff doesn't happen again? That's what I want to hear. [LR612]

SENATOR JOHNSON: It's again, policy. [LR612]

JERRY KUENNING: I'm going to make a comment. Thank you, Senator, and we appreciate that. We don't know what the future holds. The people in Wells Fargo that were referred to, they were there for a while. We don't know if Shawn Harvey will be there after we get a new director. That's...we don't know about the future, but... [LR612]

SENATOR SCHILZ: What about succession of leadership? I mean, as we talked about, who comes next in line so that if that person is gone or that person is gone, who steps up next to make sure that things get done the way they're supposed to? Is there that kind of training that's going on or will there be? Are those the types of things that you're going to be talking about the new executive director with? [LR612]

JERRY KUENNING: You're leading us into our next deal and I'm going to turn that over to Jaclyn for policy and statute changes and you've led us right into that. [LR612]

SENATOR SCHILZ: That's fine, if you want to go into that. That's fine with me. [LR612]

SENATOR JOHNSON: Let's move to that. [LR612]

JACLYN WILSON: Thank you, Senator, considering the time crunch that I'm on. One of the things that we started digging into is we started, of course, having to deal with the audit and

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

there was a lot of issues that were raised within the audit. I mean, we understand the issues in the audit, what the Auditor wrote specifically, but I also think it's important to recognize the information that has come out since then that changes the perception of some of those things within the audit and why the board performed what it did. So when we started digging into (inaudible) to how do we "remify" these problems, there's things in the audit. There's things that's written in that audit that actually occurred before I was even born, which is a little concerning to me. That means that past, previous committees have not taken the responsibility on to change some of these things. This committee is of a different mindset. We have gone gung-ho within the last year. You'll see in the back a list of things that we have done but to give you an idea, we start analyzing the policy book. The policy book is antiquated. There's policy in there that's never been even examined. We started writing policy, starting writing interim policy based on state vehicle usage, on hiring policy, on mileage distribution, on committee members. And, I mean, it was amazing the amount of policy that we started to write. Well, once we started writing policy, we found out we would say, okay, well, where should be put, for instance, state vehicle usage policy in the policy book? It would fit in the transportation section. So we flipped to the transportation section within the policy book and it starts out, if you are stranded in a blizzard, take a metal coffee can and light matches in it. That will keep you warm during a blizzard. This was how antiquated the policy was and it was never changed. So then you have to go through and you have to rewrite the transportation policy. Well, then you start looking into issues. Okay, well, let's talk about human resources, let's talk about strategic plan, let's talk about standard operating procedures. Where are those? They're not there. They haven't been in place for 75 years. The committee now has made that choice. That stuff is going to get in place and that stuff is going to be taken care of. Another thing that we've done, of course, as I said I'm chair of the policy and statutory working group, we completely revamped our state statute this year. You'll have a copy of the legislative bill in here of the ideas that we're recommending. You know, we had a great task force working group together on that deal with representatives from the industry and also outside entities that assisted in putting this together. Even though we didn't always agree on the working group, we still listened to all sides that presented in that working group. This is the bill that we'll be hoping to bring forth this legislative session. This is a wide-scope bill, I believe, in my understanding on past history dealing with the committee, kind of within the last 10, 15 years seen what the committee has done. This is one of the broadest rewrites of state statute that I've seen within the last 10 to 15 years. It looks big picture. It looks forward ahead

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

into the future. It lets instances come up, like, if we want to make a change in January of 2016 to put registered feedyards at a different fee, then the cow-calf producer, it doesn't make us wait another full year and a half to do that. It sets us up and let's us look big picture. There's things in there concerning feedlots. There's things in there concerning fee increases because our role is on the fee increases. We need cost recovery. That's it. At the end of the day, you need to run this like a business. That if you're spending X amount of dollars to provide a service, you need to be at least breaking even. This committee in the past hasn't done that. We're not looking at a per head inspection fee increase. We're hoping that with the technology program that we'll actually see an inspection fee decrease in the future because of the efficiencies that the technology program will provide. We're looking at getting the inspectors more efficient in the field. We're talking about moving away from that paper-based system and moving into a whole electronic-based system. I've spent time in our basement. It's daunting, the amount of files down there. If you need a file, you have to go through, search through boxes. That's ridiculous in today's age. Previous committees have not tackled these problems like we have. I cannot tell you...I could tell you what. When I was appointed to this committee, it was supposed to be four meetings a year. There's times when we have been in four meetings a month, easily, and then we've done a lot of work to rectify these situations. We started also looking...we've done hiring policy (inaudible) so that way we can start hiring outside individuals, put the right people in the right job. We did hire an investigator that has over ten years of deputy experience. I mean, that's something that we hadn't done before. Before we picked up an inspector, they had to attend a law enforcement training center. There was that time gap in there. This guy was able to hit the ground running. And that's the same thing that we're looking for in executive director. We're not looking...we're giving the opportunity to promote in-house, but we're also looking at outside interest putting the right people in the job. So this is what we're doing. We're running it like a business, we're setting things up so we can cost recover. We're putting the right people in the job. And at the end of the day, we can stand up here and tell you, I'm proud of the job that we're doing, and I think we're doing a dang good job. [LR612]

SENATOR SCHILZ: Okay. Thank you for that. The statute changes that you speak of, obviously cost recovery for investigations, I take it? [LR612]

JACLYN WILSON: Absolutely. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR SCHILZ: And that would apply anywhere in the state, anywhere an investigation is done? [LR612]

JACLYN WILSON: Not only investigations but also inspections. [LR612]

SENATOR SCHILZ: Right. Okay. What are the other changes that you're looking at specifically? [LR612]

JACLYN WILSON: Specifically, a lot of cost recovery in terms of dealing with a brand recording. If you have such a simple thing as copies you need printed out, you know, cost recovery on those. There's a change that we want to consider possibly charging mileage in the future to cost recovery. Mileage is actually a huge, huge cost of the committee. We have no cost recovery basis in there. The surcharge helps recover some of that. We want to just put that in there if the potential comes in the future with the benefits of the technology program that there's a possibility we could be tracking mileage. That's something the technology program will allow us to have. Just general...there's some word changes in there. There's actually a clause in there dealing with sheep. I don't know how this was ever missed. We don't brand and inspect sheep. And so, I mean, it's cleaning up some of the language. It's making it a more user friendly, moving it up to today's environment and it's also allowing us to be able to implement that technology program and see some of the benefits that that technology program is going to provide. [LR612]

SENATOR SCHILZ: Specifically talking about the technology program, basically if I understand it right, you're going to move to a paperless system. And explain that a little bit, what that's going to look like. [LR612]

JERRY KUENNING: John, you're...John has done a tremendous job and you guys, seriously, Senators, you need to thank him for what he's done and the negotiation and the process that he's done, tremendous amount of energy and I'm proud to have him on our team. John, take it over. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOHN WIDDOWSON: Thank you, Mr. Kuenning. And, Senator Schilz, we were just on the 28th of September, we went in front of the Nebraska Board of Records. They voted unanimously to approve our addendum with Nebraska Interactive. To give you just a quick brief history, everything that is done is done with paper. Our inspectors there's over...between 90 to 100 inspectors out in the country. Everything is visually appraised as far as the inspection process. They jot them down on pieces of paper. They go back to their truck, their car, the office, wherever they're going to be, and they do...not duplicates, not triplicates, but five, six copies of these things. They would then do a week's worth of work, they would then shove it into a brown envelope. At this point in time, they are taking fees of all that stuff, so they're collecting coin, cash, checks, whatever it might be. They did stuff that into a manila brown envelope once a week, fire it off to Alliance. See, our girls in the office up there get a hundred envelopes, dump it on the table, and then try to rectify and put all those pieces back together. It's completely antiquated. The amount of time that these inspectors sit and they're writing and writing the same information six, seven, eight times, is going to be eliminated. So the thought process is that we will have some kind of a tablet device at the inspector and the investigators level, each one will have that. They will then go out and do their inspection and they will then enter everything on their tablet. If they are in a Wi-Fi area, whatever, it will automatically upload instantaneously to the Alliance office and to here in Lincoln. If they are in Hyannis, Nebraska, out where they do not have it, perform-based technology, so it will store all the information. And then as soon as they get back to Wi-Fi, it will upload. [LR612]

SENATOR SCHILZ: Will they still continue to take money in the field or will you change that as well to where they'll be billed and/or pay that separately, too, so you don't have to worry about, you know, losing cash in the seats or wherever it might go? [LR612]

JOHN WIDDOWSON: Yeah, we are at all cost going to eliminate cash and coin. Right now, our thought process it will be credit card payment, pay on-line, or ACHs. And so a person...a producer will be able to hand a credit card to the guy, he will be able to swipe it right there on his tablet, or he will be able to take a picture of a check, ACH it, stuff like that. Or a producer will be able to go up...you know, one thing that we do have is we do have a producer that has five ranches with employees at five ranches. None of the ranches have a checkbook, credit card, or no authority to spend money. We, as a Brand Committee, expect payment upon right then and there.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

So this will allow somebody from an office standpoint to go on-line and pay their bill for five ranches, so that will be a definite advantage to a producer. So, yes, our inspectors will still have some form of collection, but it's going to be... [LR612]

SENATOR SCHILZ: Much tighter. [LR612]

JOHN WIDDOWSON: Yes, through the Internet. The transparency and the holding of people accountable is...we have personnel out in the field doing their job and all we can do is trust them that they're doing their job. This is going to allow us to be able to measure results. It's going to be able to allow us to find mistakes or corrections that could be made before they become a huge mistake. Some of these things in the audit, if we had known about it or had the ability to measure to know that there was an issue there, we would have been able to correct it before it got that big. We don't have those processes in place now. [LR612]

SENATOR SCHILZ: So, question then, getting back to the one of the things and talking about use of state vehicles. I mean, are you thinking about GPS to go on the vehicles to be able to see where they go, what they're doing... [LR612]

JOHN WIDDOWSON: Yeah. [LR612]

SENATOR SCHILZ: ...so that that gets eliminated so that we don't have to worry about that anymore? [LR612]

JOHN WIDDOWSON: GPS, there will be GPS on the tablets. They're going to have to log in when they get to do that inspection... [LR612]

SENATOR SCHILZ: Sure. [LR612]

JOHN WIDDOWSON: ...so they pull on to your place. This will allow us to maybe recover our mileage. We absolutely lose a tremendous amount of money as a committee on mileage. This will give us the technology to be able to quantify and track it. And if at some point in time, either

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

this committee or a committee down the road, it will allow them if they want to have a cost recovery based upon mileage, this technology will figure all that for them. [LR612]

SENATOR SCHILZ: And then I guess my next train of thought goes, all right, we've got the policy stuff we're talking about; you've got the technology stuff you're talking about; and you've had 14 people apply for the executive director job. Qualified...do we have qualified applications? [LR612]

JERRY KUENNING: I haven't seen the names. Yesterday I spent an hour and a half with Carolyn Collier at the Department of Ag. She said two of them hit it out of the park, kind of guys. Two more were very, very adequate. We're going to interview five. There's one that's...on paper didn't look the very best, but she said, he may interview though because of his experience level. The others we're not going to look at, but we're going to interview the week of October 24. Probably looks like right now, we're going to be Wednesday...or excuse me, Thursday, Friday, right--26th and 27th. We're going to be...one of those two days, we're going to have an interview all day long with the five candidates. Some of them are from out of state, two of them are what we call in-house applicants being in the Brand Committee presently. The rest of them are in-state and I don't know that makeup. I didn't ask for the names at this level. [LR612]

SENATOR SCHILZ: Well, I think it's extremely important that you get somebody on board that can create the kind of culture. [LR612]

JERRY KUENNING: You can say that twice, please, Senator. (Laughter) [LR612]

SENATOR SCHILZ: Because that will make you guys' job much easier, right? And really, I think it's important that you get beyond where you're at now. You probably do need to just clean house and get started again because it will make it much easier on everybody. [LR612]

JERRY KUENNING: Senator, we've taken time and consideration and we've set a point system of how we want to select that individual and what's important to us. That's another overhaul that wasn't in policy prior to this and we've worked on that. And I can't tell you how many times I've said, we need a director. It's not...and I'm going to ask and address this. What was our

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

alternative? When you blow the smoke away and you look at what we had to work with, you didn't want me being in Alliance because I could mess it up too. We didn't have a lot of alternatives at the time, and we lived through. I'm proud of what we've done. Again, I don't know as we did 100 percent right, but we did the best we could with what we had. [LR612]

SENATOR SCHILZ: I understand and I think that's the question that a lot of people...the answer to the question a lot of people were asking here. And that's okay, but I wouldn't be satisfied with just getting by. [LR612]

JACLYN WILSON: Senator, to put it into perspective a little. When you consider there's 14 applicants and 2 of those are in-house, if this was a previous committee, those 2 in-houses would have been the only choices that they would have chosen from. And I think that's something to know is that this committee recognizes that and has made those changes necessary so we can look at those other qualified and highly qualified individuals also. [LR612]

SENATOR SCHILZ: Right, and I think that's...I think that's very important. Thank you. [LR612]

SENATOR JOHNSON: Senator Riepe. You still have a question? [LR612]

SENATOR RIEPE: Thank you. Yes, I do. I've sat here quietly and listened and trying to gain some understanding. It seems to me that, you know, we've drilled by the fundamental problem and gotten down into a lot of the weeds about who is going to be the candidate, and, you know, are they right-handed or left-handed, not my concern. Sounds to me, my observation is that the audit...the Auditor did you a tremendous favor by doing this audit. [LR612]

JACLYN WILSON: He did. [LR612]

JERRY KUENNING: Thank you. [LR612]

SENATOR RIEPE: That said, my concern is that of the execution of the fiduciary responsibility or duty of the committee. And I say that in part because the young lady was saying, we want to have, find an executive director who complements Mr. Harvey. In that case, this executive

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

director is doomed to failure because he or she will, with that scenario, will not have the authority to replace Mr. Harvey because in the de facto way, he is there as a permanent fixture. And that's all based on, he's irreplaceable and, you know, I stand by the principle that there's not one of us in this whole world that's irreplaceable. That's just...that's my observation trying to get this, from away from swipes and left-handed candidates, back up to the fiduciary duty that rests with this committee. And it seems that sometimes, well, you want to do well, you've dodged some of those and you've had the perception that you can only do so much or that you can't do better. In this case, you can't do better than Mr. Harvey. It may not be an option. You may have to start from the ground up. That's all I have to say. [LR612]

SENATOR JOHNSON: I know you have to leave shortly here. Can your question wait a little bit or... [LR612]

SENATOR BLOOMFIELD: It can, but it is directed at Ms. Wilson, to Ms. Wilson. [LR612]

SENATOR JOHNSON: Okay. I'll allow that. You bet. [LR612]

SENATOR BLOOMFIELD: Okay. And it goes backwards from where we've moved to due process, and I'm sorry about that. But, Ms. Wilson, you keep telling us those cattle that were sold maybe without the proper paper, that it was just a very small number. You said you thought 8 out of maybe 23. That's a third...that's a pretty good percentage. And you know, I don't want to dwell on that. I just want to point out that that's not a small number when we're looking at 33 percent. [LR612]

JACLYN WILSON: Senator, then let me put it into a little bit more perspective. We inspect over 3 million head a year. [LR612]

SENATOR BLOOMFIELD: Understood. [LR612]

JACLYN WILSON: Eight head out of three million, that's a small percentage. And that's, you know... [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR BLOOMFIELD: But that's not what was in that herd that day, as I understand. There was 23. [LR612]

JACLYN WILSON: Right. But are we talking...we're talking overall picture. [LR612]

SENATOR BLOOMFIELD: No, let's talk this specific incident. That's where the question from Mr. Chambers--Senator Chambers, sorry about that, Mr. Chambers--came from... [LR612]

SENATOR CHAMBERS: He can do it. (Laughter) [LR612]

SENATOR BLOOMFIELD: ...was on that specific sale and it's not a small number in there. And this kind of goes back to everybody now. We keep...we've mentioned Mr. Harvey's name and how invaluable he is that we have to keep him around no matter what he did, but we keep talking about this individual that designed like...resigned like he's some far off individual that we don't dare mention his name. Was that Mr. Stanec? [LR612]

JACLYN WILSON: No, sir. [LR612]

SENATOR BLOOMFIELD: Who was that? [LR612]

JACLYN WILSON: That was Paul Beaver. [LR612]

SENATOR BLOOMFIELD: Okay. When Mr. Beaver was asked...or did resign, was he asked to resign? [LR612]

JACLYN WILSON: No, sir. Legal counsel did not ask him to resign. [LR612]

SENATOR BLOOMFIELD: Okay. I thought you said earlier that he was asked two or three times, are you going to resign? [LR612]

JACLYN WILSON: Are you going to resign and he chose to resign. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR BLOOMFIELD: After being asked how many times? [LR612]

JACLYN WILSON: The legal counsel asked him three times if he was going to resign. [LR612]

SENATOR JOHNSON: Did he ask him to resign or if he was going to? [LR612]

JACLYN WILSON: He asked, are you...his correct wording was, are you submitting your resignation? And he would go off on a tangent and then you'd question him again, well, are you submitting your resignation today? And then there would be another tangent and finally at the third time he said, fine, here's my resignation. I'm done. [LR612]

JERRY KUENNING: The day...excuse me. The day before we got an e-mail...excuse me, a text from him that he was going to resign. And this was about the third time that we had got those. The first time we were at the meeting we talked about the issues, it was brought up what his concerns were and we tried to address those and we tried to... [LR612]

SENATOR BLOOMFIELD: What were his concerns and were they legitimate? [LR612]

JERRY KUENNING: That things weren't getting done right. [LR612]

SENATOR BLOOMFIELD: Was that a legitimate concern? [LR612]

JERRY KUENNING: It was. Yes, it is. [LR612]

SENATOR BLOOMFIELD: Why was he... [LR612]

JERRY KUENNING: But the audit raised questions on his account also. [LR612]

SENATOR BLOOMFIELD: Understood. And I still, I have great issues with his being gone and the other gentleman still being there. It doesn't pass the smell test. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JERRY KUENNING: It does when you know the individuals and you know when there's a...and I apologize, when there's a bad apple in the basket. [LR612]

SENATOR BLOOMFIELD: So you are telling me now that the gentleman that resigned was a bad apple even though his concerns were legitimate. [LR612]

JERRY KUENNING: His concerns were legitimate. Shawn Harvey had the same concerns, too, on the other side about him. [LR612]

SENATOR BLOOMFIELD: How long was Shawn Harvey director? [LR612]

JERRY KUENNING: Two years. [LR612]

SENATOR BLOOMFIELD: Two years. And in that time he was so good at what he did that he didn't realize any of this antiquity (sic) was growing within the board or had already existed for a long time. [LR612]

JERRY KUENNING: We removed him from directorship because he wasn't good at that job. We replaced him in a job where his job skills were better. [LR612]

SENATOR BLOOMFIELD: I will not be here next year when this is acted upon by the Legislature. And I think probably for the Brand Committee that's a good thing because this smells to high heaven in my opinion. Thank you. [LR612]

SENATOR JOHNSON: Jaclyn, do you have any of your closing comments that you want to get in before you need to leave? [LR612]

JACLYN WILSON: Sure, Senator, I think, you know, we're all aware of what's in the audit. I mean that's a fact. Of course, we've all beat this dead horse numerous times concerning the media. I think it should be well made aware that, you know, we are focused on those issues in the audit and we are putting those steps in place to prevent those from happening again. There's been a history with audits in the Brand Committee. This isn't the first audit that's shown badly upon

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

the Brand Committee and I would assume Lt. Governor Foley could attest to that. But we are making those changes necessary to ensure that the Brand Committee will be run like a business, will become more efficient. We'll get the right personnel in there and the committee...the committee has made errors too. We're not saying everything we've done is perfect. We're aware of the errors we have made also, and we're attempting to rectify those. But we're also very proud of the work that we are doing to rectify those. I would also like to comment. There's been a lot of issues that have come forward within the media. We have extended invitations to certain individuals, some of which are sitting in this room, to attend those meetings. They have turned our invitations down, but yet they will continue to comment within the media. I would like those individuals to know they are more than welcome to come and attend our meetings in person instead of getting secondhand information. Because I think it's important that if you're going to comment on stuff that's occurring within an entity, you should be aware of what's actually going on within that entity. With that, I really thank you for all your time and if you don't mind, Senator, I would like to be excused. [LR612]

SENATOR JOHNSON: Well, the jury says you can go. (Laughter) [LR612]

JERRY KUENNING: Thank you, Jaclyn. Well, any other questions, Senator Johnson? [LR612]

SENATOR JOHNSON: Well, as we look at the new director, you propose eliminating the title of chief brand inspector and chief investigator assigned by statute, director. Describe in greater detail the duty...exact duties and functions carried out by the director position. What will those positions...what will that include as the chief brand inspector and chief investigator? [LR612]

JERRY KUENNING: The committee has addressed that and there's been changes made. He's going to be a...that's not in the book. He's going to be the CEO. His job responsibilities are going to be to set the budget, see that the budget is balanced. He's going to see that the function of the investigators and the functions are carried out properly so that the integrity of the Brand Committee is upheld. He's going to be responsible for answering to the board and those actions are also to keep this board out of trouble and that we don't have these kind of issues in the audit surface again. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: So it's more of an administrative position. [LR612]

JERRY KUENNING: And what we have found out as a committee is people that are really good out in the field as inspectors and long-time employees are not necessarily skilled with accounting, skilled with people management, and the things that make a good director and executive director. Those skill sets don't necessarily follow each other and there tends to be an oxymoron in those skill sets. And that is why we have opened it up to go to people outside of the family of the Brand Committee. That has been a long-time tradition. We broke that tradition. [LR612]

SENATOR JOHNSON: Okay. That covers one of my comments or next question is, sometimes people are very good in a certain position and you want to advance them but that advancement does not fit their skill set and maybe that's what happened. [LR612]

JERRY KUENNING: I think you coined it very well. He moved up through the inspector ranks and became an investigator and kind of maxed out right there. We moved him on to director. And committee might have...that's one of those mistakes that we made when we chose him to be director. I'm not saying it's a mistake, but it sure looks like it today. [LR612]

SENATOR JOHNSON: As I stated when we began the hearing, we do have some people here that have submitted some testimony. And since they made the trip here, I would ask that the Brand Committee step back into the visitors chairs and let's open it up for...okay. And then we have two people here first. I probably should recognize them. Nebraska Interactive is here. Any comments from Nebraska Interactive? Brent, are you here? There he is. Okay, back there. Any comments that you want to clarify or give you a few minutes to discuss that? And then we do have somebody here from Retirement to address another issue that was in the audit. So, Brent, if you take...okay, she is back there. So if you would be on deck and then maybe shortly after 12:00 we'll move to the other testimony that we're going to open up for this hearing. So, Brent, your name and spell it, please. [LR612]

BRENT HOFFMAN: Sure. My name is Brent, B-r-e-n-t, Hoffman, H-o-f-f-m-a-n. I am president of Nebraska Interactive, a local Nebraska corporation, and general manager of

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

Nebraska.gov who's the contract holder for the network manager for the state of Nebraska to deliver electronic government services to the citizens and businesses of Nebraska. I really don't have any clarifications as far as the technologies. I believe that the technologies that we are going to be putting in place will create efficiencies and create the evidence of authentication that is desired by the Brand Committee, desired from the conversations that I've heard here to make sure that branding is properly accounted for and the fiduciary responsibilities to the state coffers is met. So with that, I would answer any questions, specific questions. But overall, I don't have... [LR612]

SENATOR JOHNSON: So this is not a cookie-cutter type program that you're offering. You are designing one specifically for the Brand Committee, is that correct? Some of the details in our packets shows the time you're going to be spending and what you're going to function on. [LR612]

BRENT HOFFMAN: Sure, that is correct. So, you know, what we're talking about here is providing tablets to field inspectors, brand inspectors that are out in the field. These fields are sale barns out in pastures and so they will...that's where they will be conducting their work. And as John said, that information will be collected. It will be synched to the state automatically and it will also provide the interface to which state monies would be collected electronically as opposed to being put in a manila envelope. [LR612]

SENATOR JOHNSON: So then your system will be writing the checks to the...internally with the employees, and any other checks that the Brand Committee needs to write, you'll be doing that so there will be an audit trail for that? [LR612]

BRENT HOFFMAN: So everything...we by contract process all of our electronic payments through the State Treasurer's bank and payment processor. So everything that goes through our system is directly accounted for. As far as writing checks and those types of things, that would still be done from a State DAS aspect or however the Brand Committee continues to operate. So we wouldn't be writing any checks. It would go directly to the State Treasurer's Officer for accounting. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: Yeah, I used the old term checks. Yeah. [LR612]

BRENT HOFFMAN: Sure, not a problem. [LR612]

SENATOR JOHNSON: So there will be a system then we will not have checks outstanding and not cashed because we will have a receivable system in there so we will be able to track that. [LR612]

BRENT HOFFMAN: That is correct. That is correct. And that's again, within the Treasurer's purview of the way he manages his contract, so it will be within those time frames that are set by that. [LR612]

SENATOR JOHNSON: Okay. Any questions of the technology? I guess some questions that we had asked you... [LR612]

BRENT HOFFMAN: Sure. [LR612]

SENATOR JOHNSON: ...whether the contract services include supporting the creation of documentation such as brand inspection, brand clearance certificates, all of that with electronic signatures so we're really up to speed on that? [LR612]

BRENT HOFFMAN: Sure. So that's a great question. So as you mentioned, this will be a custom application because the Branding Commission in Nebraska's laws and statutes are different than any other state. This will actually put the Branding Commission far ahead of any other branding entity in any other state. So that...so we will build that custom for the state of Nebraska. Ongoing support...and provide tablets. The ongoing support--the maintenance, the marketing, the project management, the development--is all paid for under our comprehensive contract with the state of Nebraska. And so we will provide that, those services, as part of that contract at no charge to the state of Nebraska. So we will be here. We will be here to support that system and application. I think it's important to note that we've been doing electronic government for over 20 years. We've been here since 1994 through five competitive bids. And government is all we do. And so it's very important to us. I think we understand government and how it operates very well, and our

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

goal is to make sure that we deliver that effectively and efficiently to the citizens of the state of Nebraska. [LR612]

SENATOR JOHNSON: And there's always a question of security and hackers getting in there and changing information. Somebody else all of a sudden ends up with somebody else's brand or that. I'm sure you've addressed that. [LR612]

BRENT HOFFMAN: That is correct. You know, we...it's our number one concern. And so we have many government applications here in the state of Nebraska that we secure not only from a local level from my team right here in Lincoln but we are a wholly owned subsidiary of NIC. We do this in 28 other states, Nebraska being the second one. So, you know, it is 24...365, 24/7 security not only at one level but all the way from when the transaction takes place when it enters the system, all the...several measures throughout the system and then even coming back out. So security is very important to us. [LR612]

SENATOR JOHNSON: Okay. Thank you. Other questions? Thank you. [LR612]

BRENT HOFFMAN: Thank you. [LR612]

SENATOR JOHNSON: Retirement, would you clarify the question that was raised in the audit? Give you a little bit of time here. Please state your names and spell it, please. The question is whether we have full-time employees and intermittent employees. And the question was raised at what point do they become contract? At point do they need to be part of a benefit program if that's the case? [LR612]

PHYLLIS CHAMBERS: (Exhibit 3) Chairperson Johnson and Agriculture Committee Members, my name is Phyllis Chambers, P-h-y-l-l-i-s C-h-a-m-b-e-r-s, and I'm the Director of the Nebraska Public Employees Retirement Systems. And with me is Orron Hill, O-r-r-o-n H-i-l-l, and Orron is NPERS's legal counsel. Thank you for your invitation to address these questions today on the intermittent brand inspectors and their eligibility to be in the plan. We'd like to provide you with some information to assist you in your decision making, but we aren't trying to give you any legal advice. Orron and I reviewed the state and federal laws regarding employees

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

and looking at what an independent contractor would be. We also reviewed the intermittent brand inspector job description as well as the brand inspector full-time job description, and then our past history with them not being in the plan. We considered a number of factors in determining the intermittent brand inspectors and they do cross over between employee and independent contractor. But we looked at that, the intermittent brand inspector position is truly a unique job category for the state of Nebraska. So it's very difficult to classify and one of the reasons they have not been in the plan. The rules for our mandatory membership are that an individual must be a full-time employee working half-time or more permanent employee to be in the retirement plan. Then for permanent part-time employees and permanent seasonal employees, they may elect to be in the plan within the first 30 days of employment. After that, they're no longer allowed to elect into the plan. Temporary employees are not allowed to be in the plan. And we have provided a copy of those eligibility requirements with this testimony that we're providing for you today. When we looked at the job description for full-time brand inspectors and the intermittent, they were contradictory in talking about...it said they were permanent, but it also said they were temporary and it says they're intermittent, which is...you know, doesn't imply that a person is full time. So part of that would be the job description which you could work with State Personnel on a job description depending on what direction you want to go. But we did look at the characteristics of both the employees and independent contractors. They are paid by the Brand Committee and the Brand Committee does withhold taxes from their pay. So that's more of an employee, that would treat them as an employee. They are paid...they're not paid hourly or they're not salaried. They're paid by the number of livestock they inspect and with a minimum and maximum per day. Their hours are irregular and it depends on the job. They have no set schedule. Their services are provided on an intermittent basis. And they're based on the needs of the Brand Committee. So their hours vary from week to week, month to month, season to season. And some work half time or more which would mean that they would be a full-time employee--but not regularly, only on occasion. They have a lot of independence, which is more like an independent contractor, flexibility to work whenever they want to with very little supervision. They are not provided office space or equipment by the Brand Committee. They also use their own vehicles and are reimbursed for their mileage. They do not receive benefits such as health insurance, vacation, or sick pay. Most of the intermittent brand inspectors work another job and so this is a supplemental job for them. And, Senator Johnson, your questions in the letter that you wrote, Orron is going to address those four questions. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: Okay. Thank you. [LR612]

ORRON HILL: Thank you. One of the first questions that was asked--and I'll rephrase them a little bit just for the ease of testimony, Senator--what are the criteria that distinguish between part-time employees, full-time employees, and independent contractors? Well, this question is probably best answered by another entity, however, in the interest of sharing information, we would direct your attention to IRS publication 15-A published in 2016, specifically sections 1 and 2, pages 5 through 10, as well as IRS form SS-8 and its accompanying instructions. These documents provide guidance on how to distinguish between employees and independent contractors for federal tax purposes. And we've included copies of those materials with our testimony for your consideration. IRS Publication 15-A outlines the IRS 11-factor test for determining whether an individual is an employee or an independent contractor. The 11 factors include: what instructions the business gives the worker; the training the business gives to the worker; the extent to which the worker has unreimbursed business expenses; the extent of the worker's investment; the extent to which the worker makes his or her services available on the market; how the business pays the worker; the extent to which the worker realizes a profit; the written contracts describing the relationship between the parties; and whether the business provides the worker with employee-type benefits such as insurance, pension, vacation, or sick pay; the permanency of the relationship; and finally, the extent to which services performed by the worker are a key aspect of the regular business of the organization. The IRS Form SS-8 provides a list of questions that are guiding tools to help both employers and individuals review the relationship in making that determination. We'd certainly encourage the committee to consider what's on those questions when evaluating the determination. The second question that was asked is, under what conditions could intermittent brand inspectors attain the status of "employee" as that term is defined pursuant to Section 84-1301 of the Nebraska Revised Statutes, and are these implicated in the information provided in the audit report? Senators, from a practical standpoint, NPERS is reliant upon the various state entities to classify their relationship with their...between the entity and the workers. NPERS is not party to the hiring, the employment, the contract processing that's used by the entity to engage such service providers or workers and can only make a determination based upon the information provided by the entity or the workers. In order to be eligible for plan participation, an individual must, at a minimum, be a U.S. citizen or qualified alien, a permanent employee of the state of Nebraska, and not excluded

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Rough Draft

Agriculture Committee
October 14, 2016

from plan participation. If the individual is a permanent part-time employee, the individual must also make an election to participate within the first 30 days of employment, as has been previously discussed. Also as has been previously discussed, the facts and circumstances will impact the classification of an individual and specifically the intermittent brand inspectors as employees or independent contractors. As you can see from the items that Director Chambers has identified previously, they have characteristics on both sides of the fence and so it does make them very difficult to classify. We would like you to understand that all different governing bodies may come down in different ways. The IRS may not view the decision based solely upon a quantitative analysis, meaning, we're going to look at the list on this side. And the number on this side outweighs the number on that side. They may come down and assign a qualitative or weight to their analysis such as we give extra weight to these factors because of their frequency or consistency. And we want to make sure that you were aware of that when you decide how to proceed with this process. You've also asked us to review the job description for intermittent brand inspectors and advise the committee on any recommendations for revisions to avoid the potential for intermittent brand inspectors to claim retirement or other benefits. We would say that looking at the evidence and the documentation that we have provided, it would be best that they take this analysis under their own... [LR612]

SENATOR JOHNSON: Right. [LR612]

ORRON HILL: ...advisement and make that determination and then inform us as to the nature of the relationship so that we can properly respond. As we said, they've got evidence on both sides of the fence and so it's difficult for us to be able to make that determination alone. One particular note that we do want to bring to the senators' attention is that we reviewed on or about September 30 of this year an advertisement that was posted on the state jobs Web site for intermittent brand inspectors. Of particular note was that the job type listed on that advertisement was permanent part time; or in short, it said "P-E-R-M PART TIME." It is our understanding that term means permanent, part-time employee and so that is certainly a factor that would be considered in the analysis. But again, as we've said, that cuts against the nature of how they're paid, the office supplies that are being provided, and other factors on that front. You also asked us to weigh in on whether a revision to Section 84-1301 to expressly exclude intermittent brand inspectors from plan participation as identified in a rough draft that had been prepared by legal

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

counsel for the Retirement Systems Committee has any value in reconciling the ambiguity regarding the employment status of intermittent brand inspectors? In short, Senators, yes, it does. Specifically excluding intermittent brand inspectors from plan participation would clarify the issue for retirement purposes, and it would eliminate that question that the Auditor seemed to be asking in the audit. However, excluding intermittent brand inspectors from plan eligibility would be but one fact that entities that review employment status such as the Department of Labor or IRS would review in determining whether or not they believe this person to be an employee or an independent contractor. And we would certainly recommend to the committee that it is a fact that they consider in how to proceed. Finally, you asked...you invited us to provide any insight we might have on whether or not intermittent brand inspectors could trigger an obligation of the state to provide health insurance benefits under the Patient Protection and Affordable Care Act. As stated in the invitation, this subject matter is outside our area of expertise, and we are concerned about providing information that might confuse the issue and we respectfully request not to comment on this topic. [LR612]

SENATOR JOHNSON: That's fine. [LR612]

ORRON HILL: Subject to your questions and any other comments by the director, that would conclude my testimony. [LR612]

PHYLLIS CHAMBERS: And we'd be happy to answer any questions. [LR612]

SENATOR JOHNSON: That was a very good explanation. Their legal counsel and the committee will be reviewing that. And I think it pretty well defines that they are permanent because they are probably there on call all the time. But their activity does not support the fact that they are full time. Okay, thank you. [LR612]

PHYLLIS CHAMBERS: You're welcome. [LR612]

SENATOR JOHNSON: Okay, that's the end of the invited testimony. We will shift to those that have traveled here and have questions or comments. Hopefully we can be discussing things as we move forward. I think we've heard the past. I think we've heard the concerns that we've had

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Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

of the certain employee. And I think we've pretty well hashed that over. But if you have continuing concerns moving forward that you have not...that has not been addressed today, I guess I would ask that you focus on that. We can probably spend maybe a half hour on these, this testimony. And then we need to finish up at least by 1:00. So who wants to come forward? How many do we have for that? Two? Okay. State your name and spell, please. [LR612]

JOE PONGRATZ: My name is Joe Pongratz, common spelling Joe, P-o-n-g-r-a-t-z. I'd like to thank you, Senator Johnson and Committee. I'm more up here for, I think, maybe questions. I served on the Nebraska Brand Committee until March 15, 2015, when I resigned. That was my last effective date. I resigned out of frustration, disappointment, and just watching it fall apart. The biggest case right now has been that we need to change laws because the law has failed is how I'm feeling with some of this. The director failed, the committee failed, the laws didn't is the way I take it and maybe people think that differently. They say that they had to take Director Harvey back on because he was the only option they had left. He was only one with the experience and stuff. Well, if they're going to hire a brand new director, there's a chance they won't have any experience in inspecting cattle and doing those jobs either. There's a lot of things I'd like to say but I don't know if I can (laugh). [LR612]

SENATOR CHAMBERS: Feel free to say what you came to say. [LR612]

SENATOR JOHNSON: A lot of what you maybe have said... [LR612]

JOE PONGRATZ: And I'm trying to go through my notes pretty quick. [LR612]

SENATOR JOHNSON: Okay, yeah, because we do have copies of what you've sent in in the past. [LR612]

JOE PONGRATZ: There was a producer that, you know, we talked to him about many times dealing with it and we were always given a runaround about that gentleman had infractions. And it was always that the county attorney wouldn't file it. It doesn't matter. File the paperwork. If the county attorney doesn't push on, that's their problem. Do the job. File the paperwork. This assistant director, area investigator all quit. Two office people quit and brand inspectors are

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

quitting. They're not disgruntled employees. A lot of them have worked there many years just like Shawn Harvey has and they're very disgusted and disappointed at watching it fall like it has. I want to point out that in March, the agenda Shawn...Director Harvey had e-mailed the five committee members and had e-mailed the Assistant Director Beaver asking what we wanted on the agenda. I requested that we put use of state vehicles on the agenda. Director Harvey responded back to me and not as a group, just to me, and argued with me. Said he had taken care of it. I've sent those e-mails to you, the committee, to review. They just want to...they wanted to sweep it under the rug. I mean the audit came out and it really...things couldn't get ignored anymore. The Secretary of State, to my understanding, used to be more involved. He used to sit on the committee. You two have implied that maybe we need more oversight. I'm starting to understand that maybe there's a reason the Secretary of State sat on the committee. It's because he was an outside voice. I mean, you don't have to brand cattle. You don't have to be a rancher or a feedlot to understand the laws and statutes. Maybe he was sitting there for a reason. Maybe when they set this up and they put him there, maybe there was a reason he was there. I don't know. I'm probably making more questions than anything. Something I would like to touch on is the registered feedlot program, I know, is being brought up to change. In September of 2015, the committee voted to not deal with the registered feedyard. Later that fall, Director Harvey sent out a survey to the registered feedyards asking them what they wanted to do. To my knowledge, I think there was somewhere between 98 to 100 registered feedyards at that time; 35 responded. I mean, we, the committee mailed that out to those registered feedyards. Thirty-five responded. Out of those 35, 5 said they had issues with the way it was done. So 35 responded. What's that, 65 didn't then? So the old way of thinking is if you don't have a problem, you don't complain. So 5 percent, you're going to rewrite a whole law for 5 percent? I mean the Attorney General's response to the Brand Committee was that we couldn't lower it because we were still sending the person out to the registered feedyard, that's why we couldn't lower it. But at places where it was an accumulated drop-off or inspection point could be lowered. Well, that would be a sale barn, that would be a packing house. I mean, if you're going to lower the fee because it makes it easier for someone...I mean because it's easier for the Brand Committee or comes in at a cheaper price, when I take my cattle to the sale barn, I deliver them to the sale barn and the inspector is already there and that's what the Attorney General's interpretation was, is I'm delivering them to the sale barn. So instead of paying \$1 right now, maybe I should pay \$0.75 like they want to do the registered feedyard. I mean their personnel is already there. They talk about...Ms. Wilson talked

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Rough Draft

Agriculture Committee
October 14, 2016

about having to hire within, the old committees. I like that. They keep talking about old committee and new committee--kind of like old administrations and new administrations: You pass the buck down. Statutes...I believe the statute states the Brand Committee has to hire within the committee. I don't...I mean, I don't know 100 percent but maybe somebody could look into that. I may be making more questions for you guys or more work. But if that's the case, then the gentleman that replaced Investigator Bickford, he didn't work for the committee. And if the committee, if that's the way it stands, if that's what statute states, how could they hire him if he didn't work? I mean, in regards to the past and moving forward, you can't just not forget about the past either and move forward. I mean you're going to have to look at it. I guess I'll take questions. I mean, I don't know. Maybe I didn't do a very good job. I'm kind of flustered about the whole thing. I have not been on the media because I don't want...I never have wanted to be on the media. I've been asked by papers and I don't want to comment. [LR612]

SENATOR JOHNSON: Senator Chambers. [LR612]

SENATOR CHAMBERS: How long had you worked in your job? [LR612]

JOE PONGRATZ: I was on there for...I was ending my third term last September. Last September would have been the end of my third year, so basically 2.75 years. [LR612]

SENATOR CHAMBERS: Had you enjoyed the work that you were doing? [LR612]

JOE PONGRATZ: I absolutely loved being on the committee until a year ago. [LR612]

SENATOR CHAMBERS: Did you participate actively in the duties of the committee and the work they were doing? [LR612]

JOE PONGRATZ: Yes. [LR612]

SENATOR CHAMBERS: I mean, did you attend meetings and participate? [LR612]

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Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOE PONGRATZ: Yes, I missed one critical meeting. And boy, have I regretted it since. I missed the meeting that they interviewed for the new directors. I had a family issue at home that I had to stay home for. And you talk about the files. We can't talk about what's in their files, I understand that. But I don't think...my understanding from those at that meeting, those files weren't open that day either and talked about with the people that applied and they should have been. [LR612]

SENATOR CHAMBERS: Since you gave up your position, am I to understand that there's no recourse that you would have to address the issues that caused you to quit...I meant, to leave? I meant, was your only alternative to stay there and things happen that shouldn't or leave? [LR612]

JOE PONGRATZ: Judging by the way the December meeting went and when you have a registered feedyard survey saying we like the program, don't change it and you have a survey back in 2013 say we like the program 85 percent, 90 percent, don't change it and the board votes 4:1 to change it, kind of get the impression that this committee had an agenda. They were going to push the agenda. I was in the...I wasn't going to do any good there. [LR612]

SENATOR CHAMBERS: And this isn't to...well, let me just ask the question. Did you resign because you couldn't get your way or was it a matter of principle with you? [LR612]

JOE PONGRATZ: Principle. [LR612]

SENATOR CHAMBERS: Okay. And from the things you've told us, that's my opinion, but I wanted that directly on the record. [LR612]

JOE PONGRATZ: Oh, they can paint me as the disgruntled committee member just as easily as they could paint the people that have quit as the disgruntled employees. That's their opinion. [LR612]

SENATOR CHAMBERS: Were you aware of how long some of the employees had worked? [LR612]

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Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOE PONGRATZ: I came to a knowledge of the driving the vehicle, in January, to the school. I called the Auditor's Office, requested information on use of state vehicle. I turned that over to the chairman of the committee. And nothing was ever said, but within a few hours of me sending that e-mail over to the chairman, Director Harvey sent a very generic e-mail. Did not tell why he was...that he was caught driving the vehicle. It just said that he no longer, due to cost and all this, he was going to stop using the vehicle for commuting from work and home. To my understanding afterwards, I don't think that was a one-time offense. I think it had been happening more often. It was just somebody finally contacted me and reported it, and I took the steps that I felt proper. And I still...I didn't feel anything was happening. I mean they mentioned today that they are now putting in effect...you know, in the new policy they're going to address the state vehicle. I tried putting it on the agenda in March and nobody was interested. The director didn't want it on there. [LR612]

SENATOR CHAMBERS: That's all I'll ask for right now. [LR612]

JOE PONGRATZ: Okay. [LR612]

SENATOR JOHNSON: Senator Bloomfield. [LR612]

SENATOR BLOOMFIELD: Thank you, Chairman. Did you hear anything today in testimony from the board that gives you any encouragement that things might get better going forward? [LR612]

JOE PONGRATZ: My blood pressure is pretty high and I need a drink. Does that answer that? (Laugh) I'm flustered. Yeah, I agree that the computer program may be a good step. Another thing there, I asked for a return on investment and nor Shawn nor Mr. Beaver gave me a return on investment. If we're going to spend \$1 million, I mean, what are we going to save? Are we going to be able to let office personnel go because it's going to make it simpler? And I think maybe it will make it simpler but nobody...you know, if you're going to buy something for your operation or something, aren't you going to have a return on investment to go to the bank and explain that? I feel that they will make some good changes; but looking at the registered feedyard, I don't feel comfortable with what they're going to do to that. I mean it's an agenda

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

item that certain people have and certain groups have and they're going to push it through. And it's against the policy. There are some things that I see will change, but there's...I'm stuck with...they say that Shawn was their only option. There was another area investigator that had been on there for a long time too. Mr. Horton had been on there for a long time. Why didn't they put him in? You know, they had other options. Couldn't they have picked maybe a 40-year veteran? I disagree with that, that was their only option. I guess I don't know if I answered your question, but I tried. [LR612]

SENATOR BLOOMFIELD: Partly. It surprises me...I shouldn't use the word "surprise." It intrigues me that this is the first time we've heard of another individual that could have driven the proverbial ship. [LR612]

JOE PONGRATZ: As in, you mean that another person worked for the committee? [LR612]

SENATOR BLOOMFIELD: The 40-year individual that you just spoke of. [LR612]

JOE PONGRATZ: Well, I don't know if he'd been on there... [LR612]

SENATOR BLOOMFIELD: I don't know why we didn't hear that from the committee. [LR612]

JOE PONGRATZ: Well, I don't know that there is anybody with 40. I'm just saying somebody. There's brand inspectors that have worked there for many years. [LR612]

SENATOR JOHNSON: Might have been another option. [LR612]

JOE PONGRATZ: Those girls in the office can help do the books. They have the jobs. They could have survived. That's what's bothering me from... [LR612]

SENATOR BLOOMFIELD: As I said before, I think the whole idea of keeping the individual in a made-up position smells. But for you to come up here and tell me there was somebody else that probably could have done the job makes it smell worse. Thank you. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

JOE PONGRATZ: Another thing I'd like to bring up is to my understanding, and you guys correct me if I'm wrong, have they not taken the executive director position which state statute states is supposed to be the executive director along with chief investigator, chief police officer so to speak, have they not taken that position right now and split it? They're looking for an executive director and...I mean the wording from that meeting is confusing to me. The way I read it they've basically taken two positions, made two positions. [LR612]

SENATOR JOHNSON: I know they're changing the structure. [LR612]

JOE PONGRATZ: They're changing it, is what...? [LR612]

SENATOR JOHNSON: Well, job-descriptionwise. [LR612]

SENATOR BLOOMFIELD: Senator Chambers has mentioned once or twice that this maybe needs to be pulled back in and let the state have a little heavier hand in it. I'm inclined to agree with that assessment. [LR612]

JOE PONGRATZ: Are you asking me for my opinion or (laugh) just making a statement? [LR612]

SENATOR BLOOMFIELD: No, but I will now. Would you like to give me your opinion on that possibility? [LR612]

JOE PONGRATZ: I think that's a very fine line to walk of...you know, nobody likes government control. [LR612]

SENATOR BLOOMFIELD: I understand. [LR612]

JOE PONGRATZ: But I made a comment about the Secretary of State used to have an active voting...he used to be an active person on the committee. Is there a reason that when they created the Brand Commission that they put someone there? You know, it's like the constitution people say the constitution has failed in aspects. Well, we've made laws we've gone around it. Have we

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

changed something by moving him off? Have we changed it to where now the government, the state government isn't looking in there as hard as they should? I don't know. I would say that with what's happened in the last few months I'm worried about it not having oversight. But I also don't like government intrusion either. So I...but maybe the Secretary of State needs to have the role that he had before. I mean, he may not understand branding cattle but he surely can understand rules and laws and regulations. [LR612]

SENATOR BLOOMFIELD: Thank you. [LR612]

SENATOR JOHNSON: Senator. One more question. [LR612]

SENATOR CHAMBERS: To pursue that just a little further, by being an independent agency, a person who is a member such as you were who would have legitimate grievances or suggestions would have no place to go with it because it's a little self-contained group. And if there is an agenda, then the ones with the agenda are going to win and the one who is trying to bring about a change has no place to turn. That's the way it is now, isn't it? Like a little club. [LR612]

JOE PONGRATZ: Well, yeah. I mean you can look at the surveys. The surveys say that there's no need to change the registered feedyard. Even their own registered feedyard survey said there's no need to change it but yet they're going to change it. [LR612]

SENATOR CHAMBERS: And it seemed to me they were very protective. They were very...they lacked what I would think would be a forthcoming attitude. They were defensive. They pretended not to understand the nature of the question. They wanted to change from what the question was to something they wanted to say. And for my part, I don't think anybody sitting at that table should be a member of that committee. And the reason I asked the woman what was her position, she seemed to be the one who was designated as a spokesperson, but she seemed to know more than all the other guys sitting there together. So I don't know if they got together and decided how they're going to answer questions, what they would evade. And I'm not going to say that just because the Auditor isn't the...Office of the Auditor is part of state government. I place more credence in that audit than I do in what they said. And when a man is going to sit there, I didn't want to say this while you were having the proceedings because it's not my committee, but

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

I felt like telling that guy who sat on the end and said why did they look at this, why did they look at that? The answer would have been, that's what auditors do. Auditors have a job. They know how to do their job. [LR612]

JOE PONGRATZ: Senator Chambers, can I make a comment to that? [LR612]

SENATOR CHAMBERS: Yes. [LR612]

JOE PONGRATZ: How did they know where to go? Maybe because some of the employees were fed up with what was going on. Did you ever think about that? I mean if you see injustices going on...and another thing, how about this. He coached basketball. They knew that, right? They knew that because when I complained...when I called the Auditor in January, it was because he was at a basketball practice. All they have to do is pull up the Mitchell basketball schedule and see where the games are. Well, look at that. He went to Burns, Wyoming. [LR612]

SENATOR CHAMBERS: And you know why I had that lead in? I wanted the committee members to hear from somebody else and not...that I'm not just speculating. People have no place to go. Employees, other members on the committee have no place to go. Because if it's stacked, then the only alternative is our way or the highway. I had talked to an employee who had been there years and was making a very good salary and would not leave just because of being disgruntled but had some principled objections that could not and would not be met. And I think the Legislature has an obligation. We're not through with it just with this hearing to inquire more deeply into why employees who had been there for a substantial period of time would feel the need to leave and the issues raised were not dealt with by the committee. But then when the Auditor comes in, the Auditor knew where to go because somebody knew where the bodies were buried and said look. And that's how the Auditor knew. But see, if I say that then it's like I'm speculating and they could have denied it. But when somebody who is a member or had been a member of the committee will point out that there were employees who couldn't get recourse within the system and had to go outside of it were the ones who helped. [LR612]

JOE PONGRATZ: And, you know, and another comment on this is...I lost my train of thought. But go ahead. [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: No, I just wondered so we can give... [LR612]

JOE PONGRATZ: Yep, that's right. [LR612]

SENATOR JOHNSON: ...Mr. Wright some time. Appreciate it. [LR612]

JOE PONGRATZ: Thank you. [LR612]

SENATOR SCHILZ: Just one question then. And you talked about--and thanks for coming in--you talked about things that were happening and stuff. And I understand what you're saying as far as the employees and things that might have been happening such as, you know, use of state property and things like that. So that's on one hand. So that's over here, right? And then you start talking about policy decisions about, you know, how the registered feedyards are handled and that changing. And that would be over here. And so if on one side we have the employee issues where you have people that may not have done things properly, absolutely that's...I agree with you on that. On the other side when you talk about policy, I mean a duly appointed board like this can change the policy if enough of the members agree, correct? [LR612]

JOE PONGRATZ: I agree. I agree with that 100 percent. [LR612]

SENATOR SCHILZ: Okay. That's...I just wanted to make sure I was understanding what you were saying. [LR612]

JOE PONGRATZ: Can I ask a question? [LR612]

SENATOR SCHILZ: Well, you can but I probably won't answer it. (Laughter) [LR612]

JOE PONGRATZ: Probably know what's coming. If you send out a survey to 100 feedyards and only 5 percent want it changed, does it make much sense to change it? [LR612]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR SCHILZ: It depends on what the facts are and whether you...if you just get 5 percent back, then it's a question as to whether or not people understood. I don't know. I can't tell you. [LR612]

JOE PONGRATZ: Okay. No, that's fine. [LR612]

SENATOR SCHILZ: But I know what you're saying. [LR612]

JOE PONGRATZ: I won't grill you. (Laughter) [LR612]

SENATOR SCHILZ: (Inaudible.) [LR612]

JOE PONGRATZ: I know. [LR612]

SENATOR JOHNSON: Thank you. [LR612]

JOE PONGRATZ: Thank you all. [LR612]

DAVID WRIGHT: Hello, Committee. My name is David Wright, D-a-v-i-d W-r-i-g-h-t. I'd like to thank you, Senator, for this opportunity and I'd like to thank the Ag Committee. Political season is upon us, is it not? I mean, because today I heard it's not my fault, it's Bush's fault. I heard it's a conspiracy. I heard trust me because I have the most experience, don't look at my criminal record. I heard I'm the most successful so trust me. Doesn't that sound like a campaign we've been listening to for like the last six, seven, eight months, maybe a year? I'd like to point out a mistake I made one time. One time I had a little incident with a county deputy in an unmarked car. At the end of this ordeal, the State Patrol had put a stop to it. But in the end, I wound up before a judge and I said it was a mistake. He was in an unmarked car. How was I to know who he was? The judge said, yes, you did make a mistake but you will also lose your license for six months, you will also pay a \$600 fine, and you also spend the weekend in jail. Fair enough, but then there was other consequences that followed that. Do you know what Dairyland Insurance is? I'm sure you do. It's high-risk insurance--five years on Dairyland for a mistake. That's the whole point. We have laws. Laws have consequences. Everybody, everybody

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Transcriber's Office
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Agriculture Committee
October 14, 2016

lives under the law. It was pointed out today that we're going to run this like a business. So we're going to run it like a business. So we have an employee who has done some things that probably shouldn't have been done. And here's what's interesting. At that July meeting, they went into executive session for quite a while. I would say a couple of hours but I didn't time it so I don't know for sure. Director Ibach was in that executive session with them. When they came out of that executive session, Mr. Harvey resigned and the next motion was to hire him back. Now why would you do that? Why didn't you just reject his resignation? The only reason you would do that was to create a whitewash to show how noble we are, how noble the man was to resign his position and how noble we were to hire him back. That's all that was. Everybody knew. Everybody knew in that meeting--it was so long--what was going to go on. Ms. Wilson made a point several times that it's not profitable. So we're going to run it like a business make it profitable. But yet since 2015, Nebraska Cattlemen and members of Nebraska Cattlemen who are on that committee have been trying to reduce the registered feedlots' burden. But we're not making any money so let's cut someone else's pay and raise someone...raise a different entity's. That's like running it like a business? Well, that's probably how some businesses run. You know, they cut the employees but add to the executive staff, you know, let the executives make more money but cut the employees' wage. At the September...in September of '15 that was the new appointee's first meeting. When I walked into that meeting, there was some talk about technology. So they knew they had a technological problem. They knew it. They were trying to address it. They were trying to figure out how to raise money for it. That's what we had: a fee discussion. The two new appointees were hell-bent for leather to make damn sure that the registered feedlots got a reduction in fee. It was so bad it was to the point, it was pointed out that Adams Land and Cattle Company pays \$120,000-plus a year in brand inspection fee and that's not right. But a registered feedlot pays half of what everyone else pays. So I can't help it if Adams wants to own 120,000 head of cattle. That's what the fee is. Just because you own more, should you get to pay less? So we talk about let's fix the problem. I mean we're talking...let's fix the problem. I sent some written testimony that you all have and if you push the numbers you will find out that if you get rid of the registered feedlot program which allows those 100 feedlots or 98 or whatever it is to pay half, if you get rid of that, instead of one group paying \$1 and another group paying less, if you get rid of that you could do...you could make everybody pay \$0.77, everyone, every animal. The beef checkoff works that way. It's \$1 per head when it's sold. Well, because I sold 120,000 head, do I get to pay less? No. I spent 14 years on the beef

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Agriculture Committee
October 14, 2016

checkoff. Because I sell fewer, do I have to pay more, because that is the mentality that's going on here and that is what's going to come up when they continue these discussions. So let's eliminate the registered feedlot program. Let's broaden the base. Good politics, good economics--broaden the base, lower the rate instead of giving somebody an exclusion or an exemption. Last night I ran across Abraham Lincoln's argument that he was making to himself which is called the fragmentation of slavery. And if you know that argument, if any of you have read it, it is pretty simple. He questions himself why would Person A have the right to treat person B wrongly? And he goes through a list of reasons why I have the right to. Well, if you have the right to, couldn't Person B make the same argument? They have the right to do the same to you. Lincoln goes on to say, well, maybe it's color. So if that's the case, can you say that a person who is lighter or darker than you have the right to treat you wrong? Lincoln goes on to say, well, maybe it's intelligence. Well, if that's the case, then the first person who has more intelligence than you should be able to abuse you. And then he finishes by saying maybe it's your interest. Maybe you can argue that it's your interest to do this to the other person. Well, if that's the case, can't that person make the same argument against you? In the end, Lincoln concludes to the very simple rule you learned in first grade: Do unto others as you would have done unto you. So if we're going to let the registered feedlots have a break, what if the shoe was the other way around because statute is clear--statute is clear. The only time you can reduce the rate is if you bring the cattle to a point where the inspector is at one point. That would be a sale barn and a packing plant. So why don't we reduce their rate to \$0.50 and let everybody else pick up the load? See, how fast those five feedlots squeal. See, how quick that...what gives somebody the right to take the fruits of my labor, to pay more than what somebody else is willing to pay for the service? You don't have that right. Equality before the law. That's what you're going to hear. You're going to hear all these excuses coming up next time about how we got to lower the rate. So with that... [LR612]

SENATOR JOHNSON: Well, thank you. And I will just comment there appears to be statute changes and there will be a bill at a time definitely for that debate, you know, on the registered feedlots. And appreciate your input on it. Anybody have any questions? [LR612]

SENATOR CHAMBERS: This Chairman stole my thunder. Here's what I was going to say.
[LR612]

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Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: I'm sorry. [LR612]

SENATOR CHAMBERS: That when we bring a bill, whoever brings it, that will be the time for the people to have the opportunity. Those who favor it will speak, then those who are opposed to it will speak. And we will have, at the time we're considering a specific bill, information that relates to it and I hope that the people, those who...I've gotten more calls on this than anything I can think of in a long time and I don't even live in the rural areas. I do know the difference between a cow and a bull. I couldn't tell by looking but (inaudible)...(laughter). No, here's the point that I'm getting to. People go where they think they can get some help. So I hope some of those people who are not here today, because this is not, strictly speaking, a hearing like a hearing on a bill, will come when that bill is before us and present that information. And then if there are people who are on the committee are speaking, they will know that there are those in the audience who will have a different point of view and it will be a matter of record. But I'm glad the two of you came today. I really appreciate it. Thank you. [LR612]

DAVID WRIGHT: I'm sorry. [LR612]

SENATOR JOHNSON: Yes, Senator Bloomfield. [LR612]

SENATOR BLOOMFIELD: Just a direction to Senator Chambers, some of the reason you're getting that many calls is because I've been telling people I won't be here next year. Senator Chambers will. (Laughter) Please talk to him. [LR612]

SENATOR JOHNSON: You've got one more? [LR612]

DAVID WRIGHT: What I wanted to say was this committee has been in place for 75 years. Granted, there has been changes over time. Granted, there's changes that need to be...like Ms. Wilson brought up, that policies should be addressed. You know, anybody who has been on a school board knows that every month you go through a segment of the policy every month, you know, so the policies are kept up to date. I agree that needs to happen. But if you look...if you take the time and read some of the things that Ms. Wilson has written about the Brand Committee, about where she wants to go with it and you take into consideration that you have

Transcript Prepared By the Clerk of the Legislature
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Rough Draft

Agriculture Committee
October 14, 2016

two political appointees who just started in September and this thing has all of a sudden blown up in everybody's face. And those two appointees also serve on the Governor's Ag Committee. Now there's an agenda here and it's plainly obvious. There's an elephant standing in the room that wants to talk and everybody knows it. So favors are getting taken care of, but at the expense of who? Thank you. [LR612]

SENATOR JOHNSON: Thank you. I think that's the only two that wanted to testify today and I was glad we were able to accommodate that. Does the Brand Committee want to come back with any closing? If not, I would...here's what I would say. We know this is not...we don't have a conclusion today. We have another hearing in an hour. We will not go into Executive Session. We will maybe go into Executive Session later today depending on the time frame of that hearing. But we will continue to review what's been presented to us, what was presented today. I'm not sure where we need to come up yet with how many recommendations until we probably sit down and talk about it a little bit more. But I do appreciate the Brand Committee here wanting to be transparent. They wanted the extra speakers to speak today because they wanted to get it done right. And I know there's a lot of issues out there that seems to be some questions. So we would accept any additional information from the Brand Committee in response to anything that you've heard dealing with technology because you haven't had a chance to respond to that or the retirement or our two speakers that came in. So if you want to present some stuff to us in writing, that would be appreciated. Anything else that anybody needs to talk about as far as this hearing? If not, we will close the hearing on LR612 dealing with the brand inspection audit. Thank you for your attendance. Thank you, Committee. [LR612]

The Committee on Agriculture met at 1:45 p.m. on Friday, October 14, 2016, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR498. Senators present: Jerry Johnson, Chairperson; Dave Bloomfield; Ernie Chambers; Burke Harr; Merv Riepe; and Ken Schilz. Senators absent: Mark Kolterman, Vice Chairperson, and Tyson Larson. [LR498]

SENATOR JOHNSON: ...1:45 time frame. I think we're still going to have, hopefully, we had three other senators here this morning and I think they're still in the building, hopefully, they will make it here. But we'll go through the procedures, probably most of you know the procedures.

Transcript Prepared By the Clerk of the Legislature
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Agriculture Committee
October 14, 2016

But, officially, good afternoon and welcome to Agriculture Committee hearing. My name is Jerry Johnson from Wahoo representing District 23 and Chair of the Agriculture Committee. The senators that are here, as we begin the hearing: Senator Riepe from Ralston and Senator Schilz from Ogallala. And we might...others joining us might be Senator Chambers, Senator Bloomfield, and Senator Burke Harr, those three were here this morning so, hopefully, they might be able to come this afternoon. Also, to my right is research analyst, Rick Leonard, with the committee; and committee clerk, Laurie Vollertsen; and our page is Brianne Hellstrom. Ask you to turn off your phones, turn them down to vibrate at least. Remind...I don't think I see any hecklers here this afternoon, but we do not allow outbursts or demonstrations in opposition to any testimony. The agenda is simply LR498 and that's what we will follow. We really don't have what we would call invited testimony only. We have invited, because he's done some work on it, Anthony Schutz. And that's the testimony that we will be bringing forward. If you are going to testify, sign in with a green sheet over at the corner of the table, and complete that as you come forward to testify, state your name and spell it. And with that I think, maybe, we'll start the hearing since Senator Chambers is here. And I will go to the table and introduce...I've asked Senator Schilz if there's any questions as former Chair of the Agriculture Committee to step in as Chair if necessary until I get back. [LR498]

SENATOR JOHNSON: (Exhibit 1) Committee members, my name is Jerry Johnson, J-e-r-r-y J-o-h-n-s-o-n, Chair of the Ag Committee and introducing LR498, interim study based on LR378CA from last session. The study does arise out of the discussion we had commonly known as "Right to Farm." I want to take a point to point out that the text of the resolution itself does not directly charge this committee with reaching any conclusions regarding the value or risk of enacting a constitutional Right to Farm provision. Do want to take a little bit of time to kind of frame what the issue is, at least I see as trying to accomplish with LR498 and what the constitutional provision we considered last session seeks to address. The world is facing many challenges and perhaps the most pertinent of them is the projection that the world is approaching 10 billion people. It is further estimated that 90 percent of that growth must be met with increased yields and reduced waste and inefficiency and we need to accomplish this in a way that minimizes environmental tradeoffs. I firmly believe that the challenge is going to be met in large part through technology and innovation in agricultural production, and that the U.S. and the leading farm states like Nebraska have both the capacity and the focus in order to lead this

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Rough Draft

Agriculture Committee
October 14, 2016

charge. It is perhaps more important than ever that governments at all levels assist in providing a political and regulatory atmosphere that encourages and facilitates the ability of farmers and the entire food production processing and distribution to incorporate innovation. While no one argues that agriculture should be exempt from reasonable regulations, we need to guard against the growth and progress of agriculture being stymied by arbitrary regulations and political whim, especially as rural populations have declined and agriculture loses direct political clout in the Legislature with the redistricting of the Legislature each 10 years. While I may have had reservations with the constitutional provision we considered last session, I am not unsympathetic with the motivations behind it. I do not see LR498 necessary as a substitute or competing approach to the issue. I am, however, hopeful that statutory concepts could be developed that complement and reinforce the object of the constitutional provision, and secondly, that provides means to advance reasonable proposals in the event that a constitutional approach should not be adopted by the full Legislature. LR498 was introduced and has three distinct purposes in mind. The first resolution provides an opportunity to review our existing statutory Right to Farm provisions in Chapter 2, Article 44. These provisions, generally, protect agricultural operations from nuisance claims when the agricultural facility preceded conflicting nearby land use. These were enacted in 1982. This allows us to review the purpose and history of application of these provision, as well as to compare Nebraska's Right to Farm provisions with other states that are currently considering Right to Farm type of Legislation--Missouri, North Dakota, Oklahoma, and others. The second, wanted to explore the concept of expanding the purpose of the existing Right to Farm Act or other interventions available to the Legislature through other areas of law, to erect statutory firewalls that can help provide a stable regulatory atmosphere that encourages investment in necessary and desirable agricultural innovation. Third, is the study...will help gather literature and other guidance to the committee regarding interpretation and application of constitutional Right to Farm amendments such as LR378CA. If there is legislation introduced in upcoming sessions, it will help the committee to better position...to be in a better position to evaluate any provision that would come before us. And should the committee chose to forward that legislation to the full Legislature, it would be better to be prepared to participate in floor discussion and explain and defend the proposal moving forward. We have approached Professor Anthony Schutz of the University of Nebraska Law to assist the committee. In the briefing items provided, a copy of a letter defining the scope of the interim study. So at this point I will ask Professor Schutz to come forward with his student in order to prepare his information. At this

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Rough Draft

Agriculture Committee
October 14, 2016

time I will ask if there are any questions. If not, I will go back to the Chair. Thank you.
Welcome. [LR498]

ANTHONY SCHUTZ: Thank you. [LR498]

SENATOR JOHNSON: Thank you for participating in our study. [LR498]

ANTHONY SCHUTZ: (Exhibits 2 and 3) Thanks for having me. My name is Anthony Schutz, A-n-t-h-o-n-y, last name, Schutz, S-c-h-u-t-z. And I have this letter dated June 10 which lays out those three points that Senator Johnson spoke about. I'll start off with the first one: The History of Nebraska's Right to Farm Act. I've written on that, oh, it's probably a decade ago I studied that and sort of tracked that history, so it's easy for me to relay that. And then I had a student, MacKenzie Hertz, who is with us today, and she's going to talk about situating Nebraska's Right to Farm Act relative to other states. Is it broad? Is it narrow? Is it strong? Is it soft compared to other states? So she'll talk about that for a little bit. And then I'll return with the permission of the Chair, I'll return to the testimony and provide some information, some thoughts on expansions to the Right to Farm Act, or ways in which we can change it or other approaches we could take in order to ensure that agriculture has some level of protection against whatever harms people see on the horizon. And then if time permits and if people are interested, I could talk about LR378CA, the proposed constitutional amendment and answer any questions folks have about that. So first things first, the history of Nebraska's Right to Farm Act. Nebraska's Right to Farm Act, the legislation originated in response to litigation involving Leigh Land Company and, I can't remember their first names, but it was the Botsch family. The Botsches owned a farm that was next to a very large feedlot. That large feedlot had four lagoons and what they would do is they would scrape the bottoms of those lagoons and the solids that they pulled out of that lagoon would be piled up on the property. As you can imagine over the years, this was 1977, that got to be a fairly smelly mess. And so the Botsches sued Leigh Land and Cattle. Leigh Land and Cattle defended and they said, look, we're doing the best that we can; we are acting reasonably according to industry standards. We are raising, I don't know how many head of cattle on this particular chunk of property, and at the end of the day we were here first. Our feedlot was here before the residency of these folks that have sued us. And so, Judge, you ought to dismiss this particular case and grant us summary judgment in the course of that litigation. The district court

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

responded...and I can't remember if the district court granted summary judgment for the defendants or if they denied it, but they must have granted it because in any event it went to the Nebraska Supreme Court. And the Nebraska Supreme Court concluded that the manner in which that operation was conducted didn't matter to a nuisance suit. So it didn't matter if they were being as convenient or as careful as they could be with their manure or as reasonable as they could act under the circumstances. The court said the inquiries focused on the level of harm that the plaintiff has suffered, not on the way in which the operation has been conducted. In addition, the court said, the timing of these people's occupancy of that particular place doesn't matter either. Right? So just because you were there first, that's a factor to consider, but it's not dispositive. In other words, the Botsches should have gotten their day in court. They didn't, reverse and remanded. As you can imagine, ag industry folks, probably cattlemen and other folks, were upset with that result because they look at it and said, look, this is a producer who is being as reasonable as he can under the circumstances and he was there first. We ought to have some change to the law. So they came to their friendly state Legislature and the friendly state Legislature said--that's right. And so they enacted a statute called...it wasn't called the Right to Farm Act, it was 81-1507, it's still on the books. And the statute, in fact, was so geared at the Leigh Land and Cattle case that the text of it in 1977 said: An agricultural operation shall not be considered...shall not prima facie be considered a nuisance if it's conducting its operation reasonably, if it was there first, and if it's in compliance with all of the other permitting that it has to be done. In other words, it was sort of a summary judgment kind of standard that they enacted in 1977. Solved some of the problem that folks realized with the Botsch v. Leigh Land and Cattle case. And in 1980, the Legislature went back to the drawing board and they strengthened it; they took out that summary judgment language and they said: A livestock operation shall not be a nuisance if it's reasonably conducted, if it's in compliance with all zoning regulations and permitting requirements, and if it was there first. So that was the Right to Farm Act we had in 1980. In 1982, the Legislature got its hand on a new provision, a new bill that said, in effect: livestock operations and farms and ranches are not nuisances if they were there first, period. It doesn't matter how reasonable you are, you don't have to be reasonable, you don't have to be in compliance with any regulations, you just have to be there first. And as long as you're there first, as long as your use proceeded the occupancy of the adjacent property for residential purposes or whatever, then you will not be considered a nuisance. And that's what we have today; 2-4401 through 2-4403 are those Nebraska Right to Farm Act statutes. They protect livestock operations

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Rough Draft

Agriculture Committee
October 14, 2016

from nuisance liability in the event somebody new moves into the neighborhood. It doesn't require any particular level of reasonableness; it doesn't require compliance with local zoning or anything along those lines, it just says as long as you were there first you're not a nuisance. So that's kind of the history. We started off fairly tepid in response to one particular piece of litigation. We expanded that a little bit in 1980. And then in 1982, we expanded it quite a bit to give us the larger Right to Farm Act that we have today. The 1980 statute, 81-1506 as amended, remains on the books. It's not used anymore though, generally because 2-4401 and 2-4402 and so forth pretty much eclipse it. There's no real reason to go to 81-1506 anymore, but it's still there. And so that's kind of the history of our Right to Farm Acts. They haven't been tested very often in court. There was one case that where a plaintiff tried to...I'm sorry, defendant tried to raise it as a defense, but his use and occupancy of the property didn't predate that of the plaintiff, so he wasn't able to successfully do so. There have been cases in other states that questioned like later expansions, how big can these Right to...how big can these livestock operations get before they lose the protection of the Right to Farm Act? And there was also some litigation in Iowa that struck down Iowa's Right to Farm Act as constituting a taking of private property because it took away the ability to sue for nuisance. That case hasn't carried over into other states. And one can question the reasoning of that particular case, but it's definitely an argument that's still out there on Right to Farm Acts, even in Nebraska. So with that I can answer some questions and then turn it over to my student. Does anybody have any over the history of what I've said? No? Okay. [LR498]

SENATOR JOHNSON: Seeing none, we'll have some later probably. [LR498]

ANTHONY SCHUTZ: Okay. So my student, MacKenzie Hertz is going to talk. She's a second year law student at the University of Nebraska. I asked her to do some research situating Nebraska among other states in terms of its Right to Farm Act, so she's done research on that and she'll come testify. [LR498]

SENATOR JOHNSON: Welcome. [LR498]

MacKENZIE HERTZ: (Exhibit 4) Hi. I'm MacKenzie Hertz, M-a-c-K-e-n-z-i-e, Hertz, H-e-r-t-z. So thank you for having me here today. As Professor Schutz mentioned, I'm second-year law

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

student at the University of Nebraska and I've done some research on Nebraska's Right to Farm statute and its relative strength and protection to other states. So as Professor Schutz mentioned, Nebraska's Right to Farm statute is set out in Nebraska Statute 2-4401 through 2-4404 and it provides protection to agricultural operations against nuisance claims. So if an agricultural operation existed without being considered a nuisance before the entry of a nonagricultural entity or some other change occurred in that locality, that agricultural operation will be protected from nuisance actions. Nebraska's Right to Farm statute, from my research, seems to be broad relative to most states. So nearly every state, actually every state, all 50 states do have some form of a Right to Farm statute, but over 40 of these states' statutes have exceptions or conditions on the protection for a nuisance actions or other claims. Nebraska's is more of a blanket statement of protection in comparison to that. So while it's not to say that all states have more restrictive applications on agricultural operations, it is true that Nebraska seems to be quite broad in its protection. So an example of the most common exception or condition on protection against nuisance claims to agricultural operations is the limitation on the applicability of the Right to Farm statutes for nuisance protection based on the duration of the established operation. So in other words, a farm must have commenced its operation and have that operation established for a specific length of time prior to a change occurring in the locality before that protection will be applicable. So if you haven't been established for...most states who have this exception, it's one year, a one-year provision, if you haven't had an established operation for one year, the protection of the Right to Farm statute won't apply to you and you won't be able to use that. Some states have even longer periods of time, two to three years, but one year is most common. Another establishment requirement that can be read as restricting or a condition on the protection from these nuisance actions is limitations if you have either an expansion or substantial change in your operation or if you have some interruption in your operations, so a continuity requirement. So some states, they changed...they varied depending on the states, but they limit how...if you expand your operation, that might divest your operation of its original established date of operation or it might just give you a separate established date of operation for that expanded portion of your operation. Another thing that can come into play, like I mentioned, was a substantial change. So if you change your operation, what type of produce...or type of crops you have or something like...along those lines, that might divest you of your established date of operation and change your protection for those things as well. Again, there's a continuity requirement in a few states that if you interrupt your operation, say one to two years or some

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

three to four years, then you may no longer fall under the Right to Farm statute. Nebraska doesn't have any of these exceptions or conditions of protection in their Right to Farm statute. Another common exception, 20 states approximately, have this exception is if the agricultural operation is operating in a manner that is negligent or in some other way improper. So if you have a negligent operation, you won't fall underneath the protection from the Right to Farm statute. Twelve states have exceptions for water pollution. So if an agricultural operation threatens to pollute a water source, they may be excluded from the scope of the Right to Farm statute. Thirteen states provide a kind of general exception that the government may deny protection to an agricultural operation just to promote public health and safety and welfare. So that might be another source of a condition on the protection. Sixteen states hold that agricultural operations must act consistently with good agricultural practices. And generally, most states include in their Right to Farm statute that this just means you have to be in compliance with all statutes and regulations. So it's just a summary of that. Other states, about four states, have exceptions that agricultural operations which are within a corporate limit of a municipality may not be subject to the protections. So if you're within the corporate limits, the Right to Farm statute doesn't apply to those operations. Eight states in their Right to Farm statute have expressed lists of things that do not constitute nuisance. So this may be read as something that...you're expressly saying these things don't constitute nuisance, so that could be read as a good thing, but also if you say that these expressed things are not nuisance, that can be read to imply that anything that's not listed there isn't protected. So that might be another way that some states have less protection than Nebraska's Right to Farm statute. A few states have defined agriculturally-protected areas within their Right to Farm statutes, so only specific areas are allocated to be covered by the Right to Farm statute. And so I've given you a few examples of just different exceptions or conditions on the nuisance protection and other protections within Right to Farm statutes. This isn't by any means exhaustive. But Nebraska's Right to Farm statute, unlike the 40 states that do have these different clauses, they have no expressed exceptions written into their Right to Farm statute. While Nebraska doesn't have any of these exceptions or conditions, there are a few states that have provisions that can be read to be broader than Nebraska's Right to Farm statute. An example of this is 12 states have expressed provisions for attorneys' fees if an agricultural operation is sued for a nuisance action and they prevail. So you'll get your attorneys' fees, which is expressly written into their Right to Farm Statutes. Two states provide eminent domain protection for agricultural operations which limits the government's ability to exert eminent

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

domain in situations where that will affect an agricultural operation. Two states have trespass provisions in addition to nuisance provisions, while six states include unfavorable zoning ordinances are not allowed when they interfere with an agricultural operation. As Professor Schutz mentioned, a few states have adopted constitutional amendments to expand upon Right to Farm statutes: North Dakota, Missouri, and Oklahoma, I believe, are those states. And its alternative approach to that has been taken by Wyoming who instead of a constitutional amendment has written into their Right to Farm statute a provision that states that engaging in farming is a right that shall be forever guaranteed in the state, built into the statute rather than a constitutional amendment. So what I've told you is just illustrations; it's a large brush of what the 50 states have done with their Right to Farm statutes and how that kind of compares with Nebraska's. As I said, the biggest factor from my research is that Nebraska's Right to Farm statute does not have any built-in exceptions or conditions. It's just a blanket statement of protection against nuisance actions for agricultural operations. So does anybody have any questions at this time? [LR498]

SENATOR JOHNSON: Senator Bloomfield. [LR498]

SENATOR BLOOMFIELD: Thank you, Chairman. I do have a couple, and its guidelines from other states or when these folks are writing a new legislation that they may attempt next year, you mentioned if you expanded your operation, you might lose your original date? [LR498]

MacKENZIE HERTZ: Um-hum. [LR498]

SENATOR BLOOMFIELD: How drastic does that expansion have to be in the states where that is? [LR498]

MacKENZIE HERTZ: I think it's...it varies. So I haven't done any extensive research on the case law behind that which is where it would probably turn up more of those guidelines. But it depends on the state. Some states have provisions written into their Right to Farm statute which specifically states certain expansions will not constitute something that will divest you of that original established date of operation. Other states, I think California is one of them, that says

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

that any expansion and you're no longer protected by the Right to Farm statute. So I think it definitely varies and that would be something else that would have to be researched. [LR498]

SENATOR BLOOMFIELD: Something we probably should put in there then is if you go from 10 cows to 11 you're not bothered, but if you go from 10 to a thousand, you are; should that, in your opinion, be put in any legislation? [LR498]

MacKENZIE HERTZ: From my research, I can't give a definitive statement of opinion on that. However, what I can say is that Nebraska's Right to Farm statute does provide that blanket protection and because it doesn't say anything about expansions, I think that that does say something since I can look how many states do mention expansions. [LR498]

SENATOR BLOOMFIELD: That's fine. I am operating under the assumption that there will be a bill next year to modify. [LR498]

MacKENZIE HERTZ: Okay. [LR498]

SENATOR BLOOMFIELD: Whether that be good or bad, I don't know yet. But you also mentioned that if you were within a metropolitan area, it didn't...what if the metropolitan area grows into you? With Omaha's constant expanding, can they overtake a feedlot and put him out business? [LR498]

MacKENZIE HERTZ: So for the states, there's four states that exclude agricultural operations that are located within corporate limits of an established municipality since a certain date. So these ones would be like...such as, since August 12, 1982, you're within the corporate limits. These clauses within these statutes are limiting, not expanding protection. So I think that the states who have these provisions have the provisions in there to limit protection, they're not necessarily adding these to expand protection, if that makes sense. [LR498]

SENATOR BLOOMFIELD: Okay. Thank you. [LR498]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

MacKENZIE HERTZ: So I don't think because Nebraska doesn't have that limitation within theirs that it would necessarily be a concern, because we don't...in Nebraska there's no one-year provision, there's no established date of operation requirement or anything like that. [LR498]

SENATOR BLOOMFIELD: But you're going to have 49 individuals within the next year or two looking at changing Nebraska's law as it stands I think. [LR498]

MacKENZIE HERTZ: Okay. [LR498]

SENATOR BLOOMFIELD: I would just like to make sure they had some idea going forward from here. [LR498]

MacKENZIE HERTZ: Okay. Yeah. [LR498]

SENATOR JOHNSON: Other questions? I have a question and it would not be considered a nuisance situation, but another study that's before the Agriculture Committee that's been there the four years I've been here and that deals with vineyards. Corn producers say we were here first. Should there be protection built in that somebody starting up a vineyard would have any rights to protections or would that be they're at risk for being close to a cornfield? [LR498]

MacKENZIE HERTZ: I haven't seen any states that have provisions that give preferential treatment or protection to one commodity as opposed to another. So I guess from my research I can't give an educated statement about that. [LR498]

SENATOR JOHNSON: It doesn't address it. [LR498]

MacKENZIE HERTZ: Yeah. I haven't seen any states that address giving preferential treatment or protection to any commodity over another commodity whether that be an existing or a new incoming commodity. [LR498]

SENATOR JOHNSON: Thank you. [LR498]

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Agriculture Committee
October 14, 2016

SENATOR BLOOMFIELD: I think, Chairman, maybe you should ask her to come in sometime and have a long visit with the committee. [LR498]

SENATOR JOHNSON: Yeah, okay. [LR498]

RICK LEONARD: (Inaudible.) [LR498]

SENATOR JOHNSON: Where did it go? I don't have one. Oh, yeah, okay, this is your document? Okay, I don't have a copy of that, so that is before us...your testimony. No other questions? Everybody get one? Okay, thank you. [LR498]

MacKENZIE HERTZ: Thank you. [LR498]

ANTHONY SCHUTZ: Do you need me to reintroduce myself? Anthony Schutz, A-n-t-h-o-n-y S-c-h-u-t-z. That's one of our students; we've got 300 or so of them down at the law school. And so I mention that only because I know you guys do a lot of work with the law and we do a lot of work with the law as well and we have young, energetic students who are eager to help in any way that they can and that's one example of what they can offer. She's done a great job on this project. The questions that I think Senator Bloomfield asked about a community growing to a livestock operation. There's a famous case called Spur Industries down in Arizona where that happened. I don't know if you've ever been down to Phoenix area, but there's a lot of dairies that are actually pretty much within the city limits down there. But Spur Industries was one that got sued in nuisance. And what the court concluded in that particular case was that the dairy did have to shut down, that it had become a nuisance given the change in the neighborhood; not just one neighbor that moved to it, but an entire city had grown around it. The dairy did, in fact, have to move. But the city...I'm sorry, the developer who sued, it had to pay damages for the move. Right, they basically had to pay to relocate that dairy. So the court felt that that was an equitable result in a case that was resolved in equitable ways. But there is a distinction in the case law between situations where somebody moves out, builds a "McMansion" right next to a thousand-head feedyard or 2,000-head feedyard. In situations where a community has just grown to it and now it's a pretty legitimate question as to whether or not that thing should continue or the city...what are we supposed to do in those growth areas? One other solution is to try to deal with

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Agriculture Committee
October 14, 2016

that preemptively through some land-use planning and things along those lines. So prevent those things, those conflicts from occurring. But the common law in the absence of any statutory change would be usually...usually the livestock operation, if it was there first, it can often win; but in many instances when a city grows to it, it can force that operation to move. The other question that was interesting, the vineyard question that Senator Johnson asked, there was a case in Nebraska where a corn farmer who used Atrazine on his field next to a soybean farmer was sued in nuisance by the soybean farmer because dust that blew off of that corn field killed a crop of beans. Right? And it's a pretty famous case. The court didn't really resolve it. The court said go back to the district court and it enunciated in that case sort of the modern standard of nuisance law, not clear who is going to win that case. It depends on, really, which use of the property is more reasonable under the circumstances. It really...I joke with my students that it depends on whether or not the judge likes corn or soybeans more because that's how you sort that one out. The vineyard case would raise precisely that question. And it's a decent question. I mean, on the one hand one guy was there first, on the other hand that vineyard just wants to use his property in the way that he wants to use it. Right? So it's a difficult question to try to sort out. At the end of the day, maybe there's ways of balancing those interests; maybe a windbreak of cedar trees can be created or something along those lines, but who pays for that and who adopts that technology and who should put their things where is a difficult and perplexing question that we've run into a number of times. But the vineyard reminded me of the soybean farm. The second point in that June 10 letter, and the second point that Senator Johnson started off with today was it was considering other ways of maybe expanding our existing Right to Farm Act or coming up with other statutory approaches for doing what...what, I suppose, LR378CA, the constitutional amendment proposed to do this last legislative term. And really I think what that is is protect agriculture from, I guess in some instances, arbitrary regulation is one of the things that the letter said. In other instance, maybe nuisance litigation. To the extent we would try to protect agriculture from nuisance litigation, we seem to do a pretty good job of that already and it kind of goes to what MacKenzie was talking about. There's some room on the margins in the form of expansions and things along those lines. There's been a lot of litigation in Missouri, I believe, questioning those expansions and things along those lines. So maybe we can make some moves there. But insofar as nuisance litigation is concerned, I haven't seen it be a big impediment to the growth of the agricultural industry in Nebraska so far. Now that doesn't necessarily mean it won't be in the future, but so far I haven't seen that as a big problem. But I think we've identified some

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Agriculture Committee
October 14, 2016

ways in which we could change that, primarily on the expansion front. Insofar as we would be trying to protect agriculture from arbitrary regulation, just that the mention of that sort of gets a bit complex...or perplexing to me because we have constitutional provisions that protect people from arbitrary government. We have a due process clause in our state constitution. We have an equal protection clause in our state constitution. We have a special legislation provision in our state constitution. And all of those tend to protect whatever interest you're talking about from arbitrary regulation. So I don't know that we necessarily need to protect agriculture from arbitrary regulation, I think, maybe, what agriculture wants protected from is regulation with which it disagrees. And we tend to view that as the subject of the political process. And so I think that's where a lot of these balances have to be struck. And so I don't see a good way of doing many things in the legislative process by statute that would operate to protect agriculture from, for example, legislation that it doesn't like or that it views as too costly. There are a couple of ways of doing that, I suppose. One would be sort of a policy statement in state legislation that sort of talks about how good agriculture is or things along those lines. The federal code, the U.S. code includes a provision that talks about the value of family farms to agriculture and things along those lines, so it's a nice statement of policy. It doesn't carry any limiting impact, so the Legislature, to the extent it acts in a way that it's inconsistent with some policy statement that another legislature has made, doesn't necessarily violate anything. Right? It's just sort of implicitly amending whatever it said before. So they don't tend to be good ways of creating rights or ways of limiting what a legislature does in the future. You really sort of need...if you want to limit a legislature, if you want to create an individual right that persists across legislatures, you sort of do have to amend the constitution in order to do that sort of thing. Are there other ways though of considering the impacts on agriculture? And I think there are. And one good example is...for example, those sorts of statutory approaches that require the generation of information for policymakers to consider. Take, for example, the fiscal note that we have on a lot of legislation that we have, you worry about increasing costs, you worry about increasing costs to local government. Well, one way of dealing with that is to make transparent those costs. And the hope is that once you put that information before legislators they'll act in a way that takes that into account with the underlying premise being they were kind of ignoring it before and now they know about it and maybe they can do a better job of thinking about those sorts of impacts, so the fiscal note approach. The National Environmental Policy Act is another sort of information-generating sort of approach. And so a similar approach would be, for example, to

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Rough Draft

Agriculture Committee
October 14, 2016

ask the Department of Agriculture on certain legislation, or maybe all legislation, what do you think the impacts of this would be? And maybe they could create a report of some sort that would come to the Legislature or to administrative bodies within the state or to local governments or whatever. But you could create a statutory mechanism that allows for the generation of information that's relevant to the cost that legislation or regulation imposes on agriculture. And the hope would be once people know about that, once they have a better understanding of it and it's there, they can put their hand on it that they would, perhaps, refrain from burning agriculture too much. So those are just some examples of, maybe, some alternative approaches. I know Senator Johnson's office had sort of a draft of some information that would...could maybe be used. Some examples or a proposal that would maybe amend 2-404 that would maybe add some language there. That sort of thing could be one thing we could do. Again, that would be protection really from nuisance liability. Although I think some of the things that are included in it really don't raise much of a risk of nuisance liability. And so I don't know that we necessarily have to jump in and protect, but it would be an example of something we could do. But that pretty much concludes the thoughts that I have to offer on that second bullet point. Does anybody have any questions on that or ideas for alternative approaches that maybe would be open for discussion, things along those lines? [LR498]

SENATOR JOHNSON: Questions? No? [LR498]

ANTHONY SCHUTZ: The idea of generating information with regard to the cost on agriculture, I tend to think the legislators often get that information anyway. It's unlike environmental cost where you worry that there's nobody really speaking up for them. Agriculture does have quite a voice in the Legislature, so I think that you get information on cost. But it would be an approach and it would be a way of utilizing the Department of Agriculture and policymaking. You'd have to fund it though, I suppose they'd want money to generate that sort of stuff. [LR498]

SENATOR BLOOMFIELD: That voice is diminishing. [LR498]

ANTHONY SCHUTZ: Is it? Yeah, it could be, it could be. All right. Do you want me to talk about the third point or do you guys what to get on with it, with other folks? [LR498]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: Well, we don't know what...ahead of us. It appears that there's not a lot of support, interest from the ag sector. I don't know where we'd be from a committee standpoint. But there is a possibility that some would come up next year. [LR498]

ANTHONY SCHUTZ: Sure. I'd offer two points, one is if the language that comes is the same language that we had the last session, there would be some work to be done just on the language itself. And, you know, we don't really need to go into the details of the language I don't think this time. But if it's the route that folks want to go, that is a constitutional amendment, there would be work to do on the language that's used. I think a carefully crafted constitutional amendment could perhaps achieve the goal of limiting the Legislature's ability to harm agriculture in the future. The bigger question of course, and this is one of two points that I'd like to leave is that you have to really question the risk associated with the Nebraska Legislature harming agriculture, whether or not that is really something that we ought to be concerned about. Perhaps, but perhaps not, I don't think history pans out in that regard; but the future may be much different than the past and so that would be a judgment, of course, for the Legislature. And then, ultimately, for the people of the state of Nebraska. So we have to think about that whether or not it is, in fact, a risk. The other thing that I would mention, and the reason I want to mention it is because it was both in last year's LR378CA proposal, as well as the proposal to perhaps amend the Right to Farm Act and that is to shy away from using language that pertains only to citizens of Nebraska or residents of Nebraska or Nebraska companies. Because agriculture is sort of the quintessential interstate commerce that the federal government can regulate, that means that we cannot, as a state Legislature, regulate in a way that discriminates against other states' agriculture. In other words, we can't limit the scope of the protection that we give agricultural producers to only Nebraska agricultural producers. That protection has to be extended to the North Carolina producer, the North Dakota producer, the Arizona producer that's operating within the state. So if they're doing ag, if they're farming and ranching, then they have to be protected right alongside the Nebraska farmers and ranchers. So the reason I mention that, that's why I-300 got struck down; that's why a lot of efforts at doing things that protect agriculture have been struck down because they waded into an arena that is interstate commerce and the most important restriction in interstate commerce, at least insofar as state legislatures is concerned, is not to discriminate against out-of-state commerce. So I would be careful of that. But with that I'll end. [LR498]

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Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: In the letter, we talked a little about some terminology and how courts might react to certain statements. If there would be a way to expound on that a little bit, whether today or to us...defining some of these, are they too broad in their...the statement we listed was farming and ranching: farming and ranching practices, agricultural technology, livestock production and ranching practices, and citizens and lawful residents, some of those areas. And then there's, you know, bridges and some of those terms that some of us don't always use in our everyday language. [LR498]

ANTHONY SCHUTZ: Sure. Do we want to go into those terms? [LR498]

SENATOR JOHNSON: Well, if you can...wouldn't have to today. I don't know how much more...you know. [LR498]

ANTHONY SCHUTZ: Okay. Sure. And just broadly speaking, because these are placed in the constitution, they wouldn't be sort of simple questions of statutory construction. These would be questions of constitutional interpretation. Right? Which means, the intent of the people that write it and what they say along those lines when they're debating, that's relevant, but it's not necessarily dispositive because it's the people that adopt the provision. And so we have to concern ourselves really not so much with underlying meanings that might have motivated their drafting, but rather also the meanings that sort of just appear to people as they read it. So in some sense, that's a little bit easier of an inquiry. Right? What would a reasonable person who reads this provision in the constitution at this particular time what they think it means? And so that...that kind of simplifies the interpretational effort, at least in some regards with regard to terms like "farming and ranching practices." I think what the court would ask is really, you know, in any particular case, and that's one thing you'll have to remember is that as a constitutional amendment, subject to judicial interpretation, the meaning of terms will be determined on an individual case on a case-by-case basis going forward. So you would have, for example, a case that involves the regulation of the use of Glyphosate or something along those lines and the court would be faced with the issue of is the use of Glyphosate a farming or ranching practice? And I think most folks would say, yeah, because that's what people use in the production of corn at this particular time. Right? Or soybeans or whatever. And so from that we would maybe derive a principle that it means the farming and ranching practices means those sorts of technologies that

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

were employed at the time the provision was adopted. And then in the next case we would use what we developed in the prior case and hopefully add on or further flesh out that rule and over time we would get a standard order of rule. So the development of the meaning of these terms will occur over time on a case-by-case basis with the primary thing being, as far as the courts are concerned, the primary thing being the text that they use. Right? Farming and ranching practices, I mean, it's hard to think of any other way that you interpret that particular language. The term "agricultural technology", again, you would go to the dictionary first and you would use it. It wouldn't be a term of art I don't think. It wouldn't be something where we would look to many other things to interpret it. So, you know, in a vacuum or, I'm sorry, in a, you know, ex ante sort of evaluation, what other interpretational tools would the court have available to it to try to figure out these words? Well, all of the them, really. It would depend, in part, on the skill of the attorneys that put this before the court and the particular issue facing the court. Livestock production and ranching practices, those would be interesting questions. The term "citizens and lawful residents", that has some meaning in other areas, in other legal areas, which, as far as the court's concerned, would mean that the court would look at whether...the court would look at those other meanings if it appeared that what the citizens and what the drafters meant was to utilize that other meaning at the time they adopted it. So "resident"--what does resident mean? Well, it means different things for different purposes. And so we can spin arguments about "residents" means. Does it apply to corporations and limited liability companies and those sort of things? Well, it depends on what we would think reasonable people would read from the term "citizens and lawful residents." So at the time it was adopted, which would be 2017, does that make sense? Does that give you at least some indication? In other words, it's hard to give an interpretation of what many of these words mean because the court itself will be faced with those questions going forward and the tools that it will use, I think, are primarily plain meaning in the context in which it was derived. And then to the extent you use terms that have other legal meanings, those other legal meanings. But filtered through the people who created and voted for it. But this is the bread and butter of lawyers. Right? And so if it was a simple question, I wouldn't have a law school to work at. [LR498]

SENATOR JOHNSON: Okay. Any other questions? Comments? Thank you. [LR498]

ANTHONY SCHUTZ: Thank you. [LR498]

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Rough Draft

Agriculture Committee
October 14, 2016

SENATOR JOHNSON: Appreciate your input. Do we have other people wanting to testify?
Welcome. [LR498]

JACK CHELOHA: Thank you. Good afternoon, Senator Johnson, and members of the Agriculture Committee. My name is Jack Cheloha, that's spelled J-a-c-k, last name is spelled C-h-e-l-o-h-a, and I'm appearing this afternoon on behalf of the city of Omaha. You probably wonder why...why is the city of Omaha here on a Friday afternoon in front of the Ag Committee? First of all, I want to thank you for having this hearing today. When LR378CA came up for a hearing earlier this year, your committee meets at the same time as Urban Affairs and so most likely I was probably in the Urban Affairs Committee. But like any good lobbyist, I probably read your slate of agenda that day and saw that CA in front of you and maybe brushed right by it thinking that, well, what would a Right to Farm affect Omaha and why would I be concerned? But through the course of your debate in committee and then the bill being advanced and then there was actually floor debate on it as it became a priority bill we started to look at it a little closer from the city's vantage point and we thought we had some concerns. And so I wanted to at least thank you for having the chance to come in after the fact and maybe give some concerns. If there is legislation in 2017, we would look at it closely and be prepared, obviously, then. But as your resolution today invites testimony, I wanted to tell you that we looked at it seriously. I met with our city planning department, and I met with our city attorney's office, and so with that we had a little bit of concern. I mean, the first question was why would we need a constitutional amendment to protect agriculture? You know, agriculture has been around since ancient civilization, I think from my recollection, it started somewhere in Egypt, and Nebraska obviously is known as an agriculture state. And we've had ag and ag products being produced here for the history of it, and we're almost at 150 years here now. And so we thought about a little bit and at that time just off the cuff no one...I was glad to hear from the professor, nobody from the city's vantage point was even familiar with the statutory protections for ag. So I think just anecdotally that's important because as Omaha has existed and grown, apparently we haven't had too many conflicts where we've had to look at the Right to Farm or things seem to have a way of working themselves out, if you will. Omaha now is roughly 450,000 people. We typically grow to the western part of our city, because we're border-locked with Iowa on the east and Sarpy County on the south. And it seems to me as we maybe bump up against the agricultural land, things work out in a sense sometimes with economic means, if you will. A developer will

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

see that the city has a need for new housing and they'll look and purchase land from an ag producer and then get the proper permits and zoning from the city and off we'll go. But every now and then, you'll have some zoning issues. So I wanted you to know that we're here; we're interested. Something that...also the professor said that caught my eye, or maybe it was his assistant from the law student, but she said in some states they offer protection that, obviously, that the ag operation is within the...no, if it's within the city limits, then you don't get the protection of the Right to Farm statute. And that seems to be a reasonable request. In fact, I might even take it a step further and ask that you would exempt our extraterritorial zoning jurisdiction or that's a statutory right given to cities where you anticipate them growing. Omaha, for instance, has a three-mile zone. If you draw a line around the city, we have various rights to regulate land use and the construction of buildings, etcetera within there. And because of the fact that we haven't really had this hard-hitting conflict between a city's growth and agriculture, do we need a constitutional amendment? That's what our question was. Some other examples I wanted to talk to you a little bit about is sometimes as we grow within the city...as a city grows and expands, we like to have various restrictions on land use. Obviously, you're concerned about nuisances, building integrity, so we do have some concerns if a developer wants to come in and offer huge land parcels, that may be something that we want to think about, because if you have a residential structure, but then a lot of land around it, what will be the use and how will it fit into the growth and planning of the city? I've talked about the zoning and the buildings already. One other thought that we had was as we grow, obviously, you need streets and infrastructure to take care of the people that locate within a municipality. And so we want to be able to preserve and have the rights to do...you know, street locations, sewer locations. And finally, with the term "sewer", I wanted to add one last comment, Omaha has a large sanitary sewer system, the main line, if you will, in fact, the whole structure itself goes beyond Omaha city limits and parts of it flow under the ground in Sarpy County. And so obviously that's worked; we haven't had any conflict with agricultural producers. But those are some things we need to consider as well, as you think about a constitutional amendment. And then the last example I wanted to offer you is if this was put forward and put to the voters, what would this do with some of our health and safety ordinances within the city. Right now, you can't have certain agricultural livestock within the city limits. If this would happen, there may be a conflict where a zealous resident may say I have now have a right to raise cattle or livestock at 50th and Dodge Street if they have a suitable piece of property. But we just think it would be better to think through some of these things, as

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Transcriber's Office
Rough Draft

Agriculture Committee
October 14, 2016

you're doing, and that way, you know, it's better to go through it now on the legislative front as opposed through litigation down the road. So I'm glad I had a chance to talk to you today and I'll try to answer any question. [LR498]

SENATOR JOHNSON: Thank you for coming in. Any questions? No? Thank you. [LR498]

JACK CHELOHA: Thank you. [LR498]

SENATOR JOHNSON: Welcome. [LR498]

LYNN REX: Thank you. Senator Johnson, members of the committee, my name is Lynn Rex, L-y-n-n- R-e-x, representing the League of Nebraska Municipalities. It's nice to see all of you today. And first of all, we really appreciate the opportunity just to share some of our thoughts today. And first and foremost, we just want to thank the committee's work on this important issue. We agree with almost everything that was presented by Professor Schutz and his assistant. I think...law clerk, as it were, or law student, I think it's really important to underscore that the League of Nebraska Municipalities is opposed to a constitutional solution on anything relating to Right to Farm. Certainly willing to work with this committee on any type of statutory language that you'd want to put together to further enhance a protection for them. I think in addition to the issues that Jack Cheloha raised, I just want to underscore that from the municipal standpoint in terms of any conflicts with the ag side, first and foremost, the ag folks, when they're involved, when they are participating in some type of annexation, they're the ones that are the beneficiaries of that. When we met with our members on a number of different issues over the years, we don't have instances where ag folks did not want their land annexed. Those folks knew that that land was going to have tremendous value because it was going to be used, likely, for an industrial tract. So it's not a situation where we have that kind of tension. And so...and we've not had a history of that. I'm not saying it couldn't happen, but to our knowledge in terms of just meeting with our cities, that hasn't happened. And so in any event, we are very pleased that the committee is looking at this. I think that one of the most compelling things today that was presented to you is just that do you want the courts making all the decisions and years and years of litigation or do you want a situation that when you pass a statute or amend a statute it's the Legislature that makes that decision? And I frankly think the context of having the Legislature precluded from

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Rough Draft

Agriculture Committee
October 14, 2016

making these types of decisions is very inappropriate. This is within your purview. And in my view that's where it belongs, not in a constitution. There's a place and a time and a place for constitutional amendments, this is not one of them. So with that I'd be happy to answer any questions that you might have. [LR498]

SENATOR JOHNSON: Seeing none... [LR498]

LYNN REX: Thank you. And just in closing, the League strongly supports Right to Farm, just not in a constitutional setting. Thank you. [LR498]

SENATOR JOHNSON: Anybody else to testify? Seeing none, we don't really have a close. We've accomplished what we wanted to do with getting information to the committee. We thank professor and student for the work you've done. With that we will close the hearing on LR498. [LR498]