

# MINUTES

## Rules Review



Representative Jon Hansen, Chair  
Senator Jean Hunhoff, Vice Chair

Four hundred thirteenth meeting  
Tuesday, November 1, 2022

Room 414 – State Capitol  
Pierre, South Dakota

The four hundred thirteenth meeting of the Interim Rules Review Committee (IRRC) was called to order by Representative Jon Hansen, Chair, at 9:00 a.m. (CT) on November 1, 2022, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Jon Hansen, Chair, Ryan Cwach, and Kevin Jensen; and Senators Red Dawn Foster, Jean Hunhoff, Vice Chair, and Timothy Johns. Staff members present were Justin Goetz, Code Counsel; Kelly Thompson, Supervisor of Text Editing Services; and Hilary Carruthers, Legislative Systems Analyst.

**NOTE:** For purpose of continuity, the following minutes are not necessarily in chronological order. All referenced documents distributed at the meeting are hyperlinked to the document on the Legislative Research Council website. This meeting was live streamed. The archived live stream is available at [sdlegislature.gov](https://sdlegislature.gov).

### Approval of Minutes

**Representative Cwach moved, seconded by Representative Jensen, that the September 13, 2022, meeting minutes be approved. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.**

### Staff Report

**Mr. Justin Goetz, Code Counsel,** advised there were no issues to report.

### Rules Reviewed

**Department of Agriculture and Natural Resources:** Amend rules to update South Dakota's existing industrial hemp rules to meet the requirements in current federal regulations and state laws, following the passage of [Senate Bill 201](#) by the 2022 Legislature and [House Bill 1228](#) by the 2021 Legislature as well as the USDA final rule change 7-CFR 990.

**Mr. Derek Schiefelbein, Department of Agriculture and Natural Resources,** reviewed the proposed rules.

Representative Jensen asked if the removal of the \$2,000 license fee meant the fee was no longer being assessed. Mr. Schiefelbein explained that the fee is now contained in state statute.

Senator Hunhoff inquired as to what criteria determines who is eligible to receive a waiver in regard to sampling prior to harvesting the crop. Mr. Schiefelbein responded the discretionary language was included to be proactive, and the department anticipates there will be some certified seed varieties in the future that will be tested before being grown.

***Senator Hunhoff moved, seconded by Representative Cwach, that the review of the rules proposed by the Department of Agriculture and Natural Resources is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.***

**South Dakota Board of Water and Natural Resources (Department of Agriculture and Natural Resources):** Amend rules to redistrict the director areas of seven water development districts.

**Mr. Andrew Bruels, Department of Agriculture and Natural Resources,** reviewed the proposed rules.

***Senator Johns moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Board of Water and Natural Resources (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.***

**South Dakota Conservation Commission (Department of Agriculture and Natural Resources):** Amend rules to streamline the administration of the current program in order to accommodate an additional \$3,000,000.00 of one-time general funds added to the conservation district special revenue fund by House Bill 1277, passed by the 2022 Legislature.

**Mr. Bill Smith, Department of Agriculture and Natural Resources,** reviewed the proposed rules.

#### **Public Testimony**

**Ms. Angela Ehlers, South Dakota Conservation Districts,** said her organization concurs in and supports the proposed rules, and she complimented the department for their open and transparent process.

Senator Hunhoff asked if the timeframes for June 30<sup>th</sup> and December 31<sup>st</sup> constitute standard language. Mr. Smith confirmed that was correct.

Representative Cwach inquired as to the default rate for the loan program. Mr. Smith replied to date, there have been no defaults, and that the department has worked with the conservation districts to help prevent defaults.

Representative Jensen asked why the term, board of managers, was being removed from the definitions and what type of equipment would be covered by the \$5,000 deductible in the proposed rules. Mr. Smith explained the board of managers refers to the watershed district boards that were removed in 2013, so the term is obsolete. The deductible applies to any equipment the district plans to purchase, regardless of size, and is increased to allow for the purchase of larger equipment, such as grass drills.

***Representative Jensen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota Conservation Commission (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.***

**Department of Social Services:** Amend rules to update the length of coverage for the Refugee Medical Assistance (RMA) program from eight months to twelve months for eligible refugees with entry dates on or after October 1, 2021, and to update the law implemented throughout the Chapter.

**Mr. Greg Tishkoff, Department of Social Services,** reviewed the proposed rules.

Referring to the fiscal statement provided by the agency, Senator Hunhoff asked whether individuals would receive four months of additional health coverage. Mr. Tishkoff said yes, through \$12,988 in federal funding. Responding to Senator Hunhoff as to how that amount was determined, **Ms. Carrie Johnson, Department of Social Services**, replied the amount is based on historical expenditures, multiplied by the additional months per person.

Representative Jensen inquired as to under what circumstances medical assistance would not be provided, if a refugee is eligible to receive it. Ms. Johnson responded that it would not be provided only if the refugee became ineligible because of income, because they moved out of state, or because they do not want the coverage anymore.

***Senator Hunhoff moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Social Services is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**Department of Health:** Amend rules to:

- Allow an extension to certain establishments that cannot open within one year of receiving a certificate;
- Change requirements for agent identification badges;
- Create an allowance for testing facilities to use alternate methods of transportation when sending samples to the public health laboratory;
- Allow the use of non-odorized flammable gas in the extraction process; and
- Reduce the qualifications for submitting a petition for a debilitating condition to the department.

**Ms. Ali Schaeftbauer, Department of Health**, reviewed the proposed rules.

### **Public Testimony**

**Mr. Jeremiah M. Murphy, Cannabis Industry Association of South Dakota**, said his membership supports the rules, as many of them were suggested by the group, and that the language to be struck regarding qualifying conditions is necessary to align with statute.

**Mr. Emmett Reistroffer, Genesis Farms**, spoke in support of the proposed rules, saying the process is working quickly in South Dakota due to good collaboration with the department.

**Mr. Tim Engel, South Dakota State Medical Association**, voiced opposition to some of the changes – specifically, the striking of language regarding qualifying conditions - noting that medical cannabis has dangerous known and unknown side effects and to allow the approval of experimental treatments without knowing the side effects is not a reasonable interpretation of the law.

### **Rebuttal**

In response to the opposition, Ms. Schaeftbauer stated while medical cannabis is unvetted by the Food and Drug Administration (FDA), it was approved by the public and is legal in South Dakota.

Representative Jensen told of a phone call he received from a facility employee whose ID card was removed by management, yet the employee was allowed to keep working; he requested clarification of who monitors the ID cards. Mr. Reistroffer responded that from a manager's perspective, the manager must perform a background check on the individual prior to them starting employment and provide a badge to the employee with a copy going to the department. If a manager takes the card away from the employee, that individual should not be working in the facility.

Representative Cwach asked for whose use, medical cannabis is currently authorized in South Dakota. Ms. Schaeffbauer replied the department follows the definition in statute, authorizing the use of medical cannabis for any person with a debilitating medical condition, as determined by their practitioner. Mr. Murphy said the definition in statute is a list of symptoms rather than diseases.

Representative Cwach asked if a practitioner is required to look at what other medications may be prescribed instead of medical cannabis. Ms. Schaeffbauer responded that the department does not second guess a practitioner who certifies a patient as needing medical cannabis.

Referencing proposed language in ARSD 44:90:13:02, Senator Hunhoff requested data that shows the benefits of medical cannabis outweigh the risk of using it. **Ms. Lynne Valenti, Department of Health**, stated the language change was made in response to opposition by the medical association and reflects the language used by the FDA when they are considering or approving medications. Data on benefits outweighing the risks is provided to the department by the person submitting the petition. Mr. Murphy indicated that the petition would contain a clear description of the condition, its risks and benefits, and the peer-reviewed research to back up the risks and benefits.

Senator Hunhoff asked what information is provided to the patient to educate them on the benefits and side effects of medical cannabis. Mr. Reistroffer replied that the information is distributed in a variety of ways: warnings posted at medical cannabis facilities; a consultation with facility staff the first time the patient comes in to get medical cannabis; and reminders on the back of every receipt for every subsequent visit. However, information on the actual medical use is not provided – that is left to the doctor to discuss with the patient.

Representative Jensen referenced radio ads he has heard in recent months saying a person can get a medical card over the phone, which would indicate the person could purchase medical cannabis without consulting their doctor; he wondered where the safety factor is for the public. Mr. Reistroffer acknowledged that the ads are misleading and anyone offering a consultation over the phone is violating state law. A consultation must take place face to face, with the individual seeing their doctor in person to go over medical records and discuss a treatment plan, however, that consultation may take only five minutes because the need is apparent.

Representative Hansen asked if the department has denied a petition under the current rule that could be approved if the amended rule is passed and whether passage of the rule makes it easier for the department to approve petitions. Ms. Schaeffbauer replied that of the three petitions received to date, all have been incomplete and would not qualify if the revised rule is approved. She said the process would not necessarily be easier if the rule passes but it would be more in line with the legislative intent for the statute.

Representative Hansen asked if there was a condition that the agency had in mind that might be approved under this amendment. Ms. Schaeffbauer stated that there was no specific condition the agency had in mind but noted that many conditions on the list proposed by the department in last year's rulemaking would not meet the standard currently in rule.

Senator Hunhoff asked if it only takes one contact with some type of practitioner to get a medical cannabis card or are follow-up visits required. Mr. Murphy responded that the language in statute requires either ongoing discussions or for the practitioner to make themselves available for consultation. A patient must also talk to their doctor to renew their certification, which must occur annually at minimum or can be shorter if the doctor so designates.

Representative Hansen inquired about potential pop-up clinics around South Dakota State University and the University of South Dakota at which people can obtain medical cannabis cards. Mr. Murphy said none of his association's members are involved in such activities and if they are being held, they still must follow the law.

Representative Jensen commented that the wording could be more specific in terms of what the benefits of medical cannabis are and how they outweigh the risks, saying as it currently reads, he does not believe it reflects what the voters intended.

***Representative Jensen moved, seconded by Representative Hansen, that proposed rule 44:90:13:02 be reverted to a step prior under SDCL 1-26-4.7(2)(3).***

Senator Hunhoff asked the department if the Medical Marijuana Oversight Committee had been a part of their drafting and review process. Ms. Schaeftbauer answered that the committee had encouraged the department to review the changes but did not participate further in the hearing process.

***Motion failed on a roll call vote with 1 AYE and 5 NAYS. Voting AYE: Jensen. Voting NAY: Cwach, Foster, Johns, Hunhoff, and Hansen.***

***Representative Cwach moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Health is complete. Motion prevailed on a roll call vote with 5 AYES and 1 NAY. Voting AYE: Cwach, Foster, Johns, Hunhoff, and Hansen. Voting NAY: Jensen.***

**South Dakota Board of Nursing (Department of Health):** Amend rules to:

- Update the definitions used in Article 20:48;
- Revise and update the rules on the delegation of medication administration tasks to nursing assistive personnel, including training and supervision requirements;
- Remove the registration requirement for diabetes aides to be listed on the board's unlicensed personnel registry; and
- Remove the requirement for all medication aides to be registered by the board and require only those employed in skilled nursing facilities, assisted living centers, or hospitals to be registered.

**Ms. Linda Young, South Dakota Board of Nursing,** reviewed the proposed rules.

Representative Jensen asked if the proposed rules include provisions for background checks. Ms. Young explained they are a requirement for nurses but not for aides, and a formal statutory change would be necessary to make them a requirement for registrants. Representative Jensen voiced concern that a background check was not being required for individuals who would be administering Schedule II narcotics.

Senator Hunhoff wanted to know why home health care and hospice care were not included on the list of facilities for which registration is required to perform medication administration. Ms. Young responded that most of the complaints received by the board involve medication aides and occur in skilled nursing facilities, assisted living centers, and hospitals, but that the registration requirement could be updated in the future, if necessary. Senator Hunhoff suggested that home health care be considered in the future because of the level of risk involved in that environment.

***Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Nursing (Department of Health) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**South Dakota Board of Pharmacy (Department of Health):** Amend rules to provide the framework for the Redistribution of Donated Prescription Drugs and Medical Supplies program which was created with the passage of [House Bill 1086](#) by the 2022 Legislature.

**Ms. Kari Shanard-Koenders, South Dakota Board of Pharmacy,** reviewed the proposed rules.

Senator Hunhoff asked what constitutes medical supplies and where the term is defined. Ms. Shanard-Koenders said medical supplies are defined in statute and include items such as insulin pods for pumps and tubing.

Senator Hunhoff inquired as to where the pilot program was conducted in South Dakota and what are the risks for patients accepting donations from the program. Ms. Shanard-Koenders responded that the pilot program was conducted at Avera McKennan in Sioux Falls and drugs classified as narcotics are excluded from the program. Patients who accept donated drugs and medical supplies sign an acceptance form and the risk to the participating pharmacy is mitigated through the language in House Bill 1086.

Senator Hunhoff lastly asked about how illegal diversion is prevented within the program. Ms. Shanard-Koenders provided that pharmacists inspecting the products donated will be able to prevent diversion, and that this risk is diminished by the fact that controlled substances are ineligible for donation to the program.

***Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Pharmacy (Department of Health) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**Department of Human Services:** Amend rules to:

- Increase eligibility for certain telecommunications equipment;
- Correct and specify eligibility for the communication assistance services program;
- Add criteria for denial, suspension, or revocation of interpreter certification;
- Update shared living terminology and compliance requirements;
- Expand time for shared living required training and training requirements;
- Amend definitions;
- Adjust provider enrollment requirements;
- Clean up language and internal references;
- Specify records requirements;
- Update case management provisions;
- Clarify the requirement for a functional behavior analysis;
- Clarify provider role regarding immunizations;
- Increase eligibility for community training services;
- Repeal DRS statement of purpose;
- Repeal day service provisions within the shared living chapter; and
- Repeal the 300-foot provider building separation requirement.

**Ms. Jenna Howell, Department of Human Services,** reviewed the proposed rules.

### **Public Testimony**

**Mr. Dan Cross, Community Support Providers of South Dakota,** testified in support of those proposed rules pertaining to the Division of Developmental Disabilities, saying his members had formed a work group and provided feedback to the department. Mr. Cross said it would be helpful in the future for the department to make the organization aware of what rules are being proposed prior to their public hearing to give them an opportunity to provide suggestions and information. Mr. Cross noted that while the rules resulted from the work group's suggestions, a number of other rules suggested by the group were not yet considered by the department.

Representative Jensen asked if the increased rate for telecommunication equipment is a federal requirement. Ms. Howell explained it is a state program with a dedicated funding source and the rate increase is based on need and will allow them to serve more people.

Representative Jensen inquired as to whether a resident must physically live in South Dakota to benefit from the program. Ms. Howell said the rules follow the legal definition of a resident. Responding to a follow-up question from Representative Jensen on the applicability of the telecommunication equipment benefit, **Mr. Eric Weiss, Department of Human Services**, stated there are a variety of low-cost options for popular pieces of equipment.

Representative Cwach generally questioned how community support providers are impacted in their day-to-day operations by these proposals. Ms. Howell indicated the goal of the rule changes is to impose less regulation on providers and clean up some rules, but maintain provider and participant flexibility.

Senator Foster asked if there is a timeline for the department to consider other rules submissions by the work group. Ms. Howell replied that a specific time has not yet been set but she anticipates more rules will be proposed next summer.

Senator Hunhoff asked for an explanation on the proposed changes regarding letters of compliance. Ms. Howell clarified that references to contractors were updated to read shared living providers, who work under the auspices of contractors. **Ms. Joey Younie, Department of Human Services**, confirmed that the language was being changed to align with the terminology currently being used.

Senator Hunhoff commented that she sits on many committees where the testifiers talk about communication; as community service providers serve some of the state's most vulnerable residents, it is important that the agency sit down with the providers to determine what rules are most important and need to be revised next.

***Representative Cwach moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Human Services is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**[South Dakota Board of Examiners for Counselors and Marriage and Family Therapists \(Department of Social Services\)](#)**: Amend rules to:

- Clarify requirements of an approved counseling program's practicum and internship requirements for education acceptable for licensure as a professional counselor;
- Clarify the required methods of supervision for post graduate supervisees to allow flexibility in the required observation of supervisees seeking a professional counselor license or marriage and family therapist license;
- Clarify that a post-graduate plan of supervision automatically expires upon issuance of a professional counselor, professional counselor – mental health, or marriage and family therapist license;
- Add the Counselor Rehabilitation Certification Examination (CRC) as an acceptable national examination for meeting the requirements of licensure as a professional counselor; and
- Allow the board to accept an examination deemed equivalent to the Association of Marital and Family Regulatory Board's National Examination on Marital Therapy for purposes of meeting the examination requirement of licensure as a marriage and family therapist.

**Ms. Jennifer Stalley, South Dakota Board of Examiners for Counselors and Marriage and Family Therapists**, reviewed the proposed rules, which are part of the board's commitment to review their rules on a biennial basis.



### Public Testimony

**Mr. Terry Dosch, South Dakota Council of Community Behavioral Health**, thanked the board for including his members in the process, and voiced support for the rules as presented, especially the simplification of the licensing process as it will help to remove barriers to hiring people amidst pressing workforce issues.

Representative Jensen asked why the requirement to have a supervisor evaluate a trainee's work face to face was being removed. Ms. Stalley said it is difficult to read an official transcript from a school and discern if the evaluation took place face to face. Going forward, an electronic process will be utilized, which is in alignment with the recent allowance of remote counseling.

***Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Examiners for Counselors and Marriage and Family Therapists (Department of Social Services) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**State Board of Elections (Office of the Secretary of State):** Amend rules to:

- Update recapitulation sheets to provide clarifying language and additional tabulation descriptions;
- Allow for the use of certain abbreviations on official ballot stamps;
- Provide clarity regarding the certificate of transmittal to a counting board; and
- Update the voter registration form to provide clarity to the choice of party information section.

**Mr. Jason Lutz, Office of the Secretary of State**, reviewed the proposed rules, and noted they all derived from county auditor offices.

Representative Jensen asked if only stamped ballots may be counted at an election. Mr. Lutz confirmed that the stamp is required by law for a ballot to be counted and tabulation machines were reprogrammed several years ago, as a result of a Government Operations and Audit Committee discussion, to check the printing of the ballot and remove those ballots that do not contain the stamp.

Representative Jensen asked if people with mail forwarding services who do not actually live in South Dakota can register to vote in the state. Mr. Lutz responded that when a person fills out the registration form, they are attesting to their address on that form. The historical practice has been that the Legislature has discussed the issue for at least a decade and determined that a person attesting to that address can use a post office box number.

Senator Johns inquired if the stamp is placed on the ballot manually or by a machine. Mr. Lutz clarified the stamp is placed on the ballot by the election worker before giving it to the voter.

Representative Cwach asked why hand-counted paper ballots were added to the rule regarding use of recapitulation sheets. Mr. Lutz said county officials had requested that the rule expressly state its application to non-hand-counted ballots, to match the technical understanding of the officials. In answer to Representative Cwach's follow-up regarding the need to report more information on optically counted ballots, Mr. Lutz cited federal law as requiring ballot marking devices, often used by individuals with disabilities, to be separately tabulated.

Senator Foster asked if a person registering to vote leaves their party affiliation blank, how it is determined whether to list them as an independent or a no party affiliation voter. Mr. Lutz explained that there is no recognized independent party in South Dakota so if the choice of party field is left blank, the person will be listed as independent/no party affiliation.



***Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the State Board of Elections (Office of the Secretary of State) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**Department of Game, Fish and Parks:** Amend rules to:

- Remove the deadline for removing ice shacks from the ice each year;
- Remove restrictions on mesh size or net size for nets used for taking smelt;
- Remove the 15-inch minimum length limit for bass on Burke Lake and impose a 15-inch minimum length limit on Lake Mitchell;
- Allow crossbows as a legal method of take for paddlefish during seasons when bow and arrow are a legal method of take, and match areas where crossbows can be used to take paddlefish below Gavins Point Dam with Nebraska regulations;
- Remove language regarding purchasing preference points associated with the old GFP licensing system;
- Allow someone else to help tend hoop, trap, setlines, and floatlines if the licensee is present;
- Reduce the check times for hoop nets, traps, and setlines;
- Modify the rule listing fish importation requirements to better describe current definitions;
- Allow permitted individuals to receive assistance when participating in lawful fishing activities; and
- Remove the Peregrine Falcon from the list of endangered birds and add the species to the list of threatened birds.

**Mr. Tom Kirschenmann, Department of Game, Fish and Parks,** reviewed the proposed rules.

Referencing the meeting minutes provided by the department with their rules packet, Senator Hunhoff asked if there is a controversy over the use of crossbows. Mr. Kirschenmann replied there is a lot of conversation in general over the use of crossbows for big game and paddlefish, with some individuals thinking their use would increase hunter success and result in fewer available licenses.

Senator Hunhoff inquired about the consequences if a person is authorized to use a licensee's hoop nets or traps but is caught using them without the licensee present. Mr. Kirschenmann said the individual would be ticketed for fishing without a license, and noted the reason for the proposed change is to account for the greater amount of work involved in setting these nets and lines, where additional help may be necessary.

Representative Cwach wondered if people can use crossbows from boats during the same time as other paddlefishing. Mr. Kirschenmann said he believed so although most crossbow use would occur from shore as long as the person was correctly permitted. Mr. Kirschenmann clarified in response to Representative Cwach's follow-up that crossbow use will be open to anyone, not just individuals with disabilities, but the number of people using the crossbows is limited.

***Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Department of Game, Fish and Parks, is complete. Motion prevailed on a roll call vote with 4 AYES and 2 NAYS. Voting AYE: Jensen, Johns, Hunhoff, and Hansen. Voting NAY: Cwach and Foster.***

**Department of Game, Fish and Parks:** Amend rules to:

- Modify the time during the season when hunters can have uncased weapons within certain parks in the state park system;
- Change the start date of the spring turkey hunting season and increase the maximum number of licenses available to residents;
- Modify the hunting units within the Black Hills;

- Remove a unit from the spring wild turkey hunting season and revise the valid date of access permits for Good Earth State Park and Adams Homestead and Nature Preserve;
- Align start dates for turkey hunting seasons;
- Establish a later Custer State Park spring wild turkey season and set the number of licenses available to residents; and
- Remove the preference point unit from turkey hunting in Custer State Park.

**Mr. Tom Kirschenmann, Department of Game, Fish and Parks,** reviewed the proposed rules.

Senator Foster asked why turkey numbers have dropped in the Black Hills and western South Dakota. Mr. Kirschenmann cited a number of reasons including winter mortality and lower production. Research studies have been conducted in which radio collars were put on hens to check on nesting issues; the results of those studies along with hunter harvest information will be analyzed to assist the department in making turkey hunting season decisions in the future.

Representative Jensen inquired if the mountain lion population could impact turkey numbers. Mr. Kirschenmann responded that mountain lions do not generally go after turkeys but could possibly get nesting hens.

***Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**Transportation Commission (Department of Transportation):** Amend rules to:

- Delete limited speed zones on highway segments in Pennington County that have been obliterated or transferred to a local government;
- Establish a limited speed zone for the crossroad over Interstate Highway 90 at mileage reference marker 59.19 in Pennington County;
- Change the speed limits on U.S. Highways 281 and 212 in and around Redfield;
- Change requirements for becoming and remaining qualified to submit bids for highway construction contracts;
- Revise the process for accessing bid proposals;
- Repeal a rule relating to rejection of bids; and
- Allow the submission of optional combination bids.

**Ms. Karla Engle, Department of Transportation,** reviewed the proposed rules.

Representative Hansen requested an explanation of how the optional combination bid will work. Ms. Engle said the proposed rule outlines what happens with each circumstance, if a contractor submits a total number for the bid for the entire project or separate bids for each individual portion of the project. If there is at least one combination bid submitted and no bids for each of the separate projects, the bids cannot be compared, and the agency can award for the combination bid.

Representative Hansen expressed concern that in choosing a combination bid over bids for each project individually, the state may not be getting the best deal. Ms. Engle said the only way to know for sure is to compare bids, and the department is hopeful this change in the process will create more opportunity for different contractors to compete.

Representative Jensen asked if a larger contractor could submit a lower bid and shut out smaller contractors. Ms. Engle responded that the new process could likely have the opposite effect, and more smaller contractors will submit bids

on the broken-out projects. She agreed to track the program and report back to the committee next year with the results.

Senator Foster wondered if the combination bid could include a breakdown of bids for each separate project to allow for comparison with bids submitted just for a specific project. Ms. Engle replied that would force a combination bidder to essentially bid separately on each project. Senator Foster then asked if instead of separating their bids, a combination bidder could indicate where any cost savings are coming from with their bid. Ms. Engle said a concern she would have in that situation is that contractors are very careful about making their specific bid open to the public and unless they are awarded the contract, the information they submit is proprietary.

Representative Jensen asked if time and cost overrun factors are built in if one contractor does multiple projects. Ms. Engle responded that language is built into their contracts that the contractor must meet the stated deadlines and the department carefully analyzes any requests for additional compensation.

Senator Hunhoff inquired as to why the combination bid rules are being proposed. Ms. Engle said the department has been looking at the issue for a while and thought the change in process could increase competition and make more projects available for smaller contractors.

Representative Hansen asked if any geographical constraints would be placed on combination bids going forward. Ms. Engle replied that complex urban projects would likely not be combined. **Mr. Sam Weisgram, Department of Transportation**, who manages the bid-letting office, said the process would be used in rare occasions not on a frequent basis, and jobs that would limit competition would not be combined.

***Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the Transportation Commission (Department of Transportation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**South Dakota State Railroad Board (Department of Transportation):** Amend or repeal rules concerning:

- Administration of the board;
- Property management guidelines;
- The award and administration of railroad trust fund loans; and
- The requirements for railroad tax credits.

**Ms. Karla Engle, Department of Transportation**, reviewed the proposed rules.

Representative Jensen asked about how the interest rates on railroad trust fund loans are established. Ms. Engle explained the rates are set by the board, with the most current rate being two percent with a balloon payment due after seven years.

***Representative Hansen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota State Railroad Board (Department of Transportation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**South Dakota Lottery (Department of Revenue):** Amend rules to implement ticket-in, ticket-out payment for video lottery terminals, and clean up and clarify existing rules.

**Mr. Clark Hepper, South Dakota Lottery**, reviewed the proposed rules which were prompted by the passage of [Senate Bill 152](#) by the 2022 Legislature.

### Public Testimony

**Mr. Matt Krogman, South Dakota Licensed Beverage Dealers and Gaming Association**, voiced his organization's support for the rules as presented.

Representative Jensen asked whether ticket in, ticket out play was already available on gaming devices and if it would be optional for businesses to offer it. Mr. Hepper explained that it is currently available on regular casino gaming devices, but the option would be new for video lottery machines and optional for an operator to purchase. The system eliminates the need for a player to go to a cashier to redeem a ticket from a machine.

Senator Hunhoff inquired as to why a rule was being proposed allowing licensed distributors to broker the sale of video lottery machines between operators. Mr. Hepper said such activities are already in rule, but the specific rule was being proposed to clarify the process. As the video lottery market matures, there will be some opportunities for an operator to sell to another operator, and they should be encouraged to use a licensed distributor to broker the sale.

Senator Hunhoff asked if the proposed rules mandate that establishments have broken video lottery machines replaced as quickly as possible. Mr. Hepper said owners have the opportunity to pull the machine off the floor without replacing it right away, but the expectation is that if a gaming machine is on the floor, it should be in a playable state or be replaced or removed.

Representative Hansen wanted to know if all machines are currently connected to the Internet. Mr. Hepper explained that currently, each establishment has a site controller which connects to the video lottery central system. Each video lottery machine in that establishment is connected to the site controller through IP cellular service and the site controller's information is collected every night on that cellular service line.

Representative Cwach wondered if having the game odds posted to the Lottery website, as is being proposed, instead of physically on a poster at the gaming location, complies with statute. Mr. Hepper said the change was being proposed to simplify the process of making the odds available to players with the easiest way to communicate being via the website. Posters cannot be updated quickly enough or printed large enough to convey all of the necessary information. **Ms. Kirsten Jaspers, Department of Revenue**, speaking as legal staff for the agency, stated that posting the odds online complies with the statute.

Representative Cwach asked if, given the advances in technology, the odds could be posted on the screen of the gaming machine before the player begins the game. Mr. Hepper replied that capability would need to be addressed by the game manufacturer.

Senator Johns inquired as to how often game odds have to be calculated. Mr. Hepper explained that the odds do not change based on play per machine but are the overall odds for the game.

Representative Hansen said although the rules say an establishment could post a link to the odds, the statute says a link is not good enough. Ms. Jaspers responded that the Lottery is trying to help the industry and is reading the law correctly.

***Representative Hansen moved, seconded by Representative Cwach, that proposed rule 48:02:05:06 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 4 AYES and 2 NAYS. Voting AYE: Cwach, Foster, Jensen, and Hansen. Voting NAY: Hunhoff and Johns.***

***Representative Jensen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the South Dakota Lottery (Department of Revenue) is complete and the remaining rules be approved. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**South Dakota Division of Insurance (Department of Labor and Regulation):** Amend rules to:

- Adopt a definition of "authorized;"
- Identify certain circumstances that are not a conflict of interest under the annuity standards passed in [Senate Bill 148](#); and
- Amend the effective date of the proposed adopted rules to coincide with the effective date of Senate Bill 148.

**Ms. Lisa Harmon and Mr. Frank Marnell, Division of Insurance,** reviewed the proposed rules.

### **Public Testimony**

**Mr. Warren Graber, Graber and Associates,** testified in support of the proposed rules, saying the division has been open to working with insurance agencies to develop rules that are fair to both sides – independent insurance producers and industry producers. Mr. Graber said their main goal is to ensure that consumers are treated fairly.

**Mr. Randy Moses, Independent Insurance Agents of South Dakota,** said the division kept their side of the bargain in bringing the proposed rules forward and while Senate Bill 148 was contentious, the rules are necessary to provide clarification for agents so they do not unintentionally violate the law.

**Mr. Justin Smith, American Counsel of Life Insurers (ACLI),** spoke in opposition to the rules, referencing a letter his organization had submitted to the division as part of the written comments for their public hearing. Mr. Smith said while regulation of insurance should be kept at the state level, that regulation should be uniform from state to state, and the rules as presented neither carry the intent of the law nor represent a correct interpretation of the law.

**Ms. Kim O'Brien, Federation of Americans for Consumer Choice,** was opposed to the rules, stating the law is clear on what is not a material conflict of interest and further clarification is not needed.

**Ms. Sarah Wood, Insurance Retirement Institute,** testified that her members supported Senate Bill 148 but do not support the rules. Ms. Wood said these types of situations are better handled on a case by case basis rather than a one-size-fits-all basis as laid out in the rules.

### **Rebuttal**

Mr. Marnell reiterated the division's mission statement which emphasizes protecting the public and providing fair industry regulation, and said the rules work in harmony with the law to accomplish that mission.

Senator Hunhoff requested clarification on the exclusions to material conflicts of interest, as proposed in ARSD 20:06:08:67. Mr. Marnell explained that the division would not look at a producer based solely on whether the producer has a minority or majority ownership in an insurer, or has an immediate family member employed by an insurance agency. Responding to Senator Hunhoff as to why he is opposed to the language, Mr. Smith said it is too ambiguous.

Senator Johns asked what constitutes a fiduciary relationship. Mr. Smith replied that the federal government briefly enacted a standard of care for insurance agents nationally that put in place a fiduciary standard, and the best interest standard enacted by Senate Bill 148 is not at the level of a fiduciary standard.

Senator Johns clarified whether there was an obligation of the insurance producer to disclose or demand a waiver beyond a material conflict of interest. Mr. Marnell explained that there is no such requirement.

Representative Cwach noted that while Senate Bill 148 was being considered by the legislature, there was a dispute over definitions and instead of letting legislators debate and discuss the issues, it is being brought before the IRRC which is not good government.

Senator Johns stated that while he does not believe the language of the rules is ambiguous, consumers need to be aware of what constitutes material as it relates to material conflicts of interest.

In response to Senator Johns, Mr. Moses said as a matter of disclosure, if a material conflict of interest exists, the agent would be unable to make the sale to the consumer. The statute states agents should avoid or reasonably manage material conflicts of interest. Mr. Moses added that many smaller agencies in the state would be unable to operate if a sale under these circumstances was prohibited altogether.

Senator Hunhoff asked who determines what is a material conflict of interest. Mr. Marnell explained that the division would review and investigate the complaint and make a decision based on the facts. If a decision cannot be made, the complaint would go to the Office of Hearing Examiners.

Representative Hansen commented that it was unusual that a term is defined in statute but the rules based on that statute say that is not how the term is defined. He said it would be better to make the change as an amendment legislatively and that it is not appropriate for the IRRC to take that action.

Mr. Moses said his organization is more than willing to change the statute but that the ACLI was opposed to any changes, wanting to use the language as it appears in the model. According to Mr. Moses, the division asked his group to allow the issue to be addressed through rule.

Mr. Smith responded that Senate Bill 148 was model legislation, and the division introduced an amendment to the bill at the request of insurance agents.

Senator Johns said he would be satisfied to pass the rules as presented and if the issue needs to be revised, it can be done during the 2023 Legislative Session.

Senator Hunhoff admonished the division and the industry for not working out problems with the proposed rules before they came before the IRRC, and said it was not the role of the committee to do that for them.

***Senator Hunhoff moved, seconded by Representative Cwach, that all rules submitted by the Division of Insurance (Department of Labor and Regulation) should be reverted to a step prior under SDCL 1-26-4.7(4)(7). Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**South Dakota Real Estate Commission (Department of Labor and Regulation):** Amend rules to:

- Require applicants for a responsible broker's license to furnish evidence of completion of 24 class hours beyond the associate broker's license;
- Formally adopt the required course of study for the responsible broker's class hours; and
- Add continuing education subject areas related to property managers.

**Ms. Melissa Miller, South Dakota Real Estate Commission,** reviewed the proposed rules, the passage of which will coincide with statutory changes that take effect January 1, 2023.

### Public Testimony

**Mr. Matt Krogman, South Dakota Realtors Association**, testified that his organization had promoted this idea in [House Bill 1153](#) during the 2022 Session and the members support the rules as presented.

**Ms. Denise Hanzlik, South Dakota Multi-Housing Association**, whose membership is comprised of rental unit managers, expressed support for the proposed rules.

***Representative Cwach moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Real Estate Commission (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**[South Dakota Appraiser Certification Program \(Department of Labor and Regulation\)](#)**: Amend rules to redesignate the state-registered credential as the registered trainee appraiser credential and clarify the scope of practice to bring rules into closer alignment with federal rules.

Prior to the agency's presentation of the rules, Representative Hansen moved to waive, pursuant to SDCL 1-26-4, the five days' prior service of the agency's rules packet for Committee consideration as required by SDCL 1-26-4(8). Representative Hansen found sufficient reason that the agency was unable to comply, as the agency was working diligently to obtain an acceptable compromise with the industry at the recollection of the Committee.

**Ms. Anna McCarthy, South Dakota Appraiser Certification Program**, reviewed the proposed rules which bring the program back into compliance with federal law.

### Public Testimony

**Ms. Sandra Gresh, Professional Appraisers Association of South Dakota**, thanked the agency for taking the concerns of the organization into consideration when revising the rules, and voiced support for the rules as presented.

***Representative Hansen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota Appraiser Certification Program (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

**[South Dakota Appraiser Certification Program \(Department of Labor and Regulation\)](#)**: Amend rules to establish experience training programs.

**Ms. Marcia Hultman, Secretary, Department of Labor and Regulation**, reviewed the proposed rules which were reverted by the IRRC at its August 23, 2022, and September 13, 2022, meetings, and are being resubmitted for consideration for a third time.

### Public Testimony

**Ms. Sandra Gresh, Professional Appraisers Association of South Dakota**, voiced support for the proposed rules in their current form with a few minor recommended corrections. Senator Johns, acting as chair, said such corrections were inappropriate at this time and the rules would be considered as they were presented.

Representative Cwach asked what had changed in the current packet as compared to the previous versions and what is being required of trainees. Ms. Hultman said the rules in their current form lay out the minimum requirements for the program and remove the memorandum of understanding provision. The department's next



step is to work with South Dakota State University to develop the education platform. Trainees will need to pass the same assessments and meet the same requirements as other applicants for appraiser credentials.

***Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Appraiser Certification Program (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

#### **Public Testimony: General Purposes**

No public testimony was offered or received.

#### **Closing Remarks**

Chair Hansen congratulated Senator Johns on his years of service to the Interim Rules Review Committee, as he is not running for re-election. Senator Johns noted that the committee does a lot of heavy lifting on important issues, and he thanked his fellow committee members for their efforts in that duty.

#### **Adjournment**

***Senator Hunhoff moved, seconded by Representative Jensen, that the meeting be adjourned. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.***

Chair Hansen adjourned the meeting at 5:08 p.m.