



# Legislative Research Council

## RULES REVIEW COMMITTEE MINUTES

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**Two Hundred Sixty-second Meeting**  
**Tuesday**  
**September 20, 2005**

**Room 413**  
**State Capitol Building**  
**Pierre, South Dakota**

The two hundred sixty-second meeting of the Rules Review Committee was called to order by Chair Representative Jean Hunhoff at 9:00 a.m. CT, September 20, 2005, in Room 413 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Senators Eric Bogue, Jim Hundstad and Orville Smidt (Vice-Chair); Representatives Roger Hunt, Jean Hunhoff (Chair), and Bill Thompson.

Staff members present included Doug Decker, Code Counsel, and Kris Schneider, Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For the purpose of continuity, these minutes are not necessarily in chronological order.

### **Approval of Minutes**

*Representative Hunt moved, seconded by Senator Smidt, that the minutes of the August 9, 2005, and August 29, 2005, meetings be approved. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

### **Rules Reviewed**

**Department of Revenue and Regulation: Gaming Commission** - Amend racing rules as follows: provide a new basis for summary suspension of licensure – when a licensee fails to pay a fine imposed by the deadline allowed, require permission of the Board of Stewards before payment of another licensee's fine is allowed, require a mandatory suspension of licensure for individuals who do not pay fines within established deadlines, eliminate reference to the Association of Racing Commission International in the reinstatement procedure rule and to recognize that there are more than one pari-mutuel associations for racing, and eliminate the reference to the Association of Racing Commissioners International from the rule regarding procedures for denied licenses, recognizing the expansion of pari-mutuel regulatory associations. Regarding the Deadwood Gambling rules, adopt a variation of play of the game of poker known as Heads Up Poker Challenge.

**Mr. Larry Eliason** reviewed the proposed changes to the racing rules.

**Mr. John Burke**, Belle Fourche, representing Stryker Gaming, LLP, the owner of the new proposed game, explained how the game Heads Up Poker Challenge is played.

Senator Bogue questioned why the layout of the table was not defined in the proposed rules. Mr. Burke responded that these rules were written similar to other games and the intent is that the game can be played on any table but the table needs to be designated as Heads Up Poker Challenge.

In response to questions if other table layouts are defined in rules, Mr. Eliason stated that there are generic poker tables and there are some games that are only played on certain tables. Representative Hunt stated that there should be standardization in the area of table layouts just as there is for chips.

Mr. Eliason stated that the commission could do that; however, these specific games are intellectual property that someone has created and are copyrighted. Senator Bogue commented that because these games are copyrighted, there may be a problem with the delegation of authority. Mr. Decker stated that if the games are copyrighted then there should be an incorporation by reference so that a date certain is in the rules. Following considerable discussion concerning the issue of delegation of authority and the need for incorporation by reference the matter was not resolved. Mr. Eliason responded that the commission would go through their rules and make adjustments relating to clarifying the reference to table layouts.

*Senator Bogue moved, seconded by Senator Hundstad, to revert back to a prior stage 20:18:16:15.13 (Deadwood Gambling rule) proposed by the Department of Revenue and Regulation: Gaming Commission for further clarification regarding the date certain issue. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

*Senator Hundstad moved, seconded by Senator Bogue, to approve the racing rules proposed by the Department of Revenue and Regulation: Gaming Commission. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Bureau of Finance and Management** – Amend a rule to require that requests for advance travel have a minimum of \$200.

**Commissioner Jason Dilges** explained the process in obtaining an advance travel request. He stated the administrative cost to process each request is approximately \$30; thus the request to set a minimum amount.

*Senator Smidt moved, seconded by Senator Bogue, to approve the rule proposed by the Bureau of Finance and Management. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Transportation** - Amend speed zones in the following counties: Brown, Day, and Roberts Counties – US Highway 12 from east of Aberdeen to Interstate 29; Davison, Sanborn, and Beadle Counties – SD Highway 37 from north of Mitchell to south of Huron; Yankton, Clay, and Union Counties – SD Highway 50 from east of Yankton to Interstate Highway 29; Stanley and Lyman Counties – US Highway 83 from south of Fort Pierre to Interstate Highway 90; and Brown and Spink Counties – US Highway 281 from south of Aberdeen to the junction with SD Highway 20.

**Mr. Bill Nevin** reviewed the changes to the proposed rules and distributed maps of the areas that would be effected (**Document 1**). Mr. Nevin noted that only some of the speed zones for four lane highways were being changed at this time. The proposed rules were the result of SB 208 from the 2005 Legislative Session.

*Senator Smidt moved, seconded by Representative Hunt, to approve the rules proposed by the Department of Transportation. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation** – Amend rules to include boats in the damage disclosure requirements and clarify what information is required in a damage disclosure statement.

**Ms. Sherri Miller** reviewed the proposed rule changes regarding damage disclosures on boats.

*Senator Bogue moved, seconded by Senator Smidt, to approve the rules proposed by the Department of Revenue and Regulation. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation** – Amend a rule to tax a retail sale made by one florist, delivered by another florist, where the delivery is made, beginning January 1, 2006.

**Mr. Scott Peterson** stated that the proposed rule change was being made to comply with the Streamlined Sales Tax Agreement. He noted that Oklahoma has filed an amendment that would delay the effective date for two years. The amendment is scheduled to be voted on October 1. Mr. Peterson stated that the department has discussed withdrawing the proposed rule if the Oklahoma amendment passes.

## Public Testimony

**Mr. Wally Thomsen**, Pierre, owner of the Pierre Flower Shop and Greenhouse, and also representing the State Florist Association of South Dakota, spoke in opposition of the proposed rule. He stated that changing the collection of the sales tax to the point of delivery will create an extreme burden on the flower shops. Many of the florists do not have the technology in place that will allow them to keep track of all the different city and state sales tax.

In response to a question on why the florists are being forced to make this change, Mr. Peterson stated that the florists are the only industry that is not taxing the service based on the point of delivery.

Mr. Peterson noted that this rule does not require a florist to collect sales tax outside of South Dakota. Once the rule takes effect, South Dakota will see a reduction in state and city sales tax revenue.

*Senator Smidt moved to approve the rule proposed by the Department of Revenue and Regulation. Motion died for a lack of a second.*

Senator Bogue commented that he was not aware that an agency could withdraw a rule after it was approved by the committee. Mr. Decker stated that if the agency holds the rule and does not file it with the Secretary of State within 75 days of the public hearing, the rule would not become effective. If the rule is filed with the Secretary of State, it can only be repealed through the rules process.

*Senator Bogue moved, seconded by Representative Hunhoff, to revert back to a prior stage 64:06:02:32 proposed by the Department of Revenue and Regulation until such time that the outcome of the Oklahoma amendment to the Streamline Sales Tax Agreement is known. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation** – Amend rules to remove references to the special tax rate for farm machines, attachments and irrigation equipment.

**Mr. Peterson** reviewed the proposed rule changes.

*Senator Bogue moved, seconded by Senator Smidt, to approve the rules proposed by the Department of Revenue and Regulation. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation** – Amend rules to change the circumstances that require a report from an alcohol licensee about a stock transfer and to specify how that report will be used and to repeal a provision requiring employees to report any attempted solicitation of bribery, repeal a provision requiring employees to acknowledge their awareness of the requirements of the rule, and specify that the rule applies to all members of the distilled spirits industry.

**Mr. Michael Kenyon** reviewed the proposed rules.

*Representative Hunhoff moved, seconded by Representative Hunt, to approve the rules proposed by the Department of Revenue and Regulation. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation** – Amend rules to update the edition of the manuals used to value and assess property; to provide greater flexibility in how credits are counted for assessor school instructors; to revise the requirements for renewal of property assessor certificates; to update definitions that relate to the determination of agricultural income value; to revise the formula to determine agricultural land value when there are insufficient sales; to list the information a Director of Equalization must base adjustments; and to require the department to review adjustments made to valuation and any evidence submitted in support of an adjustment.

**Mr. Kenyon** reviewed the proposed rules. He requested that the committee not approve the proposed changes to 64:04:01:30 at this time because the department thinks there may be some unintended consequences in the rule as currently proposed.

*Representative Hunhoff moved, seconded by Senator Smidt, to approve the rules proposed by the Department of Revenue and Regulation with the exception of 64:04:01:30 which will revert back to a prior step for further clarification. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Revenue and Regulation: Division of Insurance** – Amend rules to change the permissible exclusions in life insurance policies; modify the open enrollment period for Medicare eligible individuals; and establish the effective date of producer appointments.

**Mr. Randy Moses** explained the changes to the proposed rules.

Representative Hunt commented that he had a problem with 20:06:08:43.01(1) - the permissible exclusion for "suicide, if insane" when insane can be excluded by 20:06:08:43.01(3) – Death due to sickness or disease. He believes the intent is to disallow coverage for those individuals that intentionally commit suicide.

In response to a question that asks what would happen if the proposed rule is sent back to a prior step, Mr. Moses stated that the department would reconsider whether to approve accidental policies that provide these exclusions. However, if the rule is sent back to a prior step, the department probably would continue current practice to approve the policies.

*Senator Bogue moved, seconded by Senator Smidt, to approve the rules proposed by the Department of Revenue and Regulation: Division of Insurance. Motion prevailed on a roll call vote with 5 ayes, 1 nay. Members voting aye: Bogue, Hundstad, Hunhoff, Smidt, and Thompson. Nay: Hunt.*

**Department of Revenue and Regulation: Real Estate Commission** - Adopt and amend rules to clarify appointed agent procedures regarding disclosure and confidentiality, to repeal forms in appendices by establishing contents of forms prescribed by the Real Estate Commission, and to update materials incorporated by reference.

**Ms. Dee Jones Noordermeer** explained the changes to the proposed rules.

In response to a question if removing the actual form from the rules and including only the minimum content will be removing a safeguard for the consumer, Ms. Noordermeer stated that the forms will still be available.

Representative Hunt was concerned with the lack of uniformity of the forms. He was concerned that if a licensee was acting as a dual agent and drafting their own forms that there is a potential for very different standards in the forms.

*Representative Hunhoff moved, seconded by Senator Bogue, to approve the rules proposed by the Department of Revenue and Regulation: Real Estate Commission. Motion prevailed on a roll call vote with 5 ayes, 1 nay. Members voting aye: Bogue, Hundstad, Hunhoff, Smidt, and Thompson. Nay: Hunt.*

**Department of Game, Fish and Parks** - Adopt, amend and repeal rules regarding: private shooting preserves - modify tagging requirements (placement and time of placement) for harvested birds, define tracts of land which do not constitute a "contiguous" tract of land for purposes of issuance of a permit and inclusion within a preserve, repeal reference to public hearings on applications, require division investigations and reporting of findings to the department, and require the department to consider certain factors in issuance of permits for preserves located within 1 mile of a publicly owned shooting area; and public water zoning – in Marshall County create a "no boating zone" on certain waters within Piyas Lake during certain periods of time.

**Mr. Doug Hansen** reviewed the proposed rules regarding the private shooting preserves. The proposed rules regarding the public water zoning in Marshall County had been withdrawn from the packet.

Mr. Hansen informed the committee that the department had been served with two petitions concerning the mountain lion rules. One was a petition to delay the effective date of the rules and the other is a petition to repeal the mountain lion rules. The commission has denied the petition to delay the effective date of the rules and will act on the petition to repeal the rules at their October meeting.

*Representative Hunhoff moved, seconded by Senator Bogue, to approve the rules proposed by the Department of Game, Fish and Parks. Motion prevailed unanimously on a roll call vote with 6 ayes. Members voting aye: Bogue, Hundstad, Hunhoff, Hunt, Smidt, and Thompson.*

**Department of Game, Fish and Parks** - Adopt, amend and repeal rules regarding park concession leases – modification of regulations relative to the park concession leases: definitions, general provisions, expiration or amendment of lease, and sale of interest in lease.

**Mr. Doug Hofer** and **Ms. Christine Hamilton**, Kimball, Chair of the Game, Fish and Parks Commission, explained the proposed changes regarding the concession leases. A corrected copy of page 151 of the DRAFT minutes and a corrected copy of proposed 41:13:02:01 were distributed (**Documents 2** and **3**). Mr. Hofer stated that the department administers ten concession leases which have total gross receipts of approximately \$10 million. The leases vary depending on the demand for services by the public and the amount of investment involved. He noted that the current rules were adopted in March 1990 and that the proposed changes will not affect the current contracts. Eight of the ten current contracts were written after the 1990 rules were adopted. The two exceptions to the 1990 rules are the Custer State Park lease, which became effective in January 1990, and the Spring Creek Resort lease, which was written by federal government and the state acquired it as part of the land transfer.

Mr. Hofer noted that during the process, several hearings were held and many changes were made to the proposed rules; however, not every rule had total agreement with every concessionaire. Under the new lease agreement, the sale of personal property will no longer be a condition of the sale. The personal property will be a sale between a willing buyer and a willing seller and the State will not have a part in the transaction. All of the leases, under the 1990 rules, have a preferential right of renewal clause (first right of refusal). The proposed rules will repeal this clause as it is a disincentive for anyone to put together a competitive bid when the existing concessionaire only has to match it.

In response to a question if at the end of the lease, the current concessionaire would be given a renewal option, **Mr. Jeff Hallem**, Assistant Attorney General, stated that

41:13:03:01(4) provides that at least 12 months prior to the termination of an existing lease, if it is in the public's best interest, the commission may renegotiate the terms of the lease without the need for a formal RFP. Commissioner Hamilton stated that having the ability to renegotiate and extend a lease allows the commission some flexibility if the concessionaire makes a substantial investment towards the end of a lease. The commission takes into account the risk return ratio.

### **Public Testimony**

**Mr. Sean Brakss**, Pierre, representing Spring Creek Resort, Inc., testified in opposition to the deletion of the preferential right of renewal. He stated that the entire infrastructure at Spring Creek is private property, unlike the majority of the other leases. Spring Creek Resort, Inc. is concerned that the exceptions to the rules are not addressed in writing and that if for some reason the concession was no longer needed, Spring Creek Resort, Inc. would receive only book value for their investment. A copy of his testimony was provided (**Document 4**).

**Mr. James Olson**, Rapid City, attorney representing Wild Phil's, Inc., and Phil Lampert, the concessionaires at the State Game Lodge, Sylvan Lake Lodge, Legion Lake Lodge and Blue Bell Lodge at Custer State Park, hand delivered a letter dated September 19, 2005, to Chair Hunhoff (**Document 5**). Mr. Olson testified in opposition to the proposed rules. He stated that the current leases have worked well and that the commission has not documented any problems with the existing rules. Mr. Olson stated that his clients do not agree with the proposed changes concerning the transfer of personal property and repealing the preferential treatment clause. He also noted that because the minutes had not been approved by the commission, no final action had been taken and thus was not valid rule making. He stated that the three minute timeframe for public testimony at the August commission hearing was insufficient. He stated that the Custer State Park Resort is very proud of its history in the park and they are concerned that the loss of renewal and protection of personal property will create the consequence that future concessionaires will let the buildings become run down.

In response to the question if there is a procedural problem with "draft" minutes, Mr. Decker stated that there was no procedural problem. The minutes of the public hearing are provided to the committee for informational purposes only and are not a requirement for the adoption of a rule. The lease rules were adopted in compliance with the Administrative Procedures Act.

In response to Mr. Olson's comments, Commissioner Hamilton stated that in her seven years on the commission, the minutes are always a "draft" until approved at their next regularly scheduled meeting. As far as the three minute time frame, she was anticipating a lot of public testimony regarding the mountain lion rules and did not want to discriminate between the two issues.

In response to a question about personal property, Mr. Olson stated that currently the personal property is appraised, and at the end of the lease, becomes part of the incoming concessionaire's lease and the lessee is required to purchase the personal property. Under the proposed rules, there is a statement the concessionaire has the right to sell it outside of the RFP.

Senator Hundstad commented that he was not going to support the rules because he thought insufficient time was allowed for public testimony at the August 5 hearing.

*Representative Hunhoff moved, seconded by Senator Bogue, to approve the rules proposed by the Department of Game, Fish and Parks. Motion prevailed on a roll call vote with 5 ayes, 1 nay. Members voting aye: Bogue, Hunhoff, Hunt, Smidt, and Thompson. Nay: Hundstad.*

### **Meeting Schedule**

The next meeting for the Rules Review Committee will be on Tuesday, October 18, 2005, in Room 413 of the State Capitol in Pierre.

Mr. Decker asked the committee for ideas on ways to improve the administrative procedures act and if criteria should be included to state when minutes are provided.

*Representative Hunt moved, seconded by Representative Hundstad, that the meeting be adjourned. Motion prevailed unanimously on a voice vote.*

The chair adjourned the meeting at 3:10 p.m.



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