

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

ATTORNEY GENERAL

DAVID L. PRINTY
Commissioner of Economic Development

Attn: GILBERT S. BUFFINGTON

JOANNE E. HINDERAKER
Special Assistant
Attorney General

In the Matter of the Proposed Adoption of Rules of the Department of Economic Development Governing Business Loans to Indians in Minnesota

The above-captioned rules have not been approved by this office for the following reasons:

1. There are several references in the rule which characterize the rule as a "proposed rule." This language is misleading as the Department has adopted the rule and it is no longer in the proposed rule stage. Thus the references in the title of 4 MCAR sec. 2.201 and in the first clause of 4 MCAR sec. 2.201 B. should be changed to delete the "proposed" language. Furthermore, any rules resubmitted to this office should be entitled "Rule as Adopted", not "Rule as Proposed."

2. The following typographical errors appear in the rules as adopted:

4 MCAR sec. 2.201 B. refers to Minn. Stat. sec. 363.40 (1978) and it appears that the reference should be to Minn. Stat. sec. 362.40 (1978).

4 MCAR sec. 2.201 C. uses the word "indicated" but it appears that the word should be "indicates."

4 MCAR sec. 2.201 D. refers to "know industry standards" and the rule should read "known industry standards" and it appears that the word "applicants" in sec. 2.201 D. 2. a. should be changed to "applicant."

3. 4 MCAR sec. 2.201 D. 2. i. requires the approval of the Commissioner of Economic Development of certain documentation provided by an applicant including "Income and expense projections which will indicate cash flow anticipated and should be verified by a CPA, if possible." The meaning and application of this rule appear to be unclear. The definition of a "rule" in Minn. Stat. sec. 15.0411 subd. 3 "includes every agency statement of general applicability and future effect, . . . made to implement or make specific the law enforced or administered by it, or to govern its organization or procedure. . . . " Because 4 MCAR sec. 2.201 D. 2. i. lacks definition and does not establish the criteria to be used to determine whether CPA verification is "possible" it does not "make specific the law" and is therefore improper. The applicant for a loan cannot determine from the rule what is required of him or her in this regard in order to obtain approval of a loan application.

4. For similar reasons 4 MCAR sec. 2.201 E. 2 which states that "Applicant shall provide additional information to the department if required for approval by the Commissioner" is improper and cannot be approved by this office. The rule appears to allow the Commissioner unbridled discretion to require additional information from some applicants and not from others. The rule does not establish criteria to be used to determine in what circumstances additional information would be required of an applicant.

5. Finally, the use of the word "may" two times in 4 MCAR sec. 2.201 E. 3 makes the rule improper. The statement that a time limitation of 60 days "may be imposed" suggests that the Commissioner may arbitrarily decide to impose a 60 day time limitation on some applicants and not others. Similarly, to state that the Commissioner "may extend the time limitation if based on good cause shown in writing" suggests that the Commissioner has the discretion to extend the time in some "good

cause" situations and not others. Thus the use of the word "may" makes the rule arbitrary and unreasonable. It appears from the Department's Statement of Need and the Hearing Examiner's Report that the Department may have intended the use of the first "may" which appears in the rule to be interpreted as a "shall." If the Department intended that the word "may" be interpreted as "shall" the Department may wish to cure the defect by substituting the word "shall" for "may" in the rule.

Upon consideration of the issues raised in this memorandum and after any further action taken by the Department in regard to these rules, the file may be resubmitted to this office with three (3) copies of the rules as amended and three (3) copies of a revised order adopting rules. In drafting any revised order adopting rules please note that the order which was previously submitted to this office incorrectly states that this matter "came on for hearing before the Commissioner of Economic Development. . . " The revised order should refer to a hearing before Jon L. Lunde, the Hearing Examiner. Copies of the other pertinent documents in the file have been retained by this office.

I also wish to advise you that the Chief Hearing Examiner requests the resubmission of rules that are changed subsequent to his review. Therefore you ~~may wish to~~ should contact Mr. Duane Harves regarding any changes in the rules prior to resubmission to this office.

Please contact me if you have any questions regarding this matter.

JEH/bw
cc: Duane Harves
Susan Robertson.

original

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA

ORDER ADOPTING RULES AS AMENDED

The above-entitled matter came on for hearing before the Commissioner of Economic Development of the State of Minnesota on the 4th day of February, 1980, at 7:30 p.m., in Room 125, State Capitol Building, St. Paul, Minnesota, and on the 5th day of February, 1980, at 7:30 p.m., in the Neighborhood Facilities Center, Tribal Chambers Room, Cass Lake, Minnesota, and after proper notice required by Minn. Stat. § 15.0412 (1978) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced, having made two nonsubstantial changes pursuant to recommendations of the hearing examiner, having confirmed the need for the above captioned rules and the reasonableness thereof upon the records, files and proceedings herein and applicable statutory standards or criteria, and hereby specifically adopting the Findings of Fact, Conclusions and Recommendations of the hearing examiner.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Rules Governing Business Loans to Indians in Minnesota, as amended, are adopted this 29 day of April, 1980, pursuant to authority vested in me by Minn. Stat. §§ 362.40 and 15.0412, subd. 3.

STATE OF MINNESOTA

DAVID L PRINTY
Commissioner of Economic Development

4 MCAR 2.201 Proposed rule governing business loans to Indians in Minnesota, as amended.

STATEMENT OF COMPLIANCE WITH
MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Gilbert S. Buffington, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed. Any exceptions are noted below.

Gilbert S. Buffington
Special Assistant Attorney General

Dated: 13 May 1980

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

TELEPHONE
(612) 296-6196

May 13, 1980

Michael Miles
Assistant Attorney General
Department of Administration
State Administration Bldg.
St. Paul, Mn

Re: 4 MCAR 2.201: Proposed Rule governing business loans to Indians in Minnesota, as amended.

Dear Mike:

Enclosed is the agency attorney's Statement of Compliance omitted from the package of documents I previously forwarded to you as to these rules.

Very truly yours,

GILBERT S. BUFFINGTON
Special Assistant Attorney General

515 Transportation Bldg. Office
St. Paul, Mn 55155
Telephone: 296-6596

GSB:jmr
Encl.
cc: Charlotte White, DED

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNEOSTA

STATEMENT OF NEED AND REASONABLENESS

The above captioned rules are not amendments to existing rules of the Department of Economic Development.

The need to adopt these rules arises because it is necessary to have clear qualification criteria and procedures for both the making and repayment of loans under the Indian Business Loan Program. The classes of persons eligible for Indian Business Loans and the allocation of revenues for the program are spelled out in Minn. Stat. 362.40, but it is eminently reasonable that the eligible borrowing public qualifying for this program know details of such criteria and procedures that are not contained in the statute.

The rule provides for the use by the Department of standards for determining the qualification of borrowers for loans that are generally accepted by banks, savings and loans, and other lending institutions. They contemplate that a high level of financial responsibility and integrity is necessary for a borrower to qualify for a loan under the Program, and that Program funds will be used for loans for soundly conceived business purposes with reasonable prospects for future success. It is not contemplated that standards will be relaxed because Indian borrowers, on the average, are likely to be on the lower end of the income scale; on the contrary, the advantages of the Program for the low-income Indian borrower lie in the Program's 2% interest rate, maturities up to 20 years, and the provision in the rules that the equity position of the borrower may be as small as 5% of the amount he/she is borrowing.

The Department of Economic Development will not present written evidence at the hearing on the rules other than Minn. Stat. § 362.40, since the subject matter of the Indian Business Loan Porgram is not such that a rule to implement it need justification by studies or reports. The agency anticipates calling M. Jean Laubach, Director, Development Grants and Loan Division, Department of Economic Development to testify how good loaning

AGENCY Exhibit No. 4
File No. ECDEV-80-001-JL
Date 2-4-80

practices in the banking and commercial loan profession dictate the need for the documentation required to be submitted by the proposed rule.

In particular, Ms. Laubach will testify in general as follows as to the following portions of the proposed rules:

D.1. The business for which the loan is made is one which generates cash flow, without which there would not be an ability to repay. The program is a business loan program, as opposed to one for residential or other purposes, where a different sort of evaluation process would have to occur than what is contemplated in these proposed rules.

D.2.a. Personal financial statements are required as an indicator of the ability of the applicant to manage financial matters, especially at the time of the start of a new business. Excessive personal debt may indicate mismanagement of personal assets, and consequent risk to the loan fund if a loan were made; on the other hand, assets could be disclosed that would indicate that the applicant has resources of his own sufficient that loan fund money should be used for other applicants with greater need. The statement serves as a track record, showing the experience of the person in the field of business, and shows his/her strengths or weaknesses and expertise or lack of it, all ultimately bearing on the success of the business and the repayment of the loan.

D.2.b. Operating statements for existing businesses will be called for to give a definite picture of the business's income and expense situation over a defined period of time. This statement will supplement the evidence of the need for a loan, and will give the loan evaluator some indication of the prospects of growth of the company and how such prospects may be enhanced by the loan. Such statements will support planning by the borrower or reveal a losing proposition, again showing the evaluator whether he desires to make the loan at all, or under what conditions.

D.2.c. Financial statements over a three-year period, together with the operating statements, further shows liabilities and equity at a point in time and assists the evaluator to determine the prospects for growth and profitability and the strengths and weaknesses of the company, all again bearing on the prospects for repayment of the loan.

D.2.d. Credit verifications serve as financial cross-references on the creditworthiness and stability of the applicant external to information provided by him.

D. 2.e. Employment history supplements a loan proposal, further giving the loan evaluator a historic view of the ability of the applicant to concentrate and stick to a project or job, bearing on his character and capacity.

D.2.f. Cost documentation is necessary to allow the evaluator to determine and cross-check the overall cost, and its breakdown, allowing analysis of financing expectations, and whether such expectations are realistic. It also allows verification of actual market costs with the applicants projections on which the loan application was based. It allows the evaluator to determine whether the applicant is applying for too much money for his project, or insufficient total funds, which might risk the possibility of being unable to complete the project for lack of funding.

D.2.g. The project description is necessary for a demonstration of the cash flow of the business, and the long-range repayment prospects. It also shows awareness of the applicant as to "start-up lag" in profitability, and whether he is realistic about the profitability over time of his proposed operation. It would also take in product and demand projections, bearing on whether he is realistic about a demand for his proposed product, and in what time frame.

D.2.h. To further enlarge upon the leniency of a 5% requirement, Federal EDA requires 15% equity and SBA prefers 20%. The banking community normally does not finance a project without at least 20% to 30% equity to debt ratio. The purpose of requiring 5% equity by the borrower is two-fold:

1) It reduces by that percentage, the creditors risk.
2) It demonstrates a financial commitment by the borrower of his/her willingness to assume the risk and/or rewards which may accrue.

D.2.i. The reasoning supporting this provision is similar to that recited for D.2.g. Requiring such projections, verified to the evaluator, the planning of the applicant for fixed expense over the long run, including taxes, and the repayment of loan.

D.2.j. Self-explanatory.

D.2.k. The tax returns, personal and business, substantiate whether there is an audit in progress or any possible tax liabilities that would be a prior lien to any loans. It also serves as a cross-check for the evaluator to the personal financial statement as to the financial position and expenditures of the applicant over the previous two years.

D.3. The documents are required to be submitted at once because the evaluator cannot make an informed and intelligent judgment on whether the application should be granted without all appropriate documents. The ability of the applicant to execute business matters expeditiously and well is also indicated by his ability to competently and timely complete and submit an adequate loan application package.

D.4. Six months to commence construction of facilities and one year to complete such facilities is considered reasonable to keep the original projections upon which a loan application is granted realistic. If construction is delayed, inflation and cost overruns easily make original determinations of profitability and ability to repay out of line with actual conditions, jeopardizing the repayment to the loan fund and total project.

D.5. This provision is based on the statutory intent of the loan fund, which is to provide business financing, and not to allow the repayment of debt incurred at a higher rate with money bearing the advantageous 2% rate of the Indian Loan Fund.

D.6. Self-explanatory.

E.1 and 2. Self-explanatory

E.3. A time limitation on submission of applications is necessary to allow expeditious processing of requests, and to avoid encumbering of requested funds for undue periods that might otherwise be loaned out to others. Extensions are certainly available in cases of real need.

F. and G. The repayment of loans will be determined based on a realistic projection of cash flow. The determination of the schedule will require the applicant to plan to meet his obligations in a realistic manner, and will allow the Program to determine its future assets for planning purposes as the availability of repaid funds for future loans. Determination of the schedule, and the subsequent monitoring of adherence to the schedule will allow the evaluator to follow the success of an applicants project, show problems as they appear (such as demonstrated by late payments) and allow the Department to take appropriate action or move to help and counsel the borrower. Monthly reviews will allow such monitoring and spotting of trouble.

H. The participation limits reflected in this section indicate the judgment of the department as to extent it feels it is advisable for the Indian Loan Program to be exposed in the event of the default of any one loan, as well as how much of the resources of the Loan Fund should be devoted to any one project.

David L. Printy by K. Holmes

David L. Printy
Commissioner of Economic Development

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNEOSTA

Supplementary STATEMENT OF NEED AND REASONABLENESS

The above captioned rules are not amendments to existing rules of the Department of Economic Development.

The need to adopt these rules arises because it is necessary to have clear qualification criteria and procedures for both the making and repayment of loans under the Indian Business Loan Program. The classes of persons eligible for Indian Business Loans and the allocation of revenues for the program are spelled out in Minn. Stat. 362.40, but it is eminently reasonable that the eligible borrowing public qualifying for this program know details of such criteria and procedures that are not contained in the statute.

The rule provides for the use by the Department of standards for determining the qualification of borrowers for loans that are generally accepted by banks, savings and loans, and other lending institutions. They contemplate that a high level of financial responsibility and integrity is necessary for a borrower to qualify for a loan under the Program, and that Program funds will be used for loans for soundly conceived business purposes with reasonable prospects for future success. It is not contemplated that standards will be relaxed because Indian borrowers, on the average, are likely to be on the lower end of the income scale; on the contrary, the advantages of the Program for the low-income Indian borrower lie in the Program's 2% interest rate, maturities up to 20 years, and the provision in the rules that the equity position of the borrower may be as small as 5% of the amount he/she is borrowing.

The Department of Economic Development will not present written evidence at the hearing on the rules other than Minn. Stat. § 362.40, since the subject matter of the Indian Business Loan Porgram is not such that a rule to implement it need justification by studies or reports. The agency anticipates calling M. Jean Laubach, Director, Development Grants and Loan Division, Department of Economic Development to testify how good loaning

practices in the banking and commercial loan profession dictate the need for the documentation required to be submitted by the proposed rule.

David L. Printy
Commissioner of Economic Development

Agency Exhibit No. 9
File No. ECDEV-80-001-JL
Date 2-4-80

Rule as Proposed (all new mate[illegible])

4 MCAR § 2.201. Proposed rule governing business loans to Indians in Minnesota.

A. Scope of the program: To provide an opportunity for eligible Indians in Minnesota to improve economic independence by implementing a business loan program which will promote an environment for economic expansion and diversification in the field of business ownership.

B. Purpose of proposed rule. The purpose of the rule is to augment Minn. Stat. § 362.40 (1978) and Laws of 1979, ch. 333, §§ 100-102, by establishing criteria which will enable Indians in Minnesota to utilize the business loan program for the expansion or establishment of Indian-owned businesses in the state.

C. Definitions. As used in this rule, the following words and terms shall have the meaning given, except where the context clearly indicated otherwise.

1. "Department" means the Department of Economic Development.

2. "Administrative costs" means those costs incurred in administering the Tribal Council's portion of the program.

3. "Commissioner" means the Commissioner of the Department of Economic Development or his/her designated representative.

4. "Borrower" means the person making application to the department for loan funds to start or expand a business.

D. Criteria for the acceptance or rejection of business loan applications. Criteria for the acceptance or rejection of business loan applications will be based on the following requested information which will convey to the department, a complete basis of information on which to evaluate the loan request, ability to repay and management of the business so that comparisons may be made with known industry standards as indicators of a company's ability to succeed.

1. Application must only be made for a profit oriented business ~~and may not be for a purpose not allowed within the meaning of 13 C.F.R. § 120.2, subd. d (2-11)~~.

2. Approval by commissioner of:

a. Personal financial statement(s) and resume(s) of management personnel which will indicate that applicant is not in an excessive debt position and serve to demonstrate the expertise of management.

b. Operating statements of existing business for which expansion, technical or management assistance loans are requested which will demonstrate the need for and feasibility of the application.

c. Financial statements for past three (3) years for existing businesses, if applicable.

d. Credit verifications to ascertain financial responsibility.

e. Employment verification to ascertain steadiness and extent of past work experience.

f. Documentation supporting cost of real estate, building(s), machinery and/or equipment which will be used to ascertain reasonableness of cost and present condition(s).

g. Detailed project description which will demonstrate dollar scope of the project, estimated revenue anticipated and indicate ability to repay the loan.

h. Equity or collateral available which must be at least five percent (5%), to demonstrate applicant's insertion of risk capital.

i. Income and expense projections which will indicate cash flow anticipated and should be verified by a CPA, if possible.

j. Applicants who will establish a business on a reservation must have or obtain approval of: tribal licenses if applicable, and/or leases when tribal lands are to be leased by the proposed business enterprise.

k. Last two (2) filed tax returns, if applicable.

3. All documents a.-k. shall be submitted to the department at one time, and because this program is a participant in the total loan package, the department's evaluation will be only one of other financial institutions' evaluations.

4. Loans for the purchase of land will require the construction of a physical facility and establishment of a business on that land within one year of receiving the loan approval; construction of a physical facility to begin within six (6) months of receiving loan approval.

5. Business loans shall not be made to repay or consolidate existing liabilities.

6. ~~If at any point in time~~, the business ~~changes~~ eligible ~~Indian~~ ownership, ~~the~~ loan becomes due and payable.

E. Procedures for making business loan applications.

1. Complete standard application on forms prescribed by the department.

2. Applicant shall provide additional information to the department if required for approval by the commissioner.

3. A time limitation of sixty (60) days may be imposed for the completion and submission of all documentatimn, which will allow applicant a reasonable time to obtain supplemental financing for the total project. The commissioner may extend the time limitation if based on good cause shown in writing.

F. Repayment. The department shall establish repayment of the loan on a schedule which will be determined by an assessment of the cash flow and ability to repay.

G. Review. There will be a monthly review of all loan accounts by the commissioner.

H. Maximum participation. Maximum participation in any one loan will be twenty-five percent (25%) of the project cost, not to exceed twenty percent (20%) of one (1) year's tax revenue allotted to the Indian Business Loan fund as per Minn. Stat. § 362.40, subd. 14.

AGENCY Exhibit No. 3
File No. ECDEV-80-001-JL
Date 2-4-80

STATE REGISTER

E[illegible]EV-80-001-JL

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA.

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on February 4 and 5, 1980, before Jon L. Lunde, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of the Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Economic Development (hereinafter "Department") on March 21, 1980; and

WHEREAS, the Department has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Department has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and 9 MCAR § 2.110; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department has met all requirements of Minn. Stat. § 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Order, the Department has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4.

Dated this 22nd day
of April, 1980.

DUANE R. HARVES
Chief Hearing Examiner

Department of Economic Development

Indian Business Loan Division

Proposed Rule Governing Business Loans to Indians in Minnesota

Notice of Hearing

Public hearings concerning the proposed rule will be held at the State Capitol Building, Rm. 125, St. Paul, Minnesota, 55155 on February 4, 1980, commencing at 7:30 p.m. and in Cass Lake, Minnesota, at the Neighborhood Facility Center, Tribal Chambers Room, Commencing at 7:30 p.m. on February 5, 1980. The proposed rule may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rule, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Jon L. Lunde, Hearing Examiner, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone (612) 296-5938, either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. § 15.0411-15.0417 and 15.052, and by 9 MCAR § 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary

AGENCY Exhibit No. 2
File No. ECDEV-80-001-JL
Date 2-5-80

of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimum charge.

The proposed rule will govern the administration of the Indian Business Loan program as set out in Minn. Stat. § 362.40. The proposed rule would lay out criteria for acceptance of or rejection of loan applications under the program, including credit verifications, approval by the Commissioner of Economic Development of operating statements and project descriptions, income and expense projections, and other data bearing on the applicant's credit worthiness and the quality of the project to be financed with the loan proceeds. The rule would also provide for procedures to be followed in applying for a loan under the program, and procedures regarding time limitations for construction financed with loan proceeds, review, repayment, and prohibited uses for loan proceeds.

The agency's authority to adopt the proposed rule is contained in Minn. Stat. § 362.40 and Minn. Stat. § 15.0412, subd. 3.

The agency estimates that there will be no cost to local bodies in the State to implement the rule for the two years immediately following its adoption within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978).

Copies of the proposed rule are now available and at least one free copy may be obtained by writing to Charlotte White, Director, Indian Business Loan Program, Department of Economic Development, Hanover Building, 480 Cedar Street, St. Paul, Minnesota 55101, telephone (612) 297-2286. Additional copies will be available at the hearing. If you have any questions on the

content of the proposed rule, contact Ms. White.

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11, as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statue provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota, 55155, telephone (612) 296-5616.

David L. Printy

Commissioner of Economic Development

Cheryl A. Richter

CHERYL A. RICHTER
NOTARY PUBLIC - MINNESOTA
ANOKA COUNTY
My Commission Expires Apr. 16, 1985

Department of Economic Development

Indian Business Loan Division

Proposed Rule Governing Business Loans to Indians in Minnesota

Order for Hearing

IT IS HEREBY ORDERED that a public hearing on the above captioned rule be held respectively at Room 125, State Capitol, St. Paul, Minnesota 55155, on Monday, February 4, 1980, and at the Tribal Facilities Room, Neighborhood Facility Center, Cass Lake, Minnesota, on Tuesday, February 5, 1980, each commencing at 7:30 p.m., and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

David L. Printy
Commissioner of Economic Development

Date: 12-18-79

Agency Exhibit No. 1
File No. ECDEV.-80-001-JL
Date 2-4-80

Minnesota
DEPARTMENT OF ECONOMIC DEVELOPMENT
480 CEDAR STREET
ST. PAUL, MINNESOTA 55101

RECEIVED
APR 29 1980
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

April 28, 1980

Michael Miles
Assistant Attorney General
Department of Administration
G-25 Administration Building

RE: In the Matter of the Proposed Adoption of Rules of the Department of Economic Development governing business loans to Indians in Minnesota.

Dear Mr. Miles:

Enclosed for review by your section pursuant to Atty. Gen. 301-305 are the following documents as to the above-referenced rulemaking proceeding.

1) The original and five (5) copies of the rule as adopted.
2) The original and one (1) copy of the rule as proposed (Agency Exhibit 3)
3) The original and one (1) copy of the Order for Hearing (Agency Exhibit 1)
4) The original and one (1) copy of the Notice of Hearing (Agency Exhibit 2)
5) The original of the Secretary of State's list with affidavit of receipt by agency (Agency Exhibit 6)
6) The original and one (1) copy of the agency affidavit of mailing of the Notice of Hearing (Agency Exhibit 5)
7) The original and one (1) copy of the Statement of Need and reasonableness (Agency Exhibit 4)
8) The original and one (1) copy of the Report of the Hearing Examiner.
9) The original and one (1) copy of the order of the Chief Hearing Examiner regarding non-substantial changes, pursuant to 9 MCAR 2.110.
10) The original and two (2) copies of the order adopting the rules as amended.

The cassette tape of the rules hearing is in my possession and available for the generation of a transcript if you so require pursuant to Minn. Stat. 15.0412, subd. 4. Neither the agency nor the hearing examiner felt it necessary to make a written transcript.

The remainder of the record of the hearing, besides the tape, is exhibits 7-10, enclosed as follows:

1) Certificate of delivery of the Secretary of State's list (Agency Exhibit 7)
2) Copy of 13 C.F.R. 120.2, subd. d (2-11) (Agency Exhibit 8)
3) Original Statement of Need and Reasonableness: the expanded version (Agency Exhibit 4) was filed less than 25 days before hearing; however, no objection by anyone at hearing (Agency Exhibit 9)
4) Resumé of M. Jean Laubach (Agency Exhibit 10)

The fulfillment of the requirements of Atty. Gen. 303 are reflected in the text of the report of the hearing examiner - which the Commissioner has adopted in his order. The Findings of Fact of the agency are likewise those of the hearing examiner, as adopted by the commissioner.

Very truly yours,

Charlotte White

Charlotte White
Director
Indian Business Loan Division

CW:gah

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA

AFFIDAVIT OF MAILING

Charlotte White, being first duly sworn, deposes and says:

That on the 21st day of December, 1979, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Charlotte White

Subscribed and sworn to before me this 21st day of DECEMBER, 1979.

Alan A. Madsen

ALAN A. MADSEN
Notary Public, Hennepin County, Mn.
My commission expires July 6, 1984

AGENCY Exhibit No. 5
File No. ECOEV-80-001-JL
Date 2-4-80

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA

CERTIFICATE OF DELIVERY OF SECRETARY OF STATE'S LIST

I hereby certify that the attached 32 labels & 1 sheets constitute the complete list of persons, associations, and other interested groups who as of 9:20 o'clock A. M., this 20th day of December, 1979, have requested pursuant to Minn. Stat. § 5.21 (1978), that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

Joan Anderson Growe

By Kathy Kjelm

Agency Exhibit No. 7

File No. ECDEV-80-001-JL

Date 2-4-80

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

Charlotte White, being duly sworn on oath deposes and says:

1) That She is an employee of the Department of Economic Development of the State of Minnesota.

2) That on the 18th day of December, She went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to Minn. Stat. 15.0412 (1978).

3) That on the 20th day of December, in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Charlotte White

Subscribed and sworn to before me
this 20th day of DECEMBER, 1979.

Notary Public,
HENNEPIN County, Minnesota
My Commission expires Notary Public
My commission

AGENCY Exhibit No. 6
File No. EC0EV-80-001-JL
Date 2-4-80

RULE AS ADOPTED (All New Material)

4 MCAR §§ 2.201. Rule, as amended, governing business loans to Indians in Minnesota.

A. Scope of the program: To provide an opportunity for eligible Indians in Minnesota to improve economic independence by implementing a business loan program which will promote an environment for economic expansion and diversification in the field of business ownership.

B. Purpose of rule. The purpose of the rule is to augment Minn. Stat. 362.40 (1978) and Laws of 1979, ch. 333 §§ 100-102, by establishing criteria which will enable Indians in Minnesota to utilize the business loan program for the expansion or establishment of Indian-owned businesses in the state.

C. Definitions. As used in this rule, the following words and terms shall have the meaning given, except where the context clearly indicates otherwise.

1. "Department" means the Department of Economic Development.

2. "Administrative costs" means those costs incurred in administering the Tribal Council's portion of the program.

3. "Commissioner" means the Commissioner of the Department of Economic Development or his/her designated representative.

4. "Borrower" means the person making application to the department for loan funds to start or expand a business.

D. Criteria for the acceptance or rejection of business loan applications. Criteria for the acceptance or rejection of business loan applications will be based on the following requested information which will convey to the department, a complete basis of information on which to evaluate the loan request, ability to repay and management of the business so that comparisons may be made with known industry standards as indicators of a company's ability to succeed.

1. Application must only be made for a profit oriented business.

2. Approval by commissioner of:

a. Personal financial statement(s) and resume(s) of management personnel which will indicate that an applicant is not in an excessive debt position and serve to demonstrate the expertise of management.

b. Operating statements of existing business for which expansion, technical or management assistance loans are requested which will demonstrate the need for and feasibility of the application.

c. Financial statements for past three (3) years for existing businesses, if applicable.

d. Credit verifications to ascertain financial responsibility.

e. Employment verification to ascertain steadiness and extent of past work experience.

f. Documentation supporting cost of real estate, building(s), machinery and/or equipment which will be used to ascertain reasonableness of cost and present condition(s).

g. Detailed project description which will demonstrate dollar scope of the project, estimated revenue anticipated and indicate ability to repay the loan.

h. Equity or collateral available which must be at least five percent (5%), to demonstrate applicant's insertion of risk capital.

i. Income and expense projections which will indicate cash flow anticipated.

j. Applicants who will establish a business on a reservation must have or obtain approval of: tribal licenses if applicable, and/or leases when tribal lands are to be leased by the proposed business enterprise.

k. Last two (2) filed tax returns, if applicable.

3. All documents a.-k. shall be submitted to the department at one time, and because this program is a participant in the total loan package, the department's evaluation will be only one of other financial institutions' evaluations.

4. Loans for the purchase of land will require the construction of a physical facility and establishment of a business on that land within one year of receiving the loan approval; construction of a physical facility to begin within six (6) months of receiving loan approval.

5. Business loans shall not be made to repay or consolidate existing liabilities.

6. Any loan made hereunder will become due and payable if the ownership of the business for which it was made is transferred in whole or in part to any individual, partnership or corporation that would have been ineligible to have received the loan in the first instance.

E. Procedures for making business loan applications.

1. Complete standard application on forms prescribed by the department.

2. A time limitation of sixty (60) days shall be imposed for the completion and submission of all documentation, which will allow applicant a reasonable time to obtain supplemental financing for the total project. The commissioner shall extend the time limitation if based on good cause shown in writing.

F. Repayment. The department shall establish repayment of the loan on a schedule which will be determined by an assessment of the cash flow and ability to repay.

G. Review. There will be a monthly review of all loan accounts by the commissioner.

H. Maximum participation. Maximum participation in any one loan will be twenty-five percent (25%) of the project cost. ~~not to exceed twenty percent (20%) of one (1) year's tax revenue allotted to the Indian Business Loan fund as per Minn. Stat. §§ 362.40, subd. 14.~~

APPROVED AS TO FORM AND LEGALITY

JUL 10 1980 19

WARREN SPANNAUS, ATTORNEY GENERAL

BY Joanne Hinderaker

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUL 11 1980
Joan Anderson Growe
Secretary of State
9:45 PM

Joanne Hinderaker

RECEIVED
MAY 23 19
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

May 22, 1980

Mr. Duane Harves
Chief Hearing Examiner
1745 University Ave.
St. Paul, Mn 55104

Re: Rules, as amended, governing business loans to Indians in Minnesota.

Dear Mr. Harves:

Enclosed for your review pursuant to 9 MCAR 2.110 in this matter are:

1) Rules as proposed (published at 4 S.R. 1069).

2) A copy of the rules as amended, pursuant to the recommendations of Hearing Examiner John Lunde.

3) The Chief Hearing Examiner's order of April 22, 1980.

4) A copy of the rules containing further changes made upon the requirement of the Attorney General's office.

5) Copy of the Order Adopting Rules (also previously sent).

6) Copy of the Revised Order Adopting Rules.

These rules were forwarded to you for your review on April 17, 1980, and you issued your order on April 22, 1980, finding the damages made from the published version of the rules to be nonsubstantial. Thereafter, upon the Attorney General's review, Special Assistant Attorney General Joanne Hinderaker notified the agency that several further changes would have to be made before her office could approve the rules.

The further changes made are as follows:

1) Change of "Rule as proposed" to "Rule as adopted" in the caption, and deletion of the word "proposed" in the second line, immediately after "4 MCAR § 2.201."

2) Correction of the typographical error in the typed rules sent to you in the second line of 4 MCAR 2.201 B, changing "Minn. Stat. § 363.40 (1978)) to the correct citation, "Minn. Stat. § 362.40 (1978)." This error was not in the rules published in the state register, but was in the copy of the rules previously sent to you for your inspection.

3) Correction of a typographical error in the sixth line of 4 MCAR 2.201 D, changing "know" to "known." This error was not in the rules published in the state register, but was in the copy of the rules previously sent to you.

4) Correction of a semantical error in the second line of 4 MCAR 2.201 D.2.a., changing "applicants" to "applicant," and inserting the word "an" before the word "applicant."

5) Deleting the words "and should be verified by a CPA, if possible." in 4 MCAR 2.201 D.2.i. The Attorney General's staff noted that the rule did not include criteria for determining when verification by a CPA was possible, and as a result, the rule did not make the law specific. The problem was solved by eliminating reference to a CPA.

6) Eliminating 4 MCAR 2.201 E.2 altogether, and renumbering 4 MCAR 2.201E.3 as 4 MCAR 2.201 E.2. The Attorney General's staff noted that the language of 4 MCAR 2.201 E.2 allowed the Commissioner unrestricted discretion to require unspecified further information, and that this was unacceptable. The provision was thus taken out.

7) Changing "may" to "shall" in lines 1 and 4 of 4 MCAR 2.201 E.3.

The references to "two further nonsubstantial changes pursuant to recommendations of the Attorney General" in the Revised Order are to the changes in D.2.i and E, all others being typographical or minor semantical.

Upon your review, and if you find the further changes made in the rules as amended to be nonsubstantial, the entire file will be resubmitted to the Attorney General for review.

Very truly yours,

GILBERT S. BUFFINGTON
Special Assistant Attorney General

515 Transportation Bldg. Office
St. Paul, Minnesota 55155
Telephone: 296-6596

GSB:jmr
Encl.
cc: Charlotte White
Jeanne Hinderaker

Our Files
#595

5/6 Charlotte White advised need cert. of compliance.

Permanent Rule X

Temporary Rule _____

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 4/29 DUE DATE 5/19 - 7/11

Resubmitted and Received 7/11

a. Returned to Agency w/o Filing w/Secretary of State 5/19/80
b. Approved 7/10 Date Sent Back to Agency 7/11

---

1. Rules as Adopted ✓
2. Rules as Proposed ✓ as in SR. 12.31.79.
3. Certificate of Board's Authorizing Resolution, where applicable N/A
4. Order for Hearing ✓ 2.4.80
5. Notice of Hearing ✓
   Sufficiency ?
6. Secretary of State's List ✓ (one copy only)
7. Certificate of Acquisition of Secretary of State's List ✓
8. Secretary of State's Certification of Delivery of Secretary of State's List to Agency ✓
9. Affidavit of Mailing ✓
   At least 30 days prior to hearing ✓
10. Publication in State Register ✓
    At least 30 days prior to hearing ✓ 12.31.79.
11. A Statement of Need and Evidence ✓
    B. Supplementary Statement of Need & Reasonableness ✓
12. Hearing Examiner's Report ✓
13. Agency's Findings of Fact ✓ incorporated in #15, order Adopting
14. Certificate of Board's Resolution Adopting Rules, where applicable N/A
15. Order Adopting ✓
16. Report of Chief Hearing Examiner ✓
17. Order Approving Incorporation by Reference, where applicable N/A
18. Certificate of Compliance with Rulemaking Procedures _____
19. Copy of Notice of Intent to Solicit Outside Opinion, where applicable ✓ not submitted but see H.E rpt, page 2. 4g.
20. Petition by Public, where applicable N/A

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : DAVID L. PRINTY
Commissioner of Economic Development

DATE: May 19, 1980

Attn:. GILBERT S. BUFFINGTON

FROM : JOANNE E. HINDERAKER JEH
Special Assistant
Attorney General

PHONE: 296-4692

SUBJECT: In the Matter of the Proposed Adoption of Rules of the Department of Economic Development Governing Business Loans to Indians in Minnesota

The above-captioned rules have not been approved by this office for the following reasons:

1. There are several references in the rule which characterize the rule as a "proposed rule." This language is misleading as the Department has adopted the rule and it is no longer in the proposed rule stage. Thus the references in the title of 4 MCAR sec. 2.201 and in the first clause of 4 MCAR sec. 2.201 B. should be changed to delete the "proposed" language. Furthermore, any rules resubmitted to this office should be entitled "Rule as Adopted", not "Rule as Proposed."

2. The following typographical errors appear in the rules as adopted:

4 MCAR sec. 2.201 B. refers to Minn. Stat. sec. 363.40 (1978) and it appears that the reference should be to Minn. Stat. sec. 362.40 (1978).

4 MCAR sec. 2.201 C. uses the word "indicated" but it appears that the word should be "indicates."

4 MCAR sec. 2.201 D. refers to "know industry standards" and the rule should read "known industry standards" and it appears that the word "applicants" in sec. 2.201 D. 2. a. should be changed to "applicant."

3. 4 MCAR sec. 2.201 D. 2. i. requires the approval of the Commissioner of Economic Development of certain documentation provided by an applicant including "Income and expense projections which will indicate cash flow anticipated and should be verified by a CPA, if possible." The meaning and application of this rule appear to be unclear. The definition of a "rule" in Minn. Stat. sec. 15.0411 subd. 3 "includes every agency statement of general applicability and future effect, . . . made to implement or make specific the law enforced or administered by it, or to govern its organization or procedure. . . . " Because 4 MCAR sec. 2.201 D. 2. i. lacks definition and does not establish the criteria to be used to determine whether CPA verification is "possible" it does not "make specific the law" and is therefore improper. The applicant for a loan cannot determine from the rule what is required of him or her in this regard in order to obtain approval of a loan application.

4. For similar reasons 4 MCAR sec. 2.201 E. 2 which states that "Applicant shall provide additional information to the department if required for approval by the Commissioner" is improper and cannot be approved by this office. The rule

appears to allow the Commissioner unbridled discretion to require additional information from some applicants and not from others. The rule does not establish criteria to be used to determine in what circumstances additional information would be required of an applicant.

5. Finally, the use of the word "may" two times in 4 MCAR sec. 2.201 E. 3 makes the rule improper. The statement that a time limitation of 60 days "may be imposed" suggests that the Commissioner may arbitrarily decide to impose a 60 day time limitation on some applicants and not others. Similarly, to state that the Commissioner "may extend the time limitation if based on good cause shown in writing" suggests that the Commissioner has the discretion to extend the time in some "good cause" situations and not others. Thus the use of the word "may" makes the rule arbitrary and unreasonable. It appears from the Department's Statement of Need and the Hearing Examiner's Report that the Department may have intended the use of the first "may" which appears in the rule to be interpreted as a "shall." If the Department intended that the word "may" be interpreted as "shall" the Department may wish to cure the defect by substituting the word "shall" for "may" in the rule.

Upon consideration of the issues raised in this memorandum and after any further action taken by the Department in regard to these rules, the file may be resubmitted to this office with three (3) copies of the rules as amended and three (3) copies of a revised order adopting rules. In drafting any revised order adopting rules please note that the order which was previously submitted to this office incorrectly states that this matter "came on for hearing before the Commissioner of Economic Development. . . " The revised order should refer to a hearing before Jon L. Lunde, the Hearing Examiner. Copies of the other pertinent documents in the file have been retained by this office.

I also wish to advise you that the Chief Hearing Examiner requests the resubmission of rules that are changed subsequent to his review. Therefore you should contact Mr. Duane Harves regarding any changes in the rules prior to resubmission to this office.

Please contact me if you have any questions regarding this matter.

JEH/bw
cc: Duane Harves
Susan Robertson.

ADMIN 1000 (Rev. 1/78) Our File: 595 STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

DAVID L. PRINTY
Commissioner of Economic Development
TO : State of Minnesota DATE: July 11, 1980

Attn: GILBERT S. BUFFINGTON
Special Assistant Attorney General

FROM : Joanne E. Hinderaker JEH
Special Assistant
Attorney General PHONE: 296-4692

SUBJECT: Rules as Approved In the Matter of the Proposed Adoption of Rules of the Department of Economic Development Governing Business Loans to Indians in Minnesota

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

If you have any questions in this regard, please contact me.

JEH:mb

Enclosure
cc: Duane Harves
Susan Robertson

ECDEV-80-001-JL

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE PROPOSED)
ADOPTION OF RULES OF THE)
DEPARTMENT OF ECONOMIC DEVELOP-)
MENT GOVERNING BUSINESS LOANS)
TO INDIANS IN MINNESOTA.)

SUPPLEMENTAL ORDER OF
THE CHIEF HEARING EXAMINER

WHEREAS, on April 17, 1980, the Department of Economic Development submitted the above-entitled rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and 9 MCAR § 2.110; and

WHEREAS, on April 23, 1980, the Chief Hearing Examiner issued his Order finding that the rules as proposed to be adopted were not substantially different from those proposed at the public hearing and that the Department of Economic Development had met all requirements of Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, upon receipt of the Chief Hearing Examiner's Order, the Department of Economic Development submitted the rules to the Attorney General for review following which, on May 19, 1980, the Attorney General returned the rules to the Department as not approved, requiring several changes; and

WHEREAS, the Department, having reviewed the memorandum of the Attorney General and further having made the changes as required, has now resubmitted the rules to the Chief Hearing Examiner for review pursuant to the provisions of Minn. Stat. § 15.052, subd. 4, and 9 MCAR § 2.110; and

WHEREAS, the Chief Hearing Examiner finds that the final adopted rules are not substantially different from those proposed at the public hearing and that the Department has met all requirements of Minn. Stat. § 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Order, the Department has the responsibility of resubmitting the complete hearing record and the rules as adopted by the Department to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4.

Dated this 4th day
of June, 1980.

DUANE R. HARVES
Chief Hearing Examiner

May 22, 1980

Mr. Duane Harves
Chief Hearing Examiner
1745 University Ave.
St. Paul, Mn 55104

Re: Rules, as amended, governing business loans to Indians in Minnesota.

Dear Mr. Harves:

Enclosed for your review pursuant to 9 MCAR 2.110 in this matter are:

1) Rules as proposed (published at 4 S.R. 1069).

2) A copy of the rules as amended, pursuant to the recommendations of Hearing Examiner John Lunde.

3) The Chief Hearing Examiner's order of April 22, 1980.

4) A copy of the rules containing further changes made upon the requirement of the Attorney General's office.

5) Copy of the Order Adopting Rules (also previously sent).

6) Copy of the Revised Order Adopting Rules.

These rules were forwarded to you for your review on April 17, 1980, and you issued your order on April 22, 1980, finding the damages made from the published version of the rules to be nonsubstantial. Thereafter, upon the Attorney General's review, Special Assistant Attorney General Joanne Hinderaker notified the agency that several further changes would have to be made before her office could approve the rules.

The further changes made are as follows:

1) Change of "Rule as proposed" to "Rule as adopted" in the caption, and deletion of the word "proposed" in the second line, immediately after "4 MCAR § 2.201."

2) Correction of the typographical error in the typed rules sent to you in the second line of 4 MCAR 2.201 B, changing "Mimn. Stat. § 363.40 (1978)) to the correct citation, "Minn. Stat. § 362.40 (1978)." This error was not in the rules published in the state register, but was in the copy of the rules previously sent to you for your inspection.

3) Correction of a typographical error in the sixth line of 4 MCAR 2.201 D, changing "know" to "known." This error was not in the rules published in the state register, but was in the copy of the rules previously sent to you.

4) Correction of a semantical error in the second line of 4 MCAR 2.201 D.2.a., changing "applicants" to "applicant," and inserting the word "an" before the word "applicant."

5) Deleting the words "and should be verified by a CPA, if possible." in 4 MCAR 2.201 D.2.i. The Attorney General's staff noted that the rule did not include criteria for determining when verification by a CPA was possible, and as a result, the rule did not make the law specific. The problem was solved by eliminating reference to a CPA.

6) Eliminating 4 MCAR 2.201 E.2 altogether, and renumbering 4 MCAR 2.201E.3 as 4 MCAR 2.201 E.2. The Attorney General's staff noted that the language of 4 MCAR 2.201 E.2 allowed the Commissioner unrestricted discretion to require unspecified further information, and that this was unacceptable. The provision was thus taken out.

7) Changing "may" to "shall" in lines 1 and 4 of 4 MCAR 2.201 E.3.

The references to "two further nonsubstantial changes pursuant to recommendations of the Attorney General" in the Revised Order are to the changes in D.2.i and E, all others being typographical or minor semantical.

Upon your review, and if you find the further changes made in the rules as amended to be nonsubstantial, the entire file will be resubmitted to the Attorney General for review.

Very truly yours,

GILBERT S. BUFFINGTON
Special Assistant Attorney General

515 Transportation Bldg. Office
St. Paul, Minnesota 55155
Telephone: 296-6596

GSB:jmr
Encl.
cc: Charlotte White
Jeanne Hinderaker

June 12, 1980

Mr. Duane Harves
Chief Hearing Examiner
1745 University Avenue
St. Paul, Mn 55104

Re: Rules, as amended, governing business loans to Indians in Minnesota

Dear Mr. Harves:

These rules were forwarded to you for your review on April 17, 1980, and you issued your order on April 22, 1980, finding the changes made from the published version of the rules to be nonsubstantial. Thereafter, upon the Attorney General's review, Special Assistant Attorney General Joanne Hinderaker notified the agency that several further changes would have to be made before her office could approve the rules. The required changes were made, and the amended rules were once again sent to your office with a revised order adopting rules as amended. You issued your order dated June 4, 1980, finding that the changes made pursuant to the requirements of the office of the Attorney General likewise were not substantial.

Within the last week, and approximately the same time as your order of June 4, 1980, arrived at my office, the agency informed me that they desired to make one further change to the rule to delete all language in 4 MCAR 2.201H after the word "cost" in the second line, leaving that section to read:

> H. Maximum participation. Maximum participation in any one loan will be twenty-five percent (25%) of the project cost.

The program director informed me that they had just learned that revenue shortfalls for the dedicated revolving fund from which Indian business loans are made was likely to be permanent rather than temporary, as previously assumed. The revolving fund is provided with money from 20% of the 25-cents an acre property tax levied on all severed mineral rights in the state. Although the tax has been levied, nearly half of the owners of such rights are in default on their taxes on such rights. As a result, restricting the maximum loan to 20% of one year's revenue as to any given Indian reservation

would result in a capability to make loans that were much smaller than contemplated when the legislation was passed.

Enclosed for your review pursuant to 9 MCAR 2.110 in this matter are the rules as amended that were approved by your order of June 4, 1980, a copy of your order of June 4, 1980, a copy of the rules as further amended with the deletion of the latter portion of section H, and an executed second revised order adopting rules as amended.

Please accept my apologies for the number of times this matter has had to come back to your office.

Very truly yours,

GILBERT S. BUFFINGTON
Special Assistant Attorney General

515 Transportation Bldg. Office
St. Paul, Mn 55155
Telephone: 296-6596

GSB:jmr
Encls.

A.G. copy. Rule As Adopted

RULE AS PROPOSED (All New Material)

4 MCAR §2.201. Proposed rule, as amended, governing business loans to Indians in Minnesota.

A. Scope of the program: To provide an opportunity for eligible Indians in Minnesota to improve economic independence by implementing a business loan program which will promote an environment for economic expansion and diversification in the field of business ownership.

B. Purpose of proposed rule. The purpose of the rule is to augment Minn. Stat. §§ 363.40 (1978) and Laws of 1979, ch. 333, §§ 100-102, by establishing criteria which will enable Indians in Minnesota to utilize the business loan program for the expansion or establishment of Indian-owned businesses in the state.

C. Definitions. As used in this rule, the following words and terms shall have the meaning given, except where the context clearly indicated otherwise.

1. "Department" means the Department of Economic Development.

2. "Administrative costs" means those costs incurred in administering the Tribal Council's portion of the program.

3. "Commissioner" means the Commissioner of the Department of Economic Development or his/her designated representative.

4. "Borrower" means the person making application to the department for loan funds to start or expand a business.

D. Criteria for the acceptance or rejection of business loan applications. Criteria for the acceptance or rejection of business loan applications will be based on the following requested information which will convey to the department, a complete basis of information on which to evaluate the loan request, ability to repay and management of the business so that comparisons may be made with know industry standards as indicators of a company's ability to succeed.

1. Application must only be made for a profit oriented business.

2. Approval by commissioner of:

a. Personal financial statement(s) and resume(s) of management personnel which will indicate that applicants is not in an excessive debt position and serve to demonstrate the expertise of management.

b. Operating statements of existing business for which expansion, technical or management assistance loans are requested which will demonstrate the need for and feasibility of the application.

c. Financial statements for past three (3) years for existing businesses, if applicable.

d. Credit verifications to ascertain financial responsibility.

e. Employment verification to ascertain steadiness and extent of past work experience.

f. Documentation supporting cost of real estate, building(s), machinery and/or equipment which will be used to ascertain reasonableness of cost and present condition(s).

g. Detailed project description which will demonstrate dollar scope of the project, estimated revenue anticipated and indicate ability to repay the loan.

h. Equity or collateral available which must be at least five percent (5%), to demonstrate applicant's insertion of risk capital.

i. Income and expense projections which will indicate cash flow anticipated and should be verified by a CPA, if possible.

j. Applicants who will establish a business on a reservation must have or obtain approval of: tribal licenses if applicable, and/or leases when tribal lands are to be leased by the proposed business enterprise.

k. Last two (2) filed tax returns, if applicable.

3. All documents a.-k. shall be submitted to the department at one time, and because this program is a participant in the total loan package, the department's evaluation will be only one of other financial institutions' evaluations.

4. Loans for the purchase of land will require the construction of a physical facility and establishment of a business on that land within one year of receiving the loan approval; construction of a physical facility to begin within six (6) months of receiving loan approval.

5. Business loans shall not be made to repay or consolidate existing liabilities.

6. Any loan made hereunder will become due and payable if the ownership of the business for which it was made is transferred in whole or in part to any individual, partnership or corporation that would have been ineligible to have received the loan in the first instance.

E. Procedures for making business loan applications.

1. Complete standard application on forms prescribed by the department.

2. Applicant shall provide additional information to the department if required for approval by the commissioner.

3. A time limitation of sixty (60) days may be imposed for the completion and submission of all documentation, which will allow applicant a reasonable time to obtain supplemental financing for the total project. The commissioner may extend the time limitation if based on good cause shown in writing.

F. Repayment. The department shall establish repayment of the loan on a schedule which will be determined by an assessment of the cash flow and ability to repay.

G. Review. There will be a monthly review of all loan accounts by the commissioner.

H. Maximum participation. Maximum participation in any one loan will be twenty-five percent (25%) of the project cost, not to exceed twenty percent (20%) of one (1) year's tax revenue allotted to the Indian Business Loan fund as per Minn. Stat. § 362.40, subd. 14.

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA

REVISED ORDER ADOPTING RULES AS AMENDED

The above-entitled matter came on for hearing before Hearing Examiner Jon L. Lunde for the Department of Economic Development on the 4th day of February, 1980, at 7:30 p.m., in Room 125, State Capitol Building, St. Paul, Minnesota, and on the 5th day of February, 1980, at 7:30 p.m., in the Neighborhood Facilities Center, Tribal Chambers Room, Cass Lake, Minnesota, and after proper notice required by Minn. Stat. § 15.0412 (1978) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced, having made two nonsubstantial changes pursuant to recommendations of the hearing examiner and two further nonsubstantial changes pursuant to recommendations of the Office of the Attorney General, having confirmed the need for the above captioned rules and the reasonableness thereof upon the records, files and proceedings herein and applicable statutory standards or criteria, and hereby specifically adopting the Findings of Fact, Conclusions and Recommendations of the hearing examiner.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Rules Governing Business Loans to Indians in Minnesota, as amended, are adopted this 21 day of May, 19 80, pursuant to authority vested in me by Minn. Stat. §§ 362.40 and 15.0412, subd. 3.

STATE OF MINNESOTA

Kent E. Eklund

KENT E. EKLUND
Commissioner of Economic Development

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC DEVELOPMENT

IN THE MATTER OF THE ADOPTION OF RULES OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BUSINESS LOANS TO INDIANS IN MINNESOTA.

SECOND REVISED ORDER ADOPTING RULES AS AMENDED

The above-entitled matter came on for hearing before Hearing Examiner Jon L. Lunde for the Department of Economic Development on the 4th day of February, 1980, at 7:30 p.m., in Room 125, State Capitol Building, St. Paul, Minnesota, and on the 5th day of February, 1980, at 7:30 p.m., in the Neighborhood Facilities Center, Tribal Chambers Room, Cass Lake, Minnesota, and after proper notice required by Minn. Stat. §§ 15.0412 (1978) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced, having made two nonsubstantial changes pursuant to recommendations of the hearing examiner, two further nonsubstantial changes pursuant to recommendations of the Office of the Attorney General, and one further nonsubstantial change pursuant to agency staff recommendations, having confirmed the need for the above captioned rules and the reasonableness thereof upon the records, files and proceedings herein and applicable statutory standards or criteria, and hereby specifically adopting the Findings of Fact, Conclusions and Recommendations of the hearing examiner.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Rules Governing Business Loans to Indians in Minnesota, as amended, are adopted this 16th day of June, 19 80, pursuant to authority vested in me by Minn. Stat. §§ 362.40 and 15.0412, subd. 3.

STATE OF MINNESOTA

Kent E. Eklund

KENT E. EKLUND
Commissioner of Economic Development

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 - 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

June 23, 1980

Mr. Gilbert S. Buffington
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

Re: OUR FILE: ECDEV-80-001-JL RULES RELATING TO INDIAN LOANS

Dear Mr. Buffington:

Receipt is herewith acknowledged of your June 12th correspondence and the enclosures.

I have reviewed the materials you sent to me and, more specifically, the changes proposed to be made in Rule "H".

The deletion of the language does not appear to in any way change my finding of June 4, 1980, and thus you may take this letter as my "reconfirmance" of my decision of June 4th.

Yours very truly,

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

Telephone: 612/296-8100

DRH:sh

RECEIVED
JUN 24 1980
ATTORNEY GENERAL'S OFFICE
515 TRANSPORTATION BLDG.
ST PAUL, MN. 55155

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : JoAnn Hinderaker
Special Assistant Attorney General
G-25 Administration Bldg.

DATE: June 30, 1980

FROM : Steve Buffington
Special Assistant Attorney General
515 Transportation Bldg. Office

PHONE: 6-6596

SUBJECT: Rules governing business loans to Indians in Minnesota

Enclosed and resubmitted for your office's review are the appropriate number of copies of the following:

1. Rule as adopted.
2. Revised Order adopting rules as amended.
3. Supplemental order of the Chief Hearing Examiner.
4. Second revised order adopting rules as amended.
5. Letter from Chief Hearing Examiner dated June 23, 1980, re: change made by second revised order.

Also enclosed for your convenience are copies of cover letters forwarding the changes made to the chief hearing examiner, and in particular, explaining the change made in the second revised order.

I believe you already have all the other documents required by Rule Atty Gen. 302. I have the file of exhibits from the rules hearing if you should need them.

Thank you very much.

SB:jmr
Encl.

RECEIVED
JUL 1 1980
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

PRINTED ON RECYCLED PAPER

ECDEV-80-001-JL

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF ECONOMIC DEVELOPMENT

In the Matter of the Proposed Adoption of Rules of the Department of Economic Development governing business loans to Indians in Minnesota.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, on Monday, February 4, 1980, at 7:30 p.m. at Room 125, State Capitol, St. Paul, Minnesota, 55155, and on Tuesday, February 5, 1980, at 7:30 p.m. at the Tribal Facilities Room, Neighborhood Facility Center, Cass Lake, Minnesota, 56633, pursuant to Notice and Order dated December 18, 1979.

Gilbert S. Buffington, Special Assistant Attorney General, 515 Transportation Building, John Ireland Boulevard, St. Paul, Minnesota, 55155, appeared as counsel on behalf of the Minnesota Department of Economic Development (hereinafter the "Department"). Appearing as witnesses for the Department were Harry Johnson, Assistant Commissioner; Charlotte White, Program Director, Indian Loan Program; M. Jean Laubach, Director, Development Grants and Loan Program.

This was a rule hearing conducted pursuant to Minn. Stat. Chapter 15, to determine whether the Department has authority to adopt the rules proposed and whether the rules are necessary and reasonable and should be adopted.

Three persons appeared and signed the hearing register at the hearing in St. Paul, and approximately ten persons appeared at the hearing in Cass Lake, six of whom signed the hearing register. Both hearings continued until all persons present had had an opportunity to be heard. The record remained open for 20 calendar days after the close of the hearing for the submission of written comments from interested persons. During that period of time, the Minnesota Chippewa tribe submitted a two-page copy of Recommendations which were discussed and alluded to during the hearing process. No other comments were received by the Hearing Examiner.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1978), this Report shall be available for review to all affected individuals upon request for at least five working days. Thereafter, the Department of Economic Development shall, if it proposes to adopt the rules as originally proposed or amended, submit a copy of the Order Adopting Rules, a copy of any additional agency findings, a copy of the rules as originally proposed, and a copy of the rules as adopted to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4 (1978). The submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 (1978) within ten calendar days. The Department will be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 3, 1979, the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing proposed to be issued.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

2. On Monday, December 31, 1979, a Notice of Hearing and a copy of the proposed rules were published at 4 State Register 1069-1071.

3. On December 21, 1979, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On December 28, 1979, the Department filed the following documents:

(a) The Order for Hearing.
(b) The Notice of Hearing as mailed.
(c) The Affidavit of Receipt of the Secretary of State's list.
(d) The Affidavit of Mailing the Notice to all persons on the Secretary of State's list.
(e) The Secretary of State's Certificate and list.
(f) The Statement of Need and Reasonableness.
(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 4 State Register 401-402 on Monday, September 10, 1979.
(h) The names of Departmental personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf. At the request of the Hearing Examiner, the Department submitted a Supplemental Statement of Need and Reasonableness on January 24, 1980. No one requested an inspection of the original or Supplemental Statement of Need and Reasonableness prior to the scheduled rule hearings

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through February 25, 1980 for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing.

Statutory Authority

6. In its Notice of Hearing, the Department cited Minn. Stat. §§ 362.40 and 15.0412, subd. 3, as authority for its adoption of the rules pertaining to business loans to Indians in Minnesota. Minn. Stat. § 15.0412, subd. 3, (1978) which is a part of the Administrative Procedures Act provides as follows:

> Subd. 3. Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

The Department also cited § 362.40 as general authority for adopting rules but no particular language from that section was quoted. Regarding the adoption of "rules", § 362.40 (1979 Supp.), provides in part as follows:

> Subd. 9. . . . The department shall prescribe the necessary forms and advise the prospective borrower as to the conditions under which his application may be expected to receive favorable consideration.
>
> * * *
>
> Subd. 10. . . .The Department is empowered to either accept or reject the application, based upon guidelines and conditions essentially similar to those used for the purpose of approving or rejecting reservation loans under subdivision 9. . . .

7. Section 15.0412 has not been construed by the courts in this state and its mandate that agencies adopt rules raises the question whether it also constitutes authorization for the exercise of rulemaking power by state agencies. If rulemaking power is granted, as it seems to be, it is clear that the power is limited to the adoption of procedural rules.[1] Procedural rules are those which "describe the methods by which the agency will carry out its appointed functions-rules which make provisions for the filing of applications . . . the conduct of hearings, and the like."[2]

8. Generally speaking, the Courts have held that procedural rules are authorized even in the absence of a specific grant of power and have the force and effect of law.[3] Thus, it has been stated:

> "The question as to the power of an agency to adopt procedural rules is one which rarely arises. It would seem that the very delegation to an agency of power to administer a statute would carry with it the power to adopt such reasonable procedures as are necessary or useful in carrying out its administrative tasks."[4]

The plain language of § 15.0412, coupled with the agency's implied power to adopt procdural rules is adequate authorization for the Department to adopt procedural rules relating to Indian loan applications under Minn. Stat. § 362.40 (1979 Supp.).

Furthermore, to the extent that any of the proposed rules are not procedural in nature, they are impliedly authorized by § 362.40, subd. 10, cited above, which alludes to "guidelines" and "conditions" used by the Department for approving or rejecting such applications. These guidelines or conditions, according to Mr. Buffington, are not intended as legislative rules having the force and effect of law but merely as interpretive rules. His conclusion in that respect is consistent with the legislature's use of the word "guidelines"

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[1] The Minnesota Supreme Court has recognized three types of administrative rules under the Administrative Procedures Act: Legislative rules having the force and effect of law; interpretive rules or guidelines which merely make specific the law enforced or administered by the Agency; and procedural rules. See Minn-Dakotas Retail Hardware Ass'n. v. State of Minnesota, 279 N.W.2d 360 (Minn. 1979); Can Manufacturers Institute, Inc. v. M.P.C.A., filed September 7, 1979. In the latter case, the Court held that when legislative history shows that an agency was not intended to have legislative rulemaking power, and the agency is authorized to adopt "guidelines" only, then it is clear that the agency may not adopt legislative rules.

[2] 1 F. Cooper, State Administrative Law, p. 173 (1965).

[3] 1 K. Davis, Administrative Law Treatise, § 5.03 (1958), and 1 F. Cooper, State Administrative Law, p. 266 (1965).

[4] Ibid., p. 176.

in § 362.40 itself. Interpretive rules usually describe the general discretionary policy the agency will follow. Thus, rules stating the conditions under which a license will be issued are interpretive.[5] Similar conditions applicable to the approval of loan applications are also interpretive in nature.

Proposed Rules

8. Laws of Minnesota 1973, Chapter 650, Art. XX, § 4, provided for business loans to Indians living on and off reservations. Funding for the loans consisted of 20% of the state tax imposed on severed mineral rights to state lands.[6] Although all loan applications were submitted to the Department, approval was, until adoption of Laws of Minnesota 1979, Chapter 333, §§ 100-102,[7] (hereinafter the "1979 Amendment"), vested in the tribal council, in the case of loans to Indians living on reservations. While the Department could approve or reject loan applications submitted by non-reservation Indians, the Department was required to follow the guidelines and conditions used by the tribal council in the approval or rejection of loans to reservation Indians.

9. The 1979 amendment to § 362.40 expanded the scope of authorized loans to include loans for technical and management assistance. In addition, it repealed the tribal council's power to approve or reject loan applications from reservation residents and gave such power to the Department which is required to consider the "recommendation period" of the tribal council. The acceptance or rejection of applications is to be based upon "guidelines" and "conditions" adopted by the Department.

Mr. John Herrera, Director of the Economic Development Division of the Minnesota Chippewa Tribe, speaking on behalf of the Tribe, and Mr. Donald Gurnoe, Executive Director of the Minnesota Indian Affairs Inter-Tribal Board, both challenged the statutory provision placing loan approval with the Department and argued that it should be returned to the tribe. Mr. Gurnoe felt that the taking of approval from the reservation business committee, as had been done by the 1979 amendment, "flies in the face of Indian self-determination." As Mr. Buffington properly pointed out, however, the Department is bound by

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5 Ibid., p. 175.

6 Pursuant to Minn. Stat. § 273.13, subd. 2(a), Class I(b), (1978), commencing in 1975, a per-acre tax of 25 cents was imposed on all severed mineral interests in state lands with some specified exclusions. 20% of that tax, or 5 cents per acre, is used for funding the Indian loans authorized under § 362.40. In 1977, there were 2,783,287 acres of severed mineral interests in the state which should yield, at 5 cents per acre, approximately $139,164,000 in loan fund revenues each year. For unknown reasons, actual revenues have been substantially smaller than this amount.

7 Jerry Seck, legal counsel for the Minnesota Chippewa Tribe, qustioned Departmental personnel regarding the sponsorship of this amendment depriving the tribal council's reservation business committee of loan approval authority. Sponsorship of this legislation was unknown by the Departmental personnel present at the hearing. Mr. Buffington did note, however, that his predecessor felt that the delegation of loan approval authority to the reservation business committee and its control of state funds was an unlawful delegation of legislative and administrative authority and rendered the prior version of the statute unconstitutional.

the statutory provisions and must abide by them in the administration of the Indian loan program and it cannot divest or relinquish its responsibility in favor of the tribal council in the area of loan approval.

Mr. George Goodwin, Executive Director of the Minnesota Chippewa Tribe, suggested that since the tribe was attempting during this current legislative session to obtain an amendment to § 362.40, returning loan approval authority for loans by reservation Indians to the tribes, that the Department should not, at this time, proceed with the adoption of rules which may soon be superseded or rendered invalid by legislative amendment. Mr. Buffington replied that the Department was required to adopt rules setting forth the conditions and procedures for loan applications and that it intended to fulfill its legal responsibility in that respect in spite of pending amendments. The Department's decision to proceed with rulemaking, in spite of possible amendments to the statute, is, of course, reasonable and within its informed discretion, given the statutory mandate of § 15.0412, subd. 3.

See No. 2 Minn. Session Laws Service 1980 for changes Ch. 391 -

The need to adopt the proposed rule was explained by the Department in the opening paragraphs of its Statement of Need and Reasonableness as follows:

> The need to adopt these rules arises because it is necessary to have clear qualification criteria and procedures for both the making and repayment of loans under the Indian business loan program. The classes of persons eligible for Indian Business Loans and the allocation of revenues for the program are spelled out in Minn. Stat. § 362.40, but it is eminently reasonable that the eligible borrowing public qualifying for this program know details of such criteria and procedures that are not contained in the statute.

10. The proposed rule, codified as 4 MCAR § 2.201, is divided into eight subsections as follows:

A. Scope of the program;
B. Purpose of the proposed rule;
C. Definitions;
D. Criteria for the acceptance or rejection of business loan applications;
E. Procedures for making business loan applications;
F. Repayment;
G. Review; and
H. Maximum participation.

11. Although the 1979 amendments and some other provisions of the statute itself are criticized by the public, the rules, themselves, were not controversial and generally went unchallenged. The rule, as presently proposed, is a necessary and reasonable exercise of the Department's duty and authority as is discussed in more detail below.

12. Subsections A. and B. explain the scope and purpose of the proposed rule and provide a general framework for its understanding. Subsection C. defines the terms "Department", "Administrative costs", "Commissioner" and "Borrower". These definitions are necessary for an understanding of the rule and are not repetitive of any definitions contained in § 362.40, itself. No one objected to any of the proposed definitions;[8] however, it was suggested

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8 Mr. Goodwin felt that the definition of "Reservation residents" contained in § 362.40, subd. 4, should be amended to include only those Indians living on reservations who are enrolled members of a Minnesota-based tribe or band as the definition of "Non-reservation resident" reads. The Department properly pointed out that such amendment required legislative action as it was beyond the scope of the rulemaking proceeding.

that the rules clarify which corporations were eligible for loans since the definition in Minn. Stat. § 362.40, subd. 6, was not specific. That section provides as follows:

> "Person" means an individual Indian, or a partnership comprising Indians only, or a corporation whose stock is owned wholly by Indians.

Mr. Herrera pointed out that some Indian-owned corporations are created under tribal authority, not under state law, and those corporations should be specifically defined as eligible "borrowers" in the Department's rules. Mr. Buffington stated that he did not anticipate that corporations established under tribal authority would be ineligible but he was not certain. Although the Department was not required to resolve this issue in its proposed rules, it has the authority to do so (as an interpretive rule), and should consider doing so.

13. Subsection D. contains the criteria (conditions and guidelines) for the acceptance or rejection of loan applications. All the criteria, as currently proposed, are generally accepted criteria used in the lending industry.

Subsection D.1., as originally proposed, provided as follows:

> Application must only be made for a profit-oriented business and may not be for a purpose not allowed within the meaning of 13 C.F.R. § 120.2, subd., d(2-11).

During the course of the hearing, the Department withdrew the incorporation by reference contained in the subsection because it was less than 3,000 words in length and was not subject to incorporation by reference under Minn. Stat. § 15.0412, subd. 4 (1978).[9] As amended, the section will read:

complied with

1. Application must only be made for a profit-oriented business.

As amended, subsection D.1. is reasonable and necessary and consistent with the concept of this being a loan program for ongoing business enterprises.

Under subsection D.2., the Applicant must submit, and the Commissioner approve, specified financial statements, resumes, operating statements, credit and employment verifications, income expense projections, tax returns and other basic loan documents, including a description of the project, copies of licenses issued, and other materials requested. All these documents are necessary to enable the Department to make an informed decision on the future success of the business for which the loan is made the financial responsibility of the borrower and the soundness of the purposes for which the loan is wanted, and the borrower's prospective ability to repay. As such, each of the criteria are necessary and reasonable exercises of the Board's informed discretion.

Although Mr. Herrera felt that the Department was requesting too much material from a prospective borrower and that the criteria were too complicated, the Department noted that the Indian business loans are contemplated only as part of a larger loan package in which other lenders will participate and that the material requested will largely be a duplication of material other lenders

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[9] The approval of the Chief Hearing Examiner had not been sought for this incorporation by reference either as would have been required under this section in the event the material exceeded 3,000 words in length.

will request. Since the Indian business loans will be approved and evaluated in coordination with other larger loans for which similar submittals would be required, the Department felt that the criteria were justified.

In addition, since the Indian business loan program is not funded by general fund appropriations and replacements, but is a revolving fund depending upon part upon loan repayment, the loans made by the Department must be carefully evaluated to prevent a large default which could hurt the goals of the total program.

Subsection D.2.h. requires the prospective borrower to have equity or collateral available which must be at least 5% of the total loan package involved. Mr. Herrera suggested that this be reduced to 5% of the principal amount of the Indian business loan, itself, but Departmental representatives felt that Mr. Herrera's suggestion would represent an insufficient risk on the part of the borrower and that the 5% requirement based on the total loan package for a particular project or purchase, was reasonable and it is well below industry standards. Mr. Buffington suggested that if only 5% of the Indian business loan, itself, was required as collateral, a borrower could obtain up to $100,000 in loans with an investment of only $1250. While that is theoretically possible, most lenders would, as a practical matter, require a greater equity investment on behalf of the borrower, and if the Department does impose a 5% equity investment based on the total loan package, some prospective borrowers will lose the leverage in obtaining conventional loans that would otherwise be available under Mr. Herrera's proposal. The amount of equity or collateral that a prospective borrower must keep available is a matter that is peculiarly within the agency's expertise and discretion, and the rule, as written, is not unreasonable.

Subsection D.3. requires that all written documents specified under the rules be submitted to the Department at one time. This requirement not only permits a proper review of the proposed loan, but it also serves as a test of the borrower's ability to execute business matters in an expeditious and orderly manner. It supplements the requirements in subsection E.3. which places a 60-day time limit upon completion of the total loan application process and the submittal of any additional information requested by the Department while the 60-day period is specified in order to avoid prolonged delays and the encumbering of available funds, extensions are available if good cause is shown in writing. These requirements certainly are beneficial to the Department in administering the Indian loan program and in evaluating the prospective borrower and are necessary and reasonable exercises of its authority. Subsection D.4. imposes time limits on the purchase of land and the construction of facilities for which loans have been approved. The time limits have been adopted because time delays change the projected costs and income from a particular project to such a degree that the total loan package could be jeopardized. Given the current inflation rate and the rapidly changing economic conditions we are experiencing, this is not an unreasonable restriction, and it protects the loan funds the Department must administer. Subsection D.5. requires that business loans shall not be made to repay, refinance or consolidate existing liabilities. The Department interprets § 362.40 as a vehicle for providing business financing, "and not to allow the repayment of debt incurred at a higher rate with money bearing the advantageous 2% rate of the Indian Loan Fund."

The Department's interpretation in this respect is certainly within its discretion to adpt interpretive rules and is not inconsistent with the statute. Subsection D.6. pertaining to the repayment of loans and the transfer of a business provides as follows:

> "If at any point in time, the business changes eligible Indian ownership, the loan becomes due and payable."

The Department testified that the intent of this rule was to require repayment of any loan when the business for which it was made is transferred to any person, partner or corporation which would not qualify for a loan originally. That is, whenever a non-Indian acquires a business or an interest in a partnership or a corporation which runs a business which is the subject of a loan under § 362.40, the loan will become due and payable. The rule, as written, however, seems to say just the opposite, that is, that whenever the business is transferred from one eligible Indian to another eligible Indian, the loan becomes due and payable. The Hearing Examiner would recommend, therefore, that the language in this subsection D.6. be amended to clarify the Department's intention It could read as follows:

> "6. Any loan made hereunder will become due and payable if the business for which it was made is transferred in whole or in part to an ineligible Indian."

intent of change complied with — language used is different from this

14. Subsection F pertains to the repayment of loans made by the Department. Under this subsection, the Department establishes a repayment schedule which is based on the borrower's particular cash flow and ability to repay. Since the repayment schedule is flexible, it can be tailored to a great variety of business needs. Thus, payment schedules can even allow for seasonal payments, as Mr. Herrera had suggested. In addition, the Department pointed out, in response to Mr. Herrera's recommendations, that principal payments can be deferred for various periods of time during which the borrower would be required to make interest payments only. This would allow flexibility to those borrowers who have 95% loans and concomitantly large loan payments.

Regarding moratoriums on loans, Mr. Herrera suggested that they should be based on extreme need only and that requests for such moratoriums on loans made to reservation residents should be made through the reservation business committee or other tribal council. Mr. Buffington replied that a reservation resident's cooperation with the reservation business committee would be standard operating procedure insofar as the Department was concerned. However, Mr. Buffington rejected any suggestion that the Department's statutory duty of approving and monitoring Indian loans be delegated to the tribe since such a delegation would be inconsistent with § 362.40 in its present form.

15. Subsection G. provides that there will be a monthly review of all loan accounts by the Commissioner. This evaluation is necessary so that the Department is informed of any problems a borrower might encounter so that the borrower can get appropriate help and assistance. Mr. Herrera suggested, however, that audits should not be required of loans under $100,000 and that the State should pay the cost of any annual audits for loans over $100,000. Since the maximum principal amount of any loan under this program is probably not more than $30,000, there won't be any loans over $100,000. Furthermore, the rules nowhere prescribe or require annual audits of borrowers, and presumably,

such audits will not be made unless the contract between the parties calls for them. Mr. Herrera stated that the small business administration does not require audits of loans less than $100,000 and that the Department should not either. Since the funding of the Small Business Administration and the funding of the Indian Business Loan program is substantially different, and since the kinds of loans and the amounts involved are wholly dissimilar, the Department could reasonably conclude that audits are necessary if it chooses to do so.

16. Subsection H. limits maximum participation in any one loan under the program to 25% of the total project cost or not to exceed 20% of one year's revenue allotted to the Indian Business Loan Fund under § 362.40, subd. 14. Since the annual income under subdivision 14 is somewhat less than $140,000 per year, maximum loans under the program will be approximately $28,000. The Department feels that larger loans are not advisable to any one borrower or any one project because, in the event of default, the loan program would be disproportionately affected. They have decided, as it were, not to put their all their eggs in one basket and that decision is certainly a reasonable one in view of the limited funds available.

There is no limitation, however, on the number of loans that can be made to any particular borrower, and as the Department explained to Mr. Donald Fairbanks, one borrower could qualify for more than one loan.

It was suggested by Mr. Robert C. Larsen that the loan funds available to the Department be granted on a quarterly basis so that potential loan funds would be available throughout the year in the event good business opportunities presented themselves to eligible borrowers. The Department chose not to make money available on any periodic basis or to establish any priorities among applicants. So long as money is available, they are content to approve those projects which are feasible and meet the criteria they have established, and those loans once approved will be funded when money is available. The Department's decision in that respect is not unreasonable or an abuse of its discretion.

Some priorities are built into the program indirectly because the loan funds, themselves, are split between non-reservation resident loans and reservation resident loans, and the loans are further divided between the eleven reservations in the state on the basis of the population of those reservations. Each reservation's population is determined by a census taken by the Minnesota Department of Economic Security. It appears that the definition of an Indian for purposes of the census and for purposes of the pro rata distribution of loan funds is different than the definition of an Indian for purposes of eligiblity as a borrower.

Based on the foregoing Findings of Fact, the Hearing Examiner makes the following

C O N C L U S I O N S

1. The Department gave due, timely and adequate legal notice of the hearing.

2. Pursuant to Minn. Stat. § 15.052, subd. 3 (1978), it is the duty of the Hearing Examiner to: ". . . (4) make a report on each proposed agency

action . . . taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action; (ii) fulfilled all relevant, substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts".

3. The Department has documented its statutory authority to promulgate the proposed rules.

4. The Department has fulfilled all relevant, substantive and procedural requirements of law or rule so long as the incorporation by reference contained in subsection D.1. is deleted from the rules as the agency now proposes to do.

5. The Department has demonstrated the need for and reasonableness of the proposed rules, except as otherwise noted in the Findings of Fact by an affirmative presentation of facts.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

That the proposed rules be modified as suggested in the Findings, and that as so modified, they be adopted.

Dated this 21 day of March, 1980.

Jon L. Lunde

JON L. LUNDE
Hearing Examiner