

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 — DEPARTMENT OF NATURAL RESOURCES  
 RULES OF PRACTICE AND PROCEDURE

LAST ISSUE DATE:

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Chapter 1 — GENERAL DEFINITIONS

Unless otherwise specifically defined in any Chapter of this Title, the following definitions apply:

001 Department. The Department of Natural Resources.

002 Director. The Director of the Department.

003 Person. An individual, partnership, limited liability company, corporation, association, district, governmental subdivision, agency, or public or private organization of any character.

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Chapter 2 — THE OFFICE OF THE DEPARTMENT OF NATURAL RESOURCES

001 Location. The office of the Department is located in Lincoln, Nebraska, at 301 Centennial Mall South on the 4th floor of the Nebraska State Office Building.

002 Mailing Address. The mailing address of the Department is:

Department of Natural Resources  
P.O. Box 94676  
Lincoln, Nebraska 68509-4676

003 Official Hours. The official hours of the Department are from 8:00 A.M. to 5:00 P.M., Monday through Friday, except legal holidays.

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Chapter 3 — FILING REQUIREMENTS

The following filing requirements apply unless more specific requirements are stated in statute or within the Department's Rules, Titles 454, 455, 456, 457 and 458:

001 Method. Pleadings, documents and correspondence required to be filed with the Department shall be properly filed in accordance with these rules when they are:

001.01 Delivered to the office of the Department. Delivery is defined as:

001.01A Personal delivery by required date; or

001.01B Mailed to and received by the Department by the required date; or

001.01C Telefaxed to and received by the Department by the required date, and the original signed document filed in the Department within five days of the receipt of the telefax; or

001.01D Electronically scanned and electronically mailed to and received by the Department by the required date, and the original signed document filed in the Department within five days of the receipt of the electronic mail. Electronic filings shall be sent to DNR.legalfile@Nebraska.gov.

001.02 Accompanied by proper fees.

When the filing of a pleading or the performing of an act is required by a certain date which falls during nonofficial hours [as described in Chapter 2 of these rules] the date for filing or performing shall be extended to the next succeeding date which falls within official hours.

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CHAPTER 3 -- FILING REQUIREMENTS

002 Form. Pleadings filed with the Department shall be in the following form:

002.01 Size and Paper. The pleading shall be made on white, letter-sized (8-1/2 x 11 inch) paper;

002.02 Print. The pleading shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the pleading must be written in ink. Only one side of a page shall contain any writing;

002.03 Margins. The first page of the pleading shall have a top or bottom margin of not less than 2 inches for the stamp of the Department; and

002.04 Attachment. Any documents attached to a pleading shall be securely fastened to the pleading and shall meet the requirements of 002.01 and 002.02 and, when possible, be reproduced on 8-1/2 x 11 inch paper or placed in an 9 x 12 inch envelope and clearly marked as an attachment to the petition.

003 Copies. One copy of all pleadings, documents and correspondence is required unless otherwise ordered by the Director or Hearing Officer.

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CHAPTER 4 -- NEGOTIATED RULEMAKING

001 Negotiated rulemaking generally. The purpose of this rule is to establish a framework for the conduct of negotiated rulemaking consistent with the *Administrative Procedure Act* and the *Negotiated Rulemaking Act, Neb. Rev. Stat. §§ 84-921 through 84-932*. The negotiated rulemaking process can be used by state agencies, whenever appropriate, to resolve controversial issues prior to the commencement of formal rulemaking. Negotiated rulemaking is not a substitute for the requirements of the *Administrative Procedure Act*, but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. The negotiated rulemaking process also does not preclude other Department efforts or processes designed to reach consensus with affected or interested persons concerning the content of rules. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by the Department as a result of a subsequent formal rulemaking process.

002 Definitions. For purposes of this Chapter of this procedural rule:

002.01 APA means the *Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920*.

002.02 Consensus means unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.

002.03 Convener means a person who impartially assists the Department in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

002.04 Facilitator means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator does not have decision making authority.

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002.05 Interest means with respect to an issue or matter, that multiple parties have a similar point of view or are likely to be affected in a similar manner.

002.06 Negotiated rulemaking means rulemaking through the use of a negotiated rulemaking committee.

002.07 Negotiated rulemaking committee or committee means an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

002.08 Person means an individual, partnership, limited liability company, corporation, association, district, governmental subdivision, agency, or public or private organization of any character.

002.09 Rule means any rule issued by the Department, including the amendment or repeal thereof whether with or without prior hearing, and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules concerning the internal management of the Department not affecting private rights, private interests, or procedures available to the public and not including permits, and any rules of interpretation thereof, and for the purpose of the APA, every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

003 Establishment of a Negotiated Rulemaking Committee; criteria. The Department may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the Director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the Director shall consider whether:

003.01 There is a need for the rule;

003.02 There are a limited number of identifiable interests that may be significantly affected by the rule;

003.03 There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

003.03A Can adequately represent the interests identified; and

003.03B Are willing to negotiate in good faith to reach a consensus on the proposed rule.

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003.04 There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

003.05 The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA;

003.06 The Department has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

003.07 The Department, to the maximum extent possible consistent with the legal obligations of the Department, will use the consensus of the committee as the basis of the rule proposed by the Department in the formal rulemaking process of the APA.

004 Conveners; selection; duties. The Department, at the discretion of the Director, may use the services of a convener.

004.01 The Department may employ or contract for an organization or an individual to serve as a convener, or may use the services of a state employee to act as a convener. A convener shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration as a convener has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

004.02 The convener may assist the Department in making the determination of need for a negotiated rulemaking process discussed in section 003 above. The convener may also assist the Department in:

004.02A Identifying persons who will be significantly affected by a proposed rule.

004.02B Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

004.03 The convener shall report findings and make recommendations to the Department. Upon request of the Department, the convener shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. The report by the convener and any recommendations of the convener shall be public records and made available to the public for review upon request.

005 Petitions for the use of a negotiated rulemaking committee. Any person may petition the Department to request the use of a negotiated rulemaking committee in the development or revision of a rule, as provided below.

005.01 A negotiated rulemaking process may be requested on any topic appropriate for a rule by the Department.

005.01A A negotiated rulemaking process may be requested only to develop or revise rules which carry out statutes that are within the authority of the Department to implement.

005.01B A negotiated rulemaking process may not be requested to develop a rule to vary or change the specific terms of a statute.

005.01C A negotiated rulemaking process may not be requested to negotiate a rule on a matter which is not within the definition of a rule as set forth herein.

005.02 A request for the use of a negotiated rulemaking procedure shall be made by a petition that meets the requirements of form set out in this subsection. In the event that it does not, the Department may refuse to accept it.

005.02A A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached to this rule and made a part of it by reference.

005.02B A petition may also be made in the form of a letter so long as the letter contains all of the information required by this rule and is clearly delineated as a petition for negotiated rulemaking.

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005.03 A petition for a negotiated rulemaking procedure shall meet the following requirements for content and substance. In the event that it does not, the Department may refuse to accept it.

005.03A The petition must identify the general subject matter about which the negotiated rulemaking procedure is requested, including the statutes or legislative bill(s) which provide authority for the desired rule, and, if amendments to existing rules are sought, identification of the rule by title, chapter and name.

005.03B The petition must identify the specific issue(s) proposed for inclusion in the negotiated rulemaking process.

005.03C The petition must discuss the facts surrounding each problem or issue proposed for inclusion in the negotiated rulemaking process.

005.03D The petition must discuss why a negotiated rulemaking process is in the public interest, including information on each of the criteria set out in subsections 003.01 through 003.05 above. The petition may also include information on the criteria included in subsections 003.06 and 003.07 above, to the extent such information is available to the petitioner. The petitioner may also submit such other information as may assist the Department in making a decision.

005.03E The petition must identify persons who will be significantly affected by any rule which might result from the proposed negotiated rulemaking process, to the extent known by the petitioner. The petitioner may also suggest the names of persons who are willing and qualified to represent the interests that will be significantly affected by the negotiated rulemaking process and the proposed rule.

005.04 Upon the filing of a petition for a negotiated rulemaking procedure, the Director may designate a Department employee or use the services of a convener to recommend to the Director whether a negotiated rulemaking process should be initiated.

005.05 Within sixty (60) days after submission of a petition for a negotiated rulemaking procedure, the Department shall:

005.05A Deny the petition in writing, stating the reason(s) for denial; or

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005.05B Initiate the negotiated rulemaking process as provided in this rule.

005.06 The decision of the Director with respect to a petition for a negotiated rulemaking procedure will be made in the form of an order clearly designated as the decision on the petition. The petitioner shall be served with a copy of the Director's final decision by first class mail.

005.07 A decision by the Director with respect to a petition for a negotiated rulemaking procedure is not subject to judicial review, although nothing herein shall bar a judicial review if such is otherwise provided by law.

006 Notice of a Negotiated Rulemaking Committee; Comment; Applications for Membership. If the Director decides to go forward with the establishment of a negotiated rulemaking committee, the Department shall proceed with the following process.

006.01 The Department shall give notice to the Secretary of State, publish notice in a newspaper having general circulation in the state, and, as appropriate, publish notice in other newspapers and publications. The notice shall include:

006.01A An announcement that the Department intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

006.01B A description of the subject and scope of the rule to be developed and the issues to be considered;

006.01C A list of interests likely to be significantly affected by the proposed rule;

006.01D A list of the persons proposed to represent the affected interests and the Department;

006.01E A proposed schedule for completing the work of the committee; and

006.01F An explanation of how a person may apply for or nominate another person for membership on the committee.

006.02 Persons interested in making comments upon the formation of a particular proposed negotiated rulemaking committee shall have thirty (30) days from the date of publication of the notice concerning that

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committee to do so. Such comments shall be in writing, and shall either be personally delivered to the Department or mailed to the Department at its business office.

006.03 Persons interested in applying for membership on a particular proposed negotiated rulemaking committee or in nominating other persons for such membership shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Persons making application for membership or nominations for membership shall do so on Attachments 2 and 3 which are attached to this rule and made a part of this rule by reference, and which shall be provided by the Department. Persons making application for membership or nominations for membership may also do so by letter, so long as the letter contains all of the information set out in Attachments 2 and 3 and is clearly delineated as an application or nomination for membership on a specific negotiated rulemaking committee.

007 Establishment of a Negotiated Rulemaking Committee; Procedure. After publication of notice and termination of the comment and membership application period, the Department will consider the comments and membership applications for a particular negotiated rulemaking committee and determine whether such a committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule, and whether such a committee is feasible and appropriate in the particular rulemaking. In making the final determination as to creation of a negotiated rulemaking committee, the Department may use the services of a convener as set out in Section 004 above. In making the final determination as to creation of a negotiated rulemaking committee, the Department and the Director will apply the criteria set out in 003 above.

007.01 If, after such a determination, the Department decides that a negotiated rulemaking procedure is feasible, it shall establish a negotiated rulemaking committee as provided in this rule. The committee will negotiate issues and develop proposed rules for use by the Department in formal rulemaking.

007.02 If, after such a determination, the Department decides not to establish a negotiated rulemaking committee, the Director shall:

007.02A Notify the persons who commented on, applied for membership on or nominated persons for membership on the particular negotiated rulemaking committee of the reasons for the decision not to establish such a committee.

007.02B Publish notice of the decision not to establish the particular negotiated rulemaking committee in a newspaper having

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general circulation in the state, and, as appropriate, in other newspapers and publications.

008 Negotiated Rulemaking Committee; membership. All members of a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members.

008.01 Members of a negotiated rulemaking committee may include:

008.01A A person designated by the Director to represent the Department. This person shall be authorized to fully represent the Department in the discussions and negotiations of the committee;

008.01B Persons selected by the Department as willing and qualified to represent the interests that will be significantly affected by the proposed rule;

008.01C Persons contacted and recruited by the negotiated rulemaking committee itself by consensus as essential to the success of the negotiated rulemaking process; and

008.01D Persons selected by the negotiated rulemaking committee by consensus upon committee review of a petition for membership or nomination as set out in subsection 008.02 below.

008.02 Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee.

008.02A Each petition or nomination for committee membership shall be in writing and be submitted to the negotiated rulemaking committee by delivering or mailing the same to the Department. All such petitions or nominations shall include:

008.02A1 Identification of the applicable negotiated rulemaking proceeding;

008.02A2 The name of the petitioner or nominee, and a description of the interests the person represents;

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008.02A3 Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

008.02A4 A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

008.02A5 An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

008.02B Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may use the forms attached hereto as Attachments 4 and 5. Attachments 4 and 5 are made a part of this rule by reference. Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may also do so by letter, provided that the letter contains the information set forth above.

008.02C Upon receiving a petition for membership on or nomination to a particular negotiated rulemaking committee, the committee in question shall decide, at its next meeting, whether or not to expand its membership. A consensus shall be required for any such expansion.

009 Negotiated rulemaking committee; operation. A negotiated rulemaking committee established under these rules shall consider the matter proposed by the Department for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

009.01 A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee consistent with this rule and the pertinent Nebraska statutes.

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009.02 The Department shall provide appropriate administrative support to a negotiated rulemaking committee including technical assistance and support.

009.03 The person representing the Department on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members of the committee and shall be authorized to fully represent the Department in the discussions and negotiations of the committee.

009.04 If a negotiated rulemaking committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the Department a report containing the proposed rule.

009.05 If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the Department a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations or materials.

010 Facilitators; selection; duties. A facilitator shall be selected to assist a negotiated rulemaking committee with its duties.

010.01 The Department may nominate a person to serve as a facilitator for the negotiations of a negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the Department's nomination for facilitator, the Department shall submit a substitute nomination. If the committee does not approve the substitute nomination of the Department for facilitator, the committee shall select, by consensus, a person to serve as facilitator.

010.02 The Department may employ or contract for an organization or an individual to serve as a facilitator for a negotiated rulemaking committee or the Department may use the services of a state employee to act as a facilitator. A person designated by the Department to represent it on a negotiated rulemaking committee with respect to substantive issues may not serve as the facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

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010.03 A facilitator approved or selected by a committee shall:

010.03A Preside at the meetings of the committee in an impartial manner;

010.03B Impartially assist members in conducting discussions and negotiations and achieving consensus; and

010.03C Manage the keeping of minutes and records.

011 Negotiated rulemaking committee; expenses. Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, the Department may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in Neb. Rev. Stat. §§ 81-1174 through 81-1177 as amended, and a reasonable per diem rate of compensation if:

011.01 The committee member certifies a lack of adequate financial resources to participate on the committee using the form at Attachment 6 which is attached to this rule and made a part of it by reference; and,

011.02 The Department determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

012 Grants or gifts. The Department may accept grants or gifts from any source to fund a negotiated rulemaking process if:

012.01 Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

012.02 The grant or gift is given to and accepted by the Department without placing any condition on the membership of a committee or the outcome of the negotiated rulemaking process; and

012.03 There is a consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

013 Negotiated rulemaking committee; termination. A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the Department pursuant to the APA, unless the Department, after consulting the committee, or the committee itself specifies an earlier termination date.

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014 Negotiated rulemaking procedure; judicial review. Any action of the Department relating to establishing, assisting or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review, except that nothing in this section shall bar judicial review if such judicial review is otherwise provided by law.

454 Neb. Admin. Code Chapter 4  
SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of \_\_\_\_\_ )  
\_\_\_\_\_ ) Petition for  
\_\_\_\_\_ ) Negotiated  
\_\_\_\_\_ ) Rulemaking  
\_\_\_\_\_ )

COMES NOW the petitioner, \_\_\_\_\_ (insert name of  
Petitioner), according to the *Nebraska Negotiated Rulemaking Act* and  
according to the Nebraska Department of Natural Resources' rule for Petitions  
for Negotiated Rulemaking, and requests that the Nebraska Department of  
Natural Resources establish a negotiated rulemaking committee as set forth in  
this Petition.

In support of this request, the Petitioner states as follows:

1. The Nebraska Department of Natural Resources administers the provisions  
of \_\_\_\_\_ (insert sections of the statutes or  
legislative bill numbers for which negotiated rulemaking is sought),  
and is responsible for development of rules to implement these  
statutes.
2. Petitioner seeks a negotiated rulemaking procedure to (check one):  
  
( ) develop new rules  
  
( ) amend existing rules, specifically \_\_\_\_\_  
\_\_\_\_\_  
  
( ) repeal certain existing rules, specifically \_\_\_\_\_  
\_\_\_\_\_

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3. A negotiated rulemaking committee should be established to negotiate and develop rules on each of the following issues concerning the statute(s), or legislative bill(s) identified above (identify each issue as to each statute, or legislative bill and the general scope of the rulemaking proposed):
4. The facts surrounding each of the issues listed in paragraph 3 above are as follows:
5. Establishment of a negotiated rulemaking committee would be in the public interest under each of the following criteria based upon the information the Petitioner hereby submits.
  - A. There is a need for rulemaking on the issue(s) identified above because:
  - B. There are a limited number of identifiable interests that will be significantly affected by the rule, including the following interests:
  - C. There is a reasonable likelihood that a negotiated rulemaking committee can be convened with a balanced representation of people (1) who can adequately represent the interests identified above and (2) who are willing to negotiate in good faith to reach a consensus on the proposed rule, as shown by the following:
  - D. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time because:
  - E. The use of this procedure will not unreasonably delay formal rulemaking and issuance of a final rule because:
  - F. (Optional for response by Petitioner) The Nebraska Department of Natural Resources should commit its resources, including technical assistance, to such committee because:
  - G. (Optional for response by Petitioner) The Nebraska Department of Natural Resources should, to the maximum extent possible consistent with its legal obligations, use a consensus of such committee as the basis for a rule to be adopted under the Administrative Procedure Act because:

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6. The following persons will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition (identify such persons by name and address where possible):
7. The following persons may be willing and qualified to represent the interests that will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition (identify such persons by name and address where possible):
8. Petitioner offers the following additional information (if any) for use by this Department in consideration of this request:
9. Petitioner has attached the following documents in support of this request (list all documents attached):

Dated \_\_\_\_\_  
(month) (day) (year)

\_\_\_\_\_  
Signature of Petitioner (Required)

\_\_\_\_\_  
Petitioner's Name (Printed or Typed, Required)

\_\_\_\_\_  
Petitioner's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Petitioner's Telephone Number with Area Code (Required)

\_\_\_\_\_  
Petitioner's E-mail Address (Required if available)

454 Neb. Admin. Code Chapter 4  
SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated )            Application  
Rulemaking Committee for \_\_\_\_\_ )            for Membership  
\_\_\_\_\_ )            on the Committee  
\_\_\_\_\_ )

APPLICATION FOR MEMBERSHIP  
(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee proposed by this Department.

\_\_\_\_\_  
Applicant's Name (Printed or Typed, (Required))

\_\_\_\_\_  
Applicant's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Applicant's Phone Number with Area Code (Required)

\_\_\_\_\_  
Applicant's E-mail Address (Required if available)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiating rulemaking committee:
3. The applicant is authorized to represent parties related to the interest listed above because:
4. The applicant can adequately represent the parties and interest listed above because:

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5. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):
6. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee.

Dated \_\_\_\_\_  
          (month)           (day) (year)           Signature of Applicant (Required)

454 Neb. Admin. Code Chapter 4  
SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated	)	Nomination
Rulemaking Committee for	)	for Membership
_____	)	on the Committee
_____	)	

NOMINATION FOR MEMBERSHIP  
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee proposed by this Department.

\_\_\_\_\_  
Nominee's Name (Printed or Typed, Required)

\_\_\_\_\_  
Nominee's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Nominee's Telephone Number with Area Code (Required)

\_\_\_\_\_  
Nominee's E-mail Address (Required if available)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiated rulemaking committee:
3. The nominee is authorized to represent parties related to the interest listed above because:
4. The nominee can adequately represent the interest and parties listed above because:

TITLE 454  
CHAPTER 4 — NEGOTIATED RULEMAKING

5. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list attachments):
6. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

Dated \_\_\_\_\_  
(month) (day) (year)

\_\_\_\_\_  
Signature of Nominating Party (Required)

\_\_\_\_\_  
Nominating Party's Name (Printed or Typed, Required)

\_\_\_\_\_  
Nominating Party's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Nominating Party's Telephone Number with Area Code (Required)

\_\_\_\_\_  
Nominating Party's E-mail Address (Required if available)

454 Neb. Admin. Code Chapter 4  
SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated	)	Application
Rulemaking Committee for _____	)	for Membership
_____	)	on the Committee
_____	)	(interest inadequately
_____	)	represented)

APPLICATION FOR MEMBERSHIP  
(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee.

\_\_\_\_\_  
Applicant's Name (Printed or Typed, Required)

\_\_\_\_\_  
Applicant's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Applicant's Phone Number with Area Code (Required)

\_\_\_\_\_  
Applicant's E-mail Address (Required if available)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiating rulemaking committee:
3. The applicant is authorized to represent parties related to the interest listed above because:
4. The applicant can adequately represent the parties related to the interest listed above because:

TITLE 454  
CHAPTER 4 — NEGOTIATED RULEMAKING

5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:
- A. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):
  - B. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule being considered by the above-referenced negotiated rulemaking committee.

Dated \_\_\_\_\_  
(month) (day) (year) Signature of Applicant (Required)

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SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated	)	Nomination
Rulemaking Committee for _____	)	for Membership
_____	)	on the Committee (interest
_____	)	inadequately represented)
_____	)	

NOMINATION FOR MEMBERSHIP  
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee.

\_\_\_\_\_  
Nominee's Name (Printed or Typed, Required)

\_\_\_\_\_  
Nominee's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Nominee's Telephone Number with Area Code (Required)

\_\_\_\_\_  
Nominee's E-mail Address (Required if available)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiated rulemaking committee:
3. The nominee is authorized to represent parties related to the interest listed above because:
4. The nominee can adequately represent the interest listed above because:

TITLE 454  
CHAPTER 4 — NEGOTIATED RULEMAKING

5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:
6. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list all attachments):
7. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

Dated \_\_\_\_\_  
(month) (day) (year)

\_\_\_\_\_  
Signature of Nominating Party (Required)

\_\_\_\_\_  
Nominating Party's Name (Printed or Typed, Required)

\_\_\_\_\_  
Nominating Party's Full Mailing Address (Required)

\_\_\_\_\_  
City, State, Zip (Required)

\_\_\_\_\_  
Nominating Party's Telephone Number with Area Code (Required)

\_\_\_\_\_  
Nominating Party's E-mail Address (Required if available)

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SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

STATE OF NEBRASKA                    )  
  ) ss.  
COUNTY OF \_\_\_\_\_                )

In the matter of the Negotiated        )  
Rulemaking Committee for \_\_\_\_\_ )                Certification of  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
  )                Financial  
  )                Need

COMES NOW the undersigned, being first duly sworn, and hereby states and certifies as follows:

1. I am a member of the above-referenced negotiated rulemaking committee created by the Nebraska Department of Natural Resources.
2. In connection with my duties on that committee, I represent (insert the name of the appropriate identified interest).
3. In connection with my duties on that committee, I have incurred or will incur expenses and/or other costs.

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CHAPTER 4 --- NEGOTIATED RULEMAKING

4. I certify that I have a lack of adequate financial resources to serve on the above-referenced negotiated rulemaking committee, and that I need financial assistance from this Department in order to serve.

Dated \_\_\_\_\_  
(month) (day) (year) \_\_\_\_\_  
Signature of Affiant (Required)

Subscribed and sworn to before me \_\_\_\_\_  
(month) (day) (year)

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

NEBRASKA ADMINISTRATIVE CODE

Title 454 — DEPARTMENT OF NATURAL RESOURCES  
RULES OF PRACTICE AND PROCEDURE

LAST ISSUE DATE:

CHAPTER 5 — PETITIONING FOR RULEMAKING

001 Rulemaking Petition.

001.01 Petition. Any person may petition the Department requesting the promulgation, amendment, or repeal of a rule.

001.02 Form. The petition shall:

001.02A Be clearly designated as a petition for a rules change;

001.02B In the case of a proposed new rule or amendment of an existing rule, set forth the desired rule in its entirety;

001.02C In the case of a petition for the repeal of an existing rule, state such purpose and either set forth the rule to be repealed in full or refer to it by Department rule number;

001.02D Describe the reason for the rule change;

001.02E Include an address and telephone where the petitioner can be reached during regular work hours; and

001.02F Be signed by:

001.02F1 The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number; or

001.02F2 A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

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CHAPTER 5 -- PETITION FOR RULEMAKING

002 Petition Consideration and Disposition.

002.01 Within sixty (60) days after submission of a petition, the Department shall:

002.01A Deny the petition in writing, stating its reasons therefor; or

002.01B Initiate rulemaking proceedings in accordance with the Administrative Procedure Act.

NEBRASKA ADMINISTRATIVE CODE

Title 454 — DEPARTMENT OF NATURAL RESOURCES  
RULES OF PRACTICE AND PROCEDURE

LAST ISSUE DATE:

CHAPTER 6 — DECLARATORY ORDERS

001 General Information.

001.01 Scope of this chapter. This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by the Department.

002 Definitions. As used in this chapter:

002.01 Argument means the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law;

002.02 Contested case means a proceeding before the Department in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the Department;

002.03 Declaratory order proceeding means a proceeding initiated by a petitioner seeking issuance of a binding order by the Department regarding the applicability of specified circumstances to a statute, rule, or order within the primary jurisdiction of the Department;

002.04 Hearing officer means the person or persons conducting a declaratory order proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title;

002.05 Intervenor(s) means person(s), political subdivision(s), corporation(s), organization(s), or other entity (entities) who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the Department's issuance of a binding declaratory order;

TITLE 454  
CHAPTER 6 — DECLARATORY ORDERS

002.06 Necessary party means a person who or an entity which has a specific interest in the applicability of the statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved;

002.07 Parties means persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the Department who are involved in a declaratory order proceeding according to the procedures set forth in this chapter;

002.08 Petition means the document filed in accordance with section 003 of this chapter to initiate a declaratory order proceeding;

002.09 Petitioner(s) means a party or parties who have filed a petition with the Department seeking issuance of a declaratory order; and

002.10 Pleading means any written petition, answer, or motion used in any declaratory order proceeding before the Department as set forth in this chapter.

003 Petition for Declaratory Order.

003.01 Generally. A request for a declaratory order must be made by a petition that meets the requirements of this section.

003.02 Who May File. Any person may petition the Department for issuance of a declaratory order regarding the applicability to specified circumstances of a statute, rule, or order which is within the primary jurisdiction of the Department.

003.03 When Orders Appropriate. A declaratory order may be requested on the applicability of a statute, rule, or order enforced by the Department. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03A A declaratory order may be requested only on the applicability of existing statutes and rules;

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CHAPTER 6 — DECLARATORY ORDERS

003.03B A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred;

003.03C A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case;

003.03D A declaratory order may not be requested to obtain a declaration by the Department that a statute or rule is unconstitutional or that a rule of the Department is invalid; and

003.03E A declaratory order may not be issued by the Department that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.04 Form of Petition. A petition for declaratory order shall be in the form of a pleading (see Attachment 1 to this rule incorporated by reference to this rule) which shall contain each of the following:

003.04A A caption, which shall include:

003.04A1 STATE OF NEBRASKA, DEPARTMENT OF NATURAL RESOURCES;

003.04A2 A heading specifying the subject matter and the name of the petitioner; and

003.04A3 The name of the pleading: PETITION FOR DECLARATORY ORDER;

003.04B The statements required in subsection 003.05 of this chapter;

003.04C The signature of the petitioner, or when represented by an attorney, the signature of the attorney; and

003.04D The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

003.05 Contents of Petition. To be considered, the petition shall include the following:

003.05A The name and address of the petitioner;

003.05B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, or order or who may be adversely affected by the issue sought to be resolved by the petitioner;

003.05C The statute, rule, or order upon which the petitioner seeks issuance of a declaratory order;

003.05D A detailed statement of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;

003.05E All propositions of law or contentions asserted by the petitioner;

003.05F A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested; and

003.05G Any documents pertinent to the petition that the petitioner wishes to be considered by the Department.

003.06 The petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

003.07 Sample Petition. The petitioner may use the sample form of a petition which is Attachment 1 and incorporated within this chapter. The petitioner may also prepare a reasonable facsimile of Attachment 1 so long as the requirements of subsections 003.04, 003.05, and 003.06 of this chapter are satisfied.

003.08 Written Consents. The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

004 Submission and Service of Declaratory Order Petition.

004.01 At the same time the petition is filed with the Department, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the Department.

005 Disposition of the Petition.

005.01 Generally. Upon the filing of a petition, the Director may consider the petition, or delegate the matter to a designated hearing officer, or Department employee to consider the petition and recommend a decision to the Director. In reviewing the petition, the Director may, in his/her discretion, do one or more of the following:

005.01A Require that additional information be submitted before the petition will be further considered;

005.01B Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the Department;

005.01C Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;

005.01D Consider the petition and any attachments without oral presentation.

005.02 Within thirty (30) days after the petition is filed, the Director shall, in writing:

005.02A Issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02B Agree to issue an order by a specified time declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02C Set the matter for specified proceedings as set forth in subsection 005.01 of this Chapter; or

005.02D Decline to issue a declaratory ruling, stating the reasons for the Director's decision.

005.03 Notwithstanding section 005.02 of this rule, the Director may determine at any time that he/she will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 009 of this Chapter. The Director shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Director determines not to issue a declaratory order.

006 Intervention in Declaratory Order Proceeding.

006.01 Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

006.01A A petition for intervention must be submitted in writing to the Department. Copies must be mailed to all parties to the proceeding;

006.01B The contents of the petition must be as specified in 006.02; and

006.01C The Director determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

006.02 Contents of Petition. The petition for intervention shall be submitted to the Department, in writing, on 8 1/2" x 11" white paper, and shall include each of the following:

006.02A The statute, rule, or order that may apply to or affect the person, property, entity, or facts at issue in the matter;

006.02B A statement of facts sufficient to show the intervenor's interest;

006.02C A statement of facts which demonstrates that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;

006.02D All propositions of law or contentions asserted by the intervenor; and

006.02E A statement of the specific relief requested by the intervenor.

006.03 The Director may, at his/her discretion, invite any person or entity to file a petition for intervention.

006.04 The Director may grant a petition for intervention if the requirements of section 006.01 and section 006.02 are satisfied.

006.05 The Director shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

006.06 The Director's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

007 Declaratory Order Proceedings.

007.01 Oral Argument, When. Oral argument shall be had only on specific order of the Department. A petitioner, intervenor, necessary party, or the Department may submit a motion for oral argument to the Director, hearing officer, or appointed Department employee. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the Director or the Director's designee with a notice of the date, time, and location for oral argument. The Director or the Director's designee shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

007.02 Oral Argument, Procedure. Oral argument will be made before a hearing officer or before any representative of the Department who is authorized to render or to recommend a decision to the Director. The hearing officer or Department representative shall be in control of the proceeding and shall:

007.02A Identify the proceeding and introduce himself or herself and identify each party for the record;

TITLE 454  
CHAPTER 6 — DECLARATORY ORDERS

007.02B Hear the oral argument of the petitioner, intervenor, or necessary parties;

007.02C Close the proceedings.

007.03 At the declaratory order proceeding, Department staff shall have the right to present oral argument.

007.04 The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

007.05 The parties and Department staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.

007.06 The oral argument may be conducted either in person or by telephone conference call or by other suitable electronic means.

008 Issuance of Declaratory Order.

008.01 The Director shall issue a declaratory order within sixty (60) days of the date on which the petition was filed unless otherwise provided for in section 005 of this chapter.

008.02 The declaratory order shall be in writing and shall include the following:

008.02A The names of all parties to the proceeding;

008.02B The facts upon which the order is based;

008.02C The statute, rule, or order at issue in the matter;

008.02D The Director's conclusion as to the applicability of the statute, rule, or order to the facts;

008.02E The Director's conclusion as to the legal effect or result of applying the statute, rule, or order to the facts; and

008.02F The reasons relied upon by the Director to support his/her conclusions.

008.03 A copy of the declaratory order shall be served upon each party.

008.04 Effect of Declaratory Order. A declaratory order shall have the same status and binding effect as any other order issued in a contested case.

008.05 No Response within 60 Days. If the Director has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the Director.

009 Circumstances Under Which Director will not Issue Declaratory Orders.

009.01 Grounds upon which the Director shall refuse to issue a declaratory order include, but are not limited to, the following:

009.01A The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

009.01B The petition requests review or appeal of a decision made by the Department in a contested case;

009.01C The petition requests a declaratory order on the effect of past conduct;

009.01D An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal a rule is pending before the Department involving the petitioner on substantially the same or similar facts or issues raised in the petition;

009.01E The petition seeks a declaration that a statute or rule is unconstitutional or invalid;

009.01F The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

009.01G An order would substantially prejudice the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

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CHAPTER 6 --- DECLARATORY ORDERS

009.01H An order would not resolve the controversy or uncertainty; or

009.01I The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the Director may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02A Refusal is necessary to assure adequate allocation of Department resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02B The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured ruling;

009.02C The petitioner fails to submit any additional information requested by the Department or submits such information after the date established by the Department.

010 Appeal.

010.01 Orders pertaining to water rights for irrigation, power, or other useful purposes. Any party or parties dissatisfied with the decision made in a declaratory order regarding water rights for irrigation, power, or other useful purposes may appeal to the Court of Appeals to reverse, vacate or modify the order complained of. The procedure to obtain such reversal, vacation or modification shall be governed by the same provisions in force with reference to appeals and error proceedings from the district court.

010.02 All other matters. All declaratory orders issued by the Department except for those described in 454 Neb. Admin. Code, Chapter 6 § 010.01 are subject to review in the same manner provided for review of contested cases by the *Administrative Procedure Act*, §§ 84-901 through 84-920. Specific procedures for appeal are set forth in Neb. Rev. Stat. § 84-917.

454 Neb. Admin. Code Chapter 6  
SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of \_\_\_\_\_ )  
\_\_\_\_\_) )  
\_\_\_\_\_) )  
\_\_\_\_\_) )  
\_\_\_\_\_) )

PETITION FOR  
DECLARATORY ORDER

1. Petitioner's name is:
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, or order, or who may be adversely affected by the issue sought to be resolved are:
3. All material facts and specific circumstances are:
4. All rules of law which apply are:
5. Petitioner's demand for relief is:

Dated \_\_\_\_\_  
(month) (day) (year) \_\_\_\_\_  
Signature of Petitioner (Required)  
\_\_\_\_\_  
Petitioner's Name (Printed or Typed, Required)  
\_\_\_\_\_  
Petitioner's Full Mailing Address (Required)  
\_\_\_\_\_  
City, State, Zip (Required)  
\_\_\_\_\_  
Petitioner's Telephone Number with Area Code (Required)  
\_\_\_\_\_  
Petitioner's E-mail Address (Required if available)

VERIFICATION

STATE OF                    )  
                                  ) ss.  
COUNTY OF                 )

On \_\_\_\_\_ '\_\_\_\_\_' \_\_\_\_\_ [name],  
      (month)        (day) (year)  
being first duly sworn, states that he/she has read the foregoing Petition  
For Declaratory Order; and that the allegations of fact therein are true.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

NEBRASKA ADMINISTRATIVE CODE

Title 454 -- DEPARTMENT OF NATURAL RESOURCES  
RULES OF PRACTICE AND PROCEDURE

LAST ISSUE DATE:

Chapter 7 -- CONTESTED CASES.

001 Definitions. The following definitions shall apply as used throughout Chapter 7 of these rules.

001.01 Adjudicative and show cause proceedings include, but are not limited to, the following:

001.01A Actions taken by the Department under the provisions of *Neb. Rev. Stat.* §§ 46-229 to 46-229.06 to modify or cancel a surface water appropriation;

001.01B Administration of surface water appropriator taking more water than can be beneficially used, *Neb. Rev. Stat.* § 46-231;

001.01C Cases before the Department to determine whether applications or petitions should be approved;

001.01D Administration of water appropriations of an irrigation ditch or canal because owners do not maintain the embankments so as to prevent waste as described under *Neb. Rev. Stat.* § 46-265;

001.01E Actions taken by the Department to modify or revoke a Municipal and Rural Domestic Ground Water Transfers Permit under the provisions of *Neb. Rev. Stat.* § 46-644;

001.01F Cases before the Department under the provisions of *Neb. Rev. Stat.* § 46-684(1) to revoke or modify an Industrial Ground Water Transfer Permit;

001.01G Actions taken by the Department under the provisions of *Neb. Rev. Stat.* § 46-684(2) to determine whether violations have occurred relative to an Industrial Ground Water Transfer Permit;

001.01H Actions taken by the Department to revoke an approval to operate a dam under the provisions of *Neb. Rev. Stat.* § 46-1660(3);

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CHAPTER 7 — CONTESTED CASES

001.01I Actions taken by the Department under the provisions of *Neb. Rev. Stat.* §§ 46-1650 and 46-1667(1) to determine whether a person is violating the Safety of Dams and Reservoirs Act;

001.01J Actions taken by the Department under the provisions of *Neb. Rev. Stat.* §§ 46-1650 and 46-1667(2) relative to the construction, reconstruction, enlargement, alteration, breaching, removal, or abandonment of a dam without having first obtained the required approval;

001.01K Actions taken by the Department under the provisions of *Neb. Rev. Stat.* § 46-1670(3) requiring a person to file an application for approval of an existing dam;

001.01L Actions taken by the Department under the provisions of *Neb. Rev. Stat.* § 46-1670(6) to stop impoundment when the Department finds an existing dam is not safe to impound;

001.02 Application includes, but is not limited to, the following:

001.02A Application for Recognition of Incidental Underground Water Storage under the provision of *Neb. Rev. Stat.* § 46-226.01;

001.02B Application for a Permit to Appropriate Water under the provision of *Neb. Rev. Stat.* § 46-233 or § 46-259;

001.02C Application for a Permit to Appropriate Water for Induced Ground Water Recharge under the provisions of *Neb. Rev. Stat.* § 46-233;

001.02D Application for a Permit for Intentional Underground Water Storage and Recovery under the provisions of *Neb. Rev. Stat.* § 46-233, § 46-240, § 46-241, § 46-242, or § 46-297;

001.02E Application for a Permit to Appropriate Water for Use in Another State under the provisions of *Neb. Rev. Stat.* § 46-233.01;

001.02F Application to Transfer the Priority Dates Among Water Wells Under and Induced Groundwater Recharge Permit under the provisions of *Neb. Rev. Stat.* § 46-235.04;

001.02G Application for an Appropriation from Natural Lakes and Reservoirs under the provisions of *Neb. Rev. Stat.* § 46-240;

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CHAPTER 7 -- CONTESTED CASES

001.02H Application for Additional Water under the provisions of Neb. Rev. Stat. § 46-240.01;

001.02I Application for a Permit to Impound under the provisions of Neb. Rev. Stat. § 46-241;

001.02J Application for a Permit to Appropriate Stored Water under the provisions of Neb. Rev. Stat. § 46-242;

001.02K Application to Conduct Water in a Channel of a Stream under the provisions of Neb. Rev. Stat. § 46-252;

001.02L Application for Approval of Plans and Specifications under the provisions of Neb. Rev. Stat. § 46-258;

001.02M Application for an Interbasin Transfer under the provisions of Neb. Rev. Stat. § 46-289;

001.02N Application for an Intrabasin Transfer under the provisions of Neb. Rev. Stat. § 46-290;

001.02O Application for Renewal of a Temporary Transfer under the provisions of Neb. Rev. Stat. § 46-294.02;

001.02P Application to Levy Fees Relative to Intentional Underground Water Storage under the provisions of Neb. Rev. Stat. § 46-2,101;

001.02Q Application for a Permit to Appropriate Water for Instream Flows under the provisions of Neb. Rev. Stat. § 46-2,110;

001.02R Application for Transfer and Map under the provisions of Neb. Rev. Stat. § 46-2,122;

001.02S Application to Drain a Natural Lake under the provisions of Neb. Rev. Stat. §§ 46-801 to 46-807;

001.02T Application for a Special Permit to Waive Groundwater Well Spacing under the provisions of Neb. Rev. Stat. § 46-610 or § 46-653;

001.02U Application for a Permit to Transfer Groundwater to Another State under the provisions of Neb. Rev. Stat. § 46-613.01

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001.02V Application for a Permit to Pump From a Groundwater Well Located Within 50 Feet of a Channel of a Stream for Purposes of Irrigation under the provisions of *Neb. Rev. Stat.* § 46-637;

001.02W Application for a Municipal and Rural Domestic Groundwater Transfer Permit under the provisions of *Neb. Rev. Stat.* § 46-639;

001.02X Application for a Permit to a Public Water Supplier to Store Excess, Unused and Unappropriated water for recharging Groundwater Reservoirs under the provisions of *Neb. Rev. Stat.* § 46-645;

001.02Y Application for an Industrial Groundwater Transfer Permit under the provisions of *Neb. Rev. Stat.* § 46-678;

001.02Z Application to Amend an Industrial Groundwater Transfer Permit under the provisions of *Neb. Rev. Stat.* § 46-683.01;

001.02AA Application for a Permit to Develop Geothermal Resources under the provisions of *Neb. Rev. Stat.* § 66-1105; and

001.02BB Application for Approval of Plans for Dams under the provisions of *Neb. Rev. Stat.* § 46-1654.

001.03 Complaint means an initial filing in the Department whereby a person sets out allegations of violation of statutes under the authorities of the Department and describes the relief requested. Complaints include, but are not limited to, allegations against the Department regarding violations of *Neb. Rev. Stat.* Chapter 46, Article 7. See also *Neb. Admin. Code* 454 Chapter 10, Public Hearings Regarding Integrated Water Management, Rule 002.04.

001.04 Contested case means a formal proceeding before the Department in which the legal rights, duties, or privileges of a specific party is required by law or constitutional right to be determined after a Department hearing. Hearings held under the provisions of Nebraska Statutes Chapter 46, Article 2; Chapter 46, Article 16; Chapter 46, Article 6 and *Neb. Rev. Stat.* § 61-206 are all contested case hearings. Public hearings required to be held by the Department under all provisions of the Nebraska Ground Water Management Act (Chapter 46, Article 7) are not contested case hearings.

001.05 Ex parte communication means an oral or written communication which is not on the record in a contested case with respect to which

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reasonable notice to all parties was not given. Ex parte communication shall not include:

001.05A Communications which do not pertain to the merits of a contested case;

001.05B Communications required for the disposition of ex parte matters as authorized by law;

001.05C Communications in a rulemaking proceeding; and

001.05D Communications to which all parties have given consent.

001.06 Hearing Officer means the person or persons designated by the Director to conduct a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.07 Interested Person means a person who or an entity which has a specific legally protectable interest in the applicability of a statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. An interested person is one who is or could be adversely affected in a legally cognizable way by the outcome of a proceeding.

001.08 Objection is a statement or statements presenting arguments in opposition to an action. Any objections filed in response to a notice given may or may not, at the discretion of the objector, include a request for hearing. If a request for hearing is filed with the objection, the objector will be responsible for paying a portion of the costs of the hearing. If an objection is filed without a request for hearing, and if a hearing will be held, then the objector will be given an opportunity to become a party to the hearing, and if the request is granted, then the objector will be responsible for paying a portion of the costs of the hearing. Objections and any accompanying requests for hearing shall be filed as described in:

001.08A Objection filed under the provisions of *Neb. Rev. Stat.* § 46-233(5);

001.08B Objection filed in response to a notice of application or petition;

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001.08C Objection and request for hearing filed under the provisions of *Neb. Rev. Stat. § 46-235.04*;

001.08D Objection and request for hearing filed under the provisions of *Neb. Rev. Stat. § 46-291(4)*;

001.08E Objection and request for hearing filed under the provisions of *Neb. Rev. Stat. § 46-2,114*;

001.08F Objection and request for hearing filed under the provisions of *Neb. Rev. Stat. § 46-640*;

001.08G Objection and request for hearing filed under the provisions of *Neb. Rev. Stat. § 46-680*;

001.09 Party means an interested person who is recognized by the Department as having standing in a contested case. A party is classified as:

001.09A Applicant: A person filing an application;

001.09B Objector: A person filing an objection to the granting of an application or petition;

001.09C Complainant: A person filing a complaint;

001.09D Defendant: A person against whom a complaint is filed;

001.09E Petitioner: A person filing a petition or seeking relief other than by complaint or application;

001.09F Respondent: A person designated in an investigative, adjudicative, or show cause proceeding;

001.09G Intervenor: A person permitted to intervene; and

001.09H Department Staff: Persons who appear in a proceeding by virtue of their Department employment.

001.10 Petition includes, but is not limited to, an application or a request for Department action filed as required under:

001.10A Petition for Extension of Time filed under the provisions of *Neb. Rev. Stat. § 46-238*;

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001.10B Petition for Changing the point of diversion or changing the line of any flume, ditch or aqueduct, or changing a storage site under the provisions of *Neb. Rev. Stat.* § 46-250;

001.10C Petition for hearing under the provisions of *Neb. Rev. Stat.* § 46-686.01;

001.10D Petition for Leave to File or Consider an Application filed under the provisions of Department rules 457 *Neb. Admin. Code* Chapter 23; and

001.10E Petition to reevaluate a basin, subbasin or reach under the provisions of *Neb. Rev. Stat.* § 46-713(2)(a).

001.11 Request for a hearing includes, but is not limited to:

001.11A Any request for hearing filed with any objection filed in response to a notice of application or petition;

001.11B Request for hearing filed with objection filed under the provisions of *Neb. Rev. Stat.* § 46-233(5);

001.11C Request for a hearing filed by an applicant aggrieved by the decision made under the provisions of *Neb. Rev. Stat.* § 46-235 in those instances where a hearing was not held before the final decision;

001.11D Request for hearing filed with objection under the provisions of *Neb. Rev. Stat.* § 46-235.04;

001.11E Requests for hearing filed under the provisions of *Neb. Rev. Stat.* § 46-238(2);

001.11F Requests for hearing filed with objections filed under the provisions of *Neb. Rev. Stat.* § 46-291(4);

001.11G Requests for hearing filed with objections under the provisions of *Neb. Rev. Stat.* § 46-2,114;

001.11H Requests for hearing filed with objection under the provisions of *Neb. Rev. Stat.* § 46-640;

001.11I Requests for hearing filed with objection under the provisions of *Neb. Rev. Stat.* § 46-680;

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001.11J Requests for hearing made under the provisions of *Neb. Rev. Stat. § 46-684*;

001.11K Requests for hearing made under the provisions of *Neb. Rev. Stat. § 46-691(2)*; and

001.11L Requests for hearing made at the request of any party to the proceeding under the provisions of *Neb. Rev. Stat. § 61-206* if a final decision is made without a hearing.

001.12 Response to a Department order includes, but is not limited to:

001.12A Notice of contests under the provisions of *Neb. Rev. Stat. § 46-229.02*; and

001.12B Response filed under the provisions of *Neb. Rev. Stat. § 46-1667*.

002 Commencement of a contested case.

002.01 A contested case begins with the timely filing of a:

002.01A Formal objection to an application; or

002.01B Formal objection to a petition; or

002.01C Formal objection to a transfer made under the provisions of *Neb. Rev. Stat. § 46-678.01*; or

002.01D A notice by the Department that a hearing will be held on the Director's own motion regarding an application or petition; or

002.01E Request for a hearing by an applicant aggrieved by a decision made under the provisions of *Neb. Rev. Stat. § 46-235* in those instances where a hearing was not held before the final decision; or

002.01F Request for a hearing on any Department order that is a final decision when the decision was made without a contested case hearing and the petition is filed by a party to the proceeding; or

002.01G Formal complaint regarding violations under the authorities of the Department; or

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002.01H An investigative, adjudicative or show cause order issued by the Director under the authorities of the Department; or

002.01I Petition for a hearing from a natural resources district under the provisions of Neb. Rev. Stat. § 46-691.

003 A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law. Any attorney that is not admitted into practice in Nebraska must be associated with an attorney admitted in this state as allowed by state statutes.

004 Pleadings. The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Department. Any pleading filed in a contested case shall meet the following requirements:

004.01 The pleading shall contain a heading specifying the name of the Department and the title or nature of the pleading, shall state material factual allegations and state concisely the action the Department is being requested to take, shall contain the name and address of the Petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, shall be signed by that attorney;

004.02 Attorneys shall also include their address, telephone number and bar association number;

004.03 The initial petition shall also contain the name and address of the Respondent;

004.04 All pleadings shall be made on white, letter-sized (8½" x 11") paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink;

004.05 All pleadings must be filed with the Department at its official office; and

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004.06 All pleadings subsequent to the commencement of the contested case shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the Department at the time of the filing of the pleading.

005 The Director may, prior to serving a complaint or objection as described in 006 of this rule, dismiss a complaint or objection without holding a hearing when it is found there is a lack of jurisdiction or of authority to grant the relief requested.

006 The Department shall serve a copy of the objection or complaint on each Applicant, Petitioner or Defendant listed in the pleading personally or by first-class or certified mail. Written proof of such service shall be filed with the Department. Each Applicant or Defendant who chooses to file a responsive pleading must do so within 30 days from the date of personal service or the date of Department mailing of the objection or complaint.

007 A hearing date shall be set by the Department in accordance with statutory requirements. A written notice of the date, time and place of hearing and the name of the Hearing Officer, if known, shall be served by the Department upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice shall include a proof of such service and shall be filed with the Department.

008 Intervention in a proceeding.

008.01 Intervention in a proceeding shall be allowed when the following requirements are met:

008.01A A petition for intervention is filed with the Department at least five days before the hearing. Copies must be served by the Petitioner for intervention to all parties named in the Hearing Officer's notice of the hearing and any other parties that subsequently joined the proceeding;

008.01B The petition for intervention states facts demonstrating that the Petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the Petitioner qualifies as an Intervenor under any provision of law; and

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008.01C The Hearing Officer or designee determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

008.02 The Hearing Officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

008.03 If a Petitioner qualifies for intervention, the Hearing Officer or designee may impose conditions upon the Intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

008.03A Limiting the Intervenor's participation to designated issues in which the Intervenor has a particular interest demonstrated either by the petition or otherwise;

008.03B Limiting the Intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

008.03C Requiring two or more Intervenors to combine their presentation of evidence and/or argument, cross-examination, discovery, and/or other participation in the proceedings.

008.04 The Hearing Officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

008.04A The Hearing Officer or designee may modify the order at any time, stating the reasons for the modification.

008.04B The Hearing Officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the Petitioner for intervention and to all parties.

009 Hearing Officer; criteria.

009.01 The Department may delegate to a Hearing Officer the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the Director.

009.02 A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve

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as Hearing Officer or assist or advise a Hearing Officer in the same proceeding except as provided in subsection 009.04.

009.03 A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as Hearing Officer or advise a Hearing Officer in the same proceeding except as provided in subsection 009.04.

009.04 If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a Hearing Officer in the preparation of orders.

009.05 A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

009.06 A person may serve as Hearing Officer at successive stages of the same contested case.

010 Prehearing Procedures.

010.01 Prehearing conferences and orders. At the discretion of the Hearing Officer or upon the request of any party, a prehearing conference may be held. All requests for a prehearing conference must be filed at least five days prior to any scheduled hearing. If a prehearing conference is not held, a Hearing Officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

010.02 If a prehearing conference is conducted:

010.02A The Hearing Officer shall promptly notify the Department of the determination that a prehearing conference will be conducted. The Department may assign another Hearing Officer for the prehearing conference; and

010.02B The Hearing Officer for the prehearing conference shall set the date, time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The notice shall be given to other persons entitled to notice.

010.02C The notice referred to in subsection 010.02B shall include the following:

010.02C1 The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;

010.02C2 The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Department;

010.02C3 The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

010.02C4 A statement of the date, time, place and nature of the prehearing conference;

010.02C5 A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

010.02C6 The name, official title, mailing address, and telephone number of the Hearing Officer for the prehearing conference;

010.02C7 A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act and these rules; and

010.02C8 Any other matters that the Hearing Officer considers desirable to expedite or otherwise improve the proceedings.

010.03 The Hearing Officer may conduct a prehearing conference to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination,

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rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. If a prehearing conference is conducted, the Hearing Officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

010.04 The Hearing Officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

011 Discovery in contested cases.

011.01 The Hearing Officer or a designee, at the request of any party or upon the Hearing Officer's own motion, may issue subpoenas, discovery orders, and protective orders utilizing the Nebraska Supreme Court rules except as may otherwise be prescribed by law. To the extent authorized by law, subpoenas and orders issued under this subsection may be enforced by the district court.

011.02 Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

011.02A Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

011.02B State the reasons supporting the motion;

011.02C Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

011.02D Be filed with the Department. The moving party must serve copies of all such motions to all parties to the contested case.

011.03 Other than is provided in subsection 011.02 above, discovery materials need not be filed with the Department.

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012 Continuances. The Hearing Officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the Hearing Officer's own motion or upon the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

012.01 Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

012.01A Illness of the party, legal counsel or witness;

012.01B A change in legal representation; or

012.01C Settlement negotiations are underway.

013 Amendments.

013.01 A petition, objection, or complaint may be amended at any time before an answer or response is filed or is due if notice is given to all the other parties to the proceeding or their attorneys. In all other cases, a petitioner, objector, or complainant must request the Hearing Officer's or in the case of no Hearing Officer, the Director's permission to amend.

013.02 A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleading was filed. A Hearing Officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

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014 Conducting a contested case hearing.

014.01 Order of Hearing. At the discretion of the Hearing Officer, the hearing may be conducted in the following order:

014.01A The hearing is called to order by the Hearing Officer. Each party shall thereafter enter his/her/its appearance. Any preliminary motions, stipulations or agreed upon orders may then be raised and/or resolved.

014.01B Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

014.01C Presentation of evidence.

014.01C1 Evidence will be received in the following order:

014.01C1a First:

(A) For cases commenced under the provisions of 002.01A or 002.01C of this rule, evidence is presented by the Applicant;

(B) For cases commenced under the provisions of 002.01B, 002.01D, or 002.01E of this rule, evidence is presented by the Petitioner;

(C) For cases commenced under the provisions of 002.01F of this rule, evidence is presented by the Complainant;

(D) For cases commenced under the provisions of 002.01G or 002.01H of this rule, evidence is presented by the Department.

014.01C1b Second:

(A) For cases filed under 002.01A and 002.01B of this rule, evidence is presented by the Objector;

(B) For cases filed under 002.01C of this rule, evidence is presented by any Objector and/or the Department;

(C) For cases filed under 002.01D of this rule, evidence is presented by the Department;

(D) For cases filed under 002.01E of this rule, evidence is presented by any respondent and/or the Department;

(E) For cases filed under 002.01F of this rule, evidence is presented by the respondent and/or the Department;

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(F) For cases filed under 002.01G or 002.01H of this rule, evidence is presented by the respondent.

014.01C1c Rebuttal evidence, if any, is presented in the same order as specified in 014.01C1a above; and

014.01C1d Surrebuttal evidence is presented as described in 014.01c1(b) above.

014.01C2 With regard to each witness who testifies, the following examination may be conducted:

014.01C2a Direct examination conducted by the party who calls the witness;

014.01C2b Cross-examination by any opposing parties;

014.01C2c Redirect examination by the party who called the witness; and

014.01C2d Recross-examination by any opposing parties.

014.01C2e The Hearing Officer may question a witness at any time, and shall give an opportunity for redirect and recross after any such questioning.

014.01D After the evidence is presented, each party may have the opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The Hearing Officer may request that the parties submit briefs in lieu of closing arguments, and parties may request that they be allowed to submit briefs in lieu of closing arguments. The hearing officer shall determine, based upon the issues raised prior to and/or during the hearing, whether briefs are to be submitted simultaneously or their sequence and timing. Any issue not raised prior to or during the hearing is waived and shall not be considered subsequent to the hearing unless allowed by the Department.

014.02 Evidence.

014.02A In contested cases the Director or Hearing Officer may admit and give probative effect to evidence which possesses

probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

014.02B Any party to a contested case hearing before the Department, may request that the Department be bound by the rules of evidence applicable in district court by delivering to the Department at least three days prior to the holding of the hearing a written request. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services.

014.02C Documentary evidence may be received in the form of copies or excerpts.

014.02D All evidence including records and documents in the possession of the Department of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than what is in the record shall be considered in the determination of the case.

014.02E A Hearing Officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

014.02F The Department will abide by the privileges recognized by law.

014.02G The Department may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules adopted and promulgated by it.

014.02G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

014.02G2 Parties shall be afforded an opportunity to contest facts so noticed.

014.02G3 The record shall contain a written record of everything officially noticed.

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014.02H The Department may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

014.03 Conducting the hearing by electronic means. The Hearing Officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

014.04 Official record.

014.04A The Department shall prepare an official record and transcript (also known as the Bill of Exceptions), which shall include testimony and exhibits, in each contested case.

014.04B The Department shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

014.04C The Department record shall consist of the following:

014.04C1 Notices of all proceedings;

014.04C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department pertaining to the contested case;

014.04C3 The record of the hearing before the Department, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Department during the proceeding, and all proffers of proof and objections and rulings thereon; and

014.04C4 The final order.

014.04D Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Department record shall constitute the exclusive basis for Department action in contested cases under the Act and for judicial review thereof.

014.05 Costs. If a hearing is held at the request of one or more parties, each such requesting party and each person who requests to be made a party will pay their proportional share of the cost of such transcript.

015 Prohibitions against ex parte communications.

015.01 Prohibitions; when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given.

015.02 Prohibitions; to whom applicable.

015.02A Parties and public. No party in a contested case or other person outside the Department having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the Hearing Officer or to the Director or any employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

015.02B Persons in decision making roles. No Hearing Officer or the Director or any employee who is or may reasonably be expected to be involved in the decision making process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the Department having an interest in the contested case.

015.02C Investigators. Any employee engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a Hearing Officer or the Director or any employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

015.03 Disclosure of contacts. The Hearing Officer, the Director and any employee who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

015.03A A copy of any such written communications;

015.03B Memoranda stating the substance of any such oral communications; and

015.03C All written responses and memoranda stating the substance of any oral responses to the ex parte communications.

015.03D The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the

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filing, with an opportunity to respond, shall be given to all parties of record.

015.03E Filing and notice of filing provided under subsection 016.03D shall be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

016 Decision and order in a contested case.

016.01 Disposition. Unless otherwise precluded by law, disposition of a contested case may be made by stipulation, agreed settlement, consent order, or default. The Director shall make a determination whether the stipulation, agreed settlement, or consent order constitute sufficient cause to dismiss the case or whether the default of a party should cause dismissal of the action.

016.02 Every decision or order adverse to a party to the proceeding, rendered by the Department in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

016.03 The decision and order should include:

016.03A The name of the Department and caption of the proceeding;

016.03B The date, time and place of the hearing;

016.03C The names of all parties or their attorneys or other authorized representation who entered an appearance at the hearing;

016.03D The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

016.03E The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

016.03F The order consisting of the action taken by the Department as a result of the facts found and the legal conclusions arising therefrom.

016.04 Parties to the proceeding shall be notified of the decision and order. A copy of the decision and order and accompanying findings and

conclusions shall be delivered or mailed to each party or his or her attorney or other authorized representative of record.

017 Rehearing and Appeals.

017.01 Petition for Rehearing. Any party aggrieved by any final order issued at or after the conclusion of a hearing, may, within thirty days after receipt of such decision, file with the Department a petition for rehearing. The petition shall set forth the grounds relied upon for requesting a rehearing.

017.01A Review. The Director shall review the petition and may deny the petition if it is without sufficient merit. If sufficient grounds are established, the Director or Department shall grant a rehearing. Such rehearing shall be conducted pursuant to this Chapter.

017.01B Effect on Appeal Procedure. Parties should not assume that filing a request for rehearing extends the deadline for appeal to the Court of Appeals or other applicable court.

017.02 Appeal shall be made under the applicable statutes.

NEBRASKA ADMINISTRATIVE CODE

Title 454 - DEPARTMENT OF NATURAL RESOURCES  
RULES OF PRACTICE AND PROCEDURE

LAST ISSUE DATE:

Chapter 9 - PROCEEDINGS

001 Definitions: The following definitions shall apply:

001.01 Proceeding shall mean the form and manner of conducting business before the Department. Types of proceedings include:

001.01A Informal proceeding shall mean any business conducted other than through a formal proceeding or a ministerial proceeding.

001.01B Formal proceedings shall include, but not be limited to, business conducted under the provisions of:

001.01B1 Chapter 4 of these rules, Negotiated Rule Making;

001.01B2 Chapter 5 of these rules, Petitioning for Rulemaking;

001.01B3 Chapter 6 of these rules, Declaratory Orders;

001.01B4 Chapter 7 of these rules, Contested Cases;

001.01B5 Rulemaking hearings held under the provisions of the Nebraska Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-909;

001.01B6 Chapter 10 of these rules, Public Hearings;

001.01B7 Public meetings held under the provisions of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414;  
or

001.01B8 Any application or petition filed pursuant to the Department's jurisdiction.

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001.01C Ministerial proceedings shall mean the action of the Department performed in a prescribed manner under certain authorities of the Department based upon a given state of facts. Ministerial actions include, but are not limited to the following:

001.01C1 Administration of surface water based upon first in time is first in right, *Neb. Rev. Stat. § 46-203* and distribution of water in accordance with the rights of priority, *Neb. Rev. Stat. § 61-216*;

001.01C2 Administration of surface water for a riparian water right that has been recognized in a court order, *Neb. Rev. Stat. § 46-226*;

001.01C3 Administration of surface water to pass inflow through a reservoir when needed for livestock, *Neb. Rev. Stat. § 46-241(5)*;

001.01C4 Administration of surface water when a person takes water without authority, *Neb. Rev. Stat. § 46-254*;

001.01C5 Administration of surface water for failure to install a measuring device, *Neb. Rev. Stat. § 46-256*;

001.01C6 Denying the right to divert surface water if an acreage report is required, or map transfer information is required, or a gage is to be installed or a report is required and an appropriator does not comply, *Neb. Rev. Stat. § 46-261*; or

001.01C7 Administration of a surface water appropriation because of overflow on roads as described under *Neb. Rev. Stat. § 46-266*.

002 Informal Proceedings. The Department may accept informal complaints, objections or informal requests for adjudicative or investigative actions by the Department unless there is a formal proceeding before the Department on the same matter. The Department may investigate such complaints or requests and depending upon the facts determined by such investigation, may proceed either in an informal, formal or ministerial manner, at the discretion of the Director.

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003 Formal Proceedings. The Department will take formal action on:

003.01 Any application or petition filed pursuant to the Department's jurisdiction;

003.02 A formal complaint which may be filed by any interested person against any person or entity subject to the jurisdiction of the Department, including the Department; or

003.03 An investigative, adjudicative, or show cause order or notice issued by the Department.

004 Ministerial Proceedings. Ministerial proceedings are initiated by the Department in a timely manner based upon a set of facts known to or determined by the Department. Persons who believe they are harmed by the ministerial actions of the Department, and believe that the facts used and/or determined by the Department are an incorrect set of facts or an incomplete set of facts, may file a complaint in the Department under Chapter 7 of these rules. Filing a complaint does not stay the action of the Department.

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Chapter 10 - PUBLIC HEARINGS REGARDING INTEGRATED WATER MANAGEMENT

001 Definitions.

001.01 Interested person means a person who or an entity which has a specific interest in the applicability of a statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. An interested person is one who is or could be adversely affected in a legally cognizable way by the outcome of a proceeding.

001.02 Public hearing shall include, but not be limited to, hearings held for the purpose of soliciting public comment under the provisions of:

001.02A Neb. Rev. Stat. § 46-713(2)(b), Department's preliminary change in the determination based upon a reevaluation that a basin, subbasin, or reach is or is not fully appropriated or overappropriated;

001.02B Neb. Rev. Stat. § 46-714(4), Department's preliminary determination that a basin, subbasin, or reach is fully appropriated;

001.02C Neb. Rev. Stat. § 46-715(5)(a), basin-wide integrated management plans for overappropriated area held in coordination with applicable natural resources districts; and

001.02D Neb. Rev. Stat. § 46-718(1), integrated management plan held in coordination with applicable natural resources districts.

002 Process.

002.01 Notice. Notice of the hearings held under Neb. Rev. Stat. §§ 46-713(2)(b) and 46-714(4) shall be given in accordance with Neb. Rev. Stat. § 46-714(1). Notice of the hearings held under the provisions of Neb. Rev. Stat. §§ 46-715(5)(a) and 46-718(1) shall be given in accordance with Neb. Rev. Stat. § 46-743. At the time notice

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is given, copies of the documents that are the subject of the hearing shall be available on the Department's website.

002.02 Hearing.

002.02A Public hearings held under the provisions of *Neb. Rev. Stat.* §§ 46-713(2)(b) and 46-714(4).

001.02A1 A hearing officer will be appointed by the Director.

001.02A2 The hearing shall be recorded and transcribed by a court reporter. Documentary evidence presented at the hearing shall be marked as an exhibit and made a part of the record by the court reporter.

001.02A3 Any interested person may appear and present written or oral information concerning the appropriation status of the river basin, subbasin, or reach. Testimony and evidence must be relevant to the issues regarding:

001.02A3a Whether current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural-flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws;

002.02A3b The appropriation status of the river basin, subbasin or reach;

002.02A3c The Department's preliminary conclusions about the extent of the area within which the surface water and ground water supplies for the river basin,

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subbasin, or reach are determined to be hydrologically connected.

002.02B Public Hearings held under the provisions of Neb. Rev. Stat. §§ 46-715(5)(a) and 46-718(1).

002.02B1 A hearing officer will be appointed by the Director and the applicable natural resources district(s).

002.02B2 The hearing shall be recorded and transcribed by a court reporter. Documentary evidence presented shall be marked as an exhibit and retained by the court reporter.

002.02B3 Any interested person may appear and present written or oral information relevant to the issues being considered.

002.03 Final Decisions. Final decisions shall be in writing, shall be issued in accordance with the controlling statutes, and will be published on the Department's web site.

002.04 Request for a Contested Case Hearing. Any interested person may file a request for a contested case hearing as described in Chapter 7 of these rules within 30 days following the final decision. See Chapter 7.001.03.

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Chapter 12 - IRRIGATION DISTRICTS

001 MAPS. Irrigation Districts shall provide maps to the Department showing district boundaries as follows:

001.01 When filing a petition for formation of an irrigation district, the map shall be submitted as described in *Neb. Rev. Stat. § 46-104*. The map shall be made with black ink on mylar or tracing cloth; shall be neat, legible; and the map dimensions shall not exceed 22 inches by 27 inches. The name of the proposed district shall be printed on the front page of the map. Each page of the map shall be numbered consecutively showing the total number of pages [Page 1 of \_\_\_, Page 2 of \_\_\_]. Sections shall be divided into 40-acre government subdivisions.

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Chapter 14 - PUBLIC RECORDS AVAILABILITY

001 Any person may examine public records maintained by the Department during the Department's business hours, make memoranda or abstracts from such records, or copies of such records, upon written request to the records manager of the Department for an appointment to view such records at its Lincoln office.

001.01 The request letter and its envelope should be marked "Records Request" and include the name, mailing address and day-time telephone number in the event the Department needs to contact the person.

001.02 The request should reasonably describe the records being sought and, whenever possible, include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. The Department does not conduct research to determine what records to provide.

001.03 If the request does not sufficiently describe the records to allow the Department to locate them, the Department may require additional information be provided.

001.04 A written request for copies of records shall be considered an agreement that the person requesting the copies will pay all applicable fees up to fifty dollars (\$50). Copies the cost of which are anticipated to exceed fifty dollars are subject to 003.02.

001.05 Records shall not be removed from the Department premises.

001.06 The Department will not provide copies of materials that are subject to copyright law or subject to Neb. Rev. Stat. 84-712-05.

002 Upon receipt of a written request for access to or copies of a public record, the Department will provide the requested record(s) for examination or copies as soon as practicable but no later than four business days after the written request is received except as provided in 002.01.

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002.01 If the entire request cannot reasonably be fulfilled within four business days due to the significant difficulty or extensiveness of the request, the Department will notify the requestor in writing of the reasons for the delay, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requestor to modify or prioritize the items within the request.

003 Costs. Any person requesting photographic or other copies of public records must pay for the cost of reproduction in an amount determined by the Department to cover the actual cost of making the copies available.

003.01 Charges for postage, if necessary, shall be assessed on all requests.

003.02 If the cost of copies is estimated by the Department's records manager to cost more than fifty dollars (\$50), the Department will require the requestor to furnish the full cost prior to fulfilling the request.

004 The Department will provide a certified copy of the public records upon receipt of a written request and on payment of the applicable fees, including:

004.01 The cost of copies under 003.

004.02 A fee of one dollar shall be charged for each certificate of the certifying officer.

004.03 Transcripts and other documents prepared and transcribed by a court reporter may be viewed but not copied. Arrangements for reproduction may be made with the court reporter.

005 The Department may withhold records in accordance with applicable law. Any reasonably segregatable public portion of such record shall be provided upon request after deletion of the portions which may be withheld.

005.01 Any person denied a request for public records by the director or his or her designee shall receive a written response in accordance with Neb. Rev. Stat. § 84-712.04.

005.02 Any person denied a request for public records may seek review in accordance with Neb. Rev. Stat. § 84-712.03.

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Chapter 15 - CONFIDENTIALITY FOR TRADE SECRETS

001 Whenever the Department requests that an entity furnish records or information which may be entitled to confidential treatment as trade secrets under Neb. Rev. Stat. §84-712.05, the entity may raise a claim of confidentiality for trade secrets at the time of submission of the record or information to the Department.

001.01 If no claim of confidentiality for trade secrets accompanies the record or information when it is received by the Department, the claim is waived and the material may be made available to the public by the Department without further notice to the submitting entity, unless the claimant establishes a just reason for the claim subsequent to submission of the record or information under 002.

001.02 The claimant shall certify the record or information by placing on or attaching at the time of submission a cover sheet with appropriate notice, reasons for asserting the claim, and language, such as trade secret, proprietary, or confidential.

001.03 The appropriate notice and reasons for asserting the claim shall include:

001.03A Certification that the record or information is entitled to confidentiality as a trade secret and that such claim has not expired by its terms, been waived, or withdrawn;

001.03B Description of reasonable measures the claimant has taken to protect the confidentiality of the information or record, and that it intends to continue to take such measures;

001.03C Assurance that the information or record is not, and has not been, reasonably obtainable without the claimant's consent by other persons (other than governmental bodies) by use of legitimate means; and

001.03D Reasons why or how disclosure of the information or record is likely to result in substantial harmful effects to the

business's competitive position and what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

001.04 Allegedly confidential portions of otherwise non-confidential records and information should be clearly identified by the claimant and may be submitted separately to facilitate identification and handling by the Department. The Department may require the claimant to submit a separate copy of the record and information with the confidential portions omitted to facilitate requests for access by the public.

001.05 If the entity desires confidential treatment only until a certain date or the occurrence of a certain event, the notice should so state.

002 If a confidentiality claim for trade secrets covering the record or information is received after the submission of the record or information itself is received, the Department will make such efforts as are administratively practicable to associate the late claim with copies of the previously submitted information in the Department files, although the Department cannot assure that such efforts will be effective given the possibility of prior disclosure to the public.

003 For each claim the director or his or her designee shall determine whether the record or information relates to processes or methods entitled to protection as trade secrets.

003.01 In making such determination which shall be in writing, the Director shall consider whether:

003.01A The claimant has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

003.01B The claimant has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information or record, and that it intends to continue to take such measures;

003.01C The information or record is not, and has not been, reasonably obtainable without the business' consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

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003.01D No statute specifically requires disclosure of the information or record; and

003.01E The claimant has satisfactorily shown that disclosure of the information or record is likely to cause substantial harm to the business's competitive position.

004 Whenever the director or his or her designee preliminarily determines that records or information required to be submitted to the Department are not entitled to confidential treatment as trade secrets, a written explanation of the reasons for such determination shall be furnished to the claimant, who shall be afforded an opportunity to comment before a final decision is made.

004.01 Notice of such determination shall be sent by certified mail to the claimant specifying a reasonable time allowed for comments.

004.02 Failure to furnish timely comments shall be considered a waiver of the claim.

005 Notice of the final decision denying a claim for confidential treatment of records or information as trade secrets shall be provided to the claimant in writing by certified mail. The Department will make the record or information available to the public on the tenth day after the date of the claimant's receipt of the written notice of denial of its claim.

006 The director may not withhold records as confidential if they have been disclosed in an open court, open administrative proceeding, open meeting or disclosed by the department in its duties.