arrested, as provided in the Act of February 6, 1905 (33 Stat. 700) any person or persons who appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under the supervision of the Secretaries of Agriculture, Army, and Interior, respectively.

§ 3.16 Seizure.

Any object of antiquity taken, or collection made, on lands owned or controlled by the United States, without a permit, as prescribed by the act and this part, or there taken or made, contrary to the terms of the permit, or contrary to the act and this part, may be seized wherever found and at any time, by the proper field officer or by any person duly authorized by the Secretary having jurisdiction, and disposed of as the Secretary shall determine, by deposit in the proper national depository or otherwise.

§ 3.17 Preservation of collection.

Every collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

NOTE TO §3.17: Regulations concerning curation of federally owned or administered archeological collections are found in 36 CFR part 79. Objects excavated under the Antiquities Act may be eligible for disposal under subpart E of 36 CFR part 79.

[19 FR 8838, Dec. 23, 1954, as amended at 87 FR 22462, Apr. 15, 2022]

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

Subpart A—General; Office of Hearings and Appeals

Subpart B—General Rules Relating to Procedures and Practice

Subpart C [Reserved]

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AUTHORITY: 5 U.S.C. 301, 503–504; 25 U.S.C. 9, 372–74, 410, 2201 *et seq.*; 43 U.S.C. 1201, 1457; Pub. L. 99–264, 100 Stat. 61, as amended.

SOURCE: 36 FR 7186, Apr. 15, 1971, unless otherwise noted.

Subpart A—General; Office of Hearings and Appeals

§4.1 Scope of authority; applicable regulations.

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. The Office may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary. Principal components of the Office include:

(a) One or more Hearings Divisions consisting of administrative law judges who are authorized to conduct hearings in cases required by law to be conducted under 5 U.S.C. 554, and other deciding officials who are authorized to conduct hearings in cases arising under statutes and regulations of the Department; and

(b) Appeals Boards, shown below, with administrative jurisdiction and special procedural rules as indicated. General rules applicable to all types of proceedings are set forth in subpart B of this part. Therefore, for information as to applicable rules, reference should be made to the special rules in the subpart relating to the particular type of proceeding, as indicated, and to the general rules in subpart B of this part. Wherever there is any conflict between one of the general rules in subpart B of this part and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern. Reference should be made also to the governing laws, substantive regulations and policies of the Department relating to the proceeding. In addition, reference should be made to part 1 of this subtitle which regulates practice before the Department of the Interior.

(1) *Board of Indian Appeals.* The Board decides finally for the Department appeals to the head of the Department pertaining to:

(i) Administrative actions of officials of the Bureau of Indian Affairs, issued

under 25 CFR chapter I, except as limited in 25 CFR chapter I or §4.330 of this part, and

(ii) Decisions and orders of administrative law judges and Indian probate judges in Indian probate matters, other than those involving estates of the Five Civilized Tribes of Indians. The Board also decides such other matters pertaining to Indians as are referred to it by the Secretary, the Director of the Office of Hearings and Appeals, or the Assistant Secretary-Indian Affairs for exercise of review authority of the Secretary. Special regulations applicable to proceedings before the Board are contained in subpart D of this part.

(2) *Board of Land Appeals.* The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to: (i) The use and disposition of public lands and their resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended; (ii) the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977. Special procedures for hearings, appeals and contests in public land cases are contained in subpart E of this part; special procedures for hearings and appeals under the Surface Mining Control and Reclamation Act of 1977 are contained in subpart L of this part.

(3) *Ad Hoc Board of Appeals.* Appeals to the head of the Department which do not lie within the appellate review jurisdiction of an established Appeals Board and which are not specifically excepted in the general delegation of authority to the Director may be considered and ruled upon by the Director or by Ad Hoc Boards of Appeals appointed by the Director to consider the particular appeals and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the issues. Jurisdiction of the Boards would include, but not be limited to, the appellate and review authority of the Secretary referred to in parts 13, 21, and 230 of this title, and in 36 CFR parts 8 and 20. Special regulations applicable to proceedings in such cases are contained in subpart G of this part.

(Sec. 525, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275, and sec. 301, Administrative Procedure Act, 5 U.S.C. 301)

[36 FR 7186, Apr. 15, 1971, as amended at 40 FR 33172, Aug. 6, 1975; 47 FR 26392, June 18, 1982; 49 FR 7565, Mar. 1, 1984; 54 FR 6485, Feb. 10, 1989; 61 FR 47434, Sept. 9, 1996; 61 FR 49976, Sept. 24, 1996; 75 FR 64663, Oct. 20, 2010]

§ 4.2 Membership of appeals boards; decisions, functions of Chief Judges.

(a) The Appeals Boards consist of regular members, who are hereby designated Administrative Judges, one of whom is designated as Chief Administrative Judge, the Director as an ex officio member, and alternate members who may serve, when necessary, in place of or in addition to regular members. The Chief Administrative Judge of an Appeals Board may direct that an appeal may be decided by a panel of any two Administrative Judges of the Board, but if they are unable to agree upon a decision, the Chief Administrative Judge may assign one or more additional Administrative Judges of the Board to consider the appeal. The concurrence of a majority of the Board Administrative Judges who consider an appeal shall be sufficient for a decision.

(b) Decisions of the Board must be in writing and signed by not less than a majority of the Administrative Judges who considered the appeal. The Director, being an ex officio member, may participate in the consideration of any appeal and sign the resulting decision.

(c) The Chief Administrative Judge of an Appeals Board shall be responsible for the internal management and administration of the Board, and the Chief Administrative Judge is authorized to act on behalf of the Board in conducting correspondence and in carrying out such other duties as may be necessary in the conduct of routine business of the Board.

[39 FR 7931, Mar. 1, 1974]

§4.3 Representation before appeals boards.

(a) *Appearances generally*. Representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals is governed by Part 1 of this subtitle, which regulates practice before the Department of the Interior.

(b) *Representation of the Government*. Department counsel designated by the Solicitor of the Department to represent agencies, bureaus, and offices of the Department of the Interior in proceedings before the Office of Hearings and Appeals, and Government counsel for other agencies, bureaus or offices of the Federal Government involved in any proceeding before the Office of Hearings and Appeals, shall represent the Government agency in the same manner as a private advocate represents a client.

(c) *Appearances as amicus curiae*. Any person desiring to appear as amicus curiae in any proceeding shall make timely request stating the grounds for such request. Permission to appear, if granted, will be for such purposes as established by the Director or the Appeals Board in the proceeding.

§4.4 Public records; locations of field offices.

Part 2 of this subtitle prescribes the rules governing availability of the public records of the Office of Hearings and Appeals. Contact information for offices referenced in part 4 is available in the OHA Standing Orders on Contact Information on the Department of the Interior OHA website.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5792, Jan. 30, 2023]

§4.5 Power of the Secretary and Director.

(a) *Secretary*. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon the Secretary by law. The authority reserved to the Secretary includes, but is not limited to:

(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, and render the final decision in the matter after holding such hearing as may be required by law; and

(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision.

(b) Pursuant to his delegated authority from the Secretary, the Director may assume jurisdiction of any case before any board of the Office or review any decision of any board of the Office or direct reconsideration of any decision by any board of the Office. The Director may issue Standing Orders to convey current information to parties and the public. This includes, but is not limited to, the OHA Standing Orders on Contact Information and the OHA Standing Orders on Electronic Transmission to convey information related to electronic transmission, including filing and service. OHA Standing Orders may be issued related to emergency or other contingency. OHA Standing Orders are available on the Department of the Interior OHA website.

(c) *Exercise of reserved power*. If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued.

[50 FR 43705, Oct. 29, 1985, as amended at 52 FR 46355, Dec. 7, 1987; 52 FR 47097, Dec. 11, 1987; 88 FR 5792, Jan. 30, 2023]

Subpart B—General Rules Relating to Procedures and Practice

§4.20 Purpose.

In the interest of establishing and maintaining uniformity to the extent feasible, this subpart sets forth general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals.

§4.21 General provisions.

(a) *Effect of decision pending appeal*. Except as otherwise provided by law or other pertinent regulation:

(1) A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately;

(2) A decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal;

(3) A decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section.

(b) *Standards and procedures for obtaining a stay.* Except as otherwise provided by law or other pertinent regulation:

(1) A petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

(i) The relative harm to the parties if the stay is granted or denied,

(ii) The likelihood of the appellant's success on the merits,

(iii) The likelihood of immediate and irreparable harm if the stay is not granted, and

(iv) Whether the public interest favors granting the stay;

(2) The appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted;

(3) The appellant shall serve a copy of its notice of appeal and petition for a stay on each party named in the decision from which the appeal is taken, and on the Director or the Appeals Board to which the appeal is taken, at the same time such documents are served on the appropriate officer of the Department; any party, including the officer who made the decision being appealed, may file a response to the stay petition within 10 days after service; failure to file a response shall not result in a default on the question of whether a stay should be granted; service shall be made by delivering copies personally or by sending them by registered or certified mail, return receipt requested; and

(4) The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 calendar days of the expiration of the time for filing a notice of appeal.

(c) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

(d) *Finality of decision.* No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies.

[36 FR 7186, Apr. 15, 1971, as amended at 58 FR 4942, Jan. 19, 1993; 75 FR 64663, Oct. 20, 2010]

§ 4.22 Documents; filing and service.

(a) *Filing of documents.* A document is filed in the office where the filing is required only when the document is received in that office during its regular business hours and by a person authorized to receive it. A document received after the office's regular business hours is considered filed on the next business day.

(b) *Service generally.* A copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case, except as otherwise provided by § 4.31. In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his/her client, and service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by order of a presiding official or an appeals board. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

(c) *Retention of documents.* All documents, books, records, etc., received in evidence in a hearing or submitted for the record in any proceeding before the Office of Hearings and Appeals will be retained with the official record of the proceedings. However, the withdrawal of original documents may be permitted while the case is pending upon the submission of true copies in lieu thereof. When a decision has become final, an appeals board in its discretion may, upon request and after notice to the other party or parties, permit the withdrawal of original exhibits or any part thereof by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal. Transcripts of testimony and/or documents received or reviewed pursuant to § 4.31 of these rules shall be sealed against disclosure to unauthorized persons and retained with the official record, subject to the withdrawal and substitution provisions hereof.

(d) *Record address.* Every person who files a document for the record in connection with any proceeding before the Office of Hearings and Appeals shall at the time of his initial filing in the matter state his address. Thereafter he must promptly inform the office in which the matter is pending of any change in address, giving the docket or other appropriate numbers of all matters in which he has made such a filing. The successors of such person shall likewise promptly inform such office of their interest in the matters and state their addresses. If a person fails to furnish a record address as required herein, he will not be entitled to notice in connection with the proceedings.

(e) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation.

(f) *Extensions of time.* (1) The time for filing or serving any document may be extended by the Appeals Board or other officer before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation.

(2) A request for an extension of time must be filed within the time allowed for the filing or serving of the document and must be filed in the same office in which the document in connection with which the extension is requested must be filed.

(g) *Electronic transmission of documents.* A document may be electronically transmitted under the terms of specified in the OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance

with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission, if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971, as amended at 53 FR 49660, Dec. 9, 1988; 75 FR 64663, Oct. 20, 2010; 88 FR 5792, Jan. 30, 2023]

§ 4.23 Transcript of hearings.

Hearings will be recorded verbatim and transcripts thereof shall be made when requested by interested parties, costs of transcripts to be borne by the requesting parties. Fees for transcripts prepared from recordings by Office of Hearings and Appeals employees will be at rates which cover the cost of manpower, machine use and materials, plus 25 percent, adjusted to the nearest 5 cents. If the reporting is done pursuant to a contract between the reporter and the Department of the Interior Agency or office which is involved in the proceeding, or the Office of Hearings and Appeals, fees for transcripts will be at rates established by the contract.

§ 4.24 Basis of decision.

(a) *Record.* (1) The record of a hearing shall consist of the transcript of testimony or summary of testimony and exhibits together with all documents and requests filed in the hearing.

(2) If a hearing has been held on an appeal pursuant to instructions of an Appeals Board, this record shall be the sole basis for decision insofar as the referred issues of fact are involved except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section.

(3) Where a hearing has been held in other proceedings, the record made shall be the sole basis for decision except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section.

(4) In any case, no decision after a hearing or on appeal shall be based upon any record, statement, file, or similar document which is not open to inspection by the parties to the hearing or appeal, except for documents or other evidence received or reviewed pursuant to § 4.31(d).

(b) *Official notice.* Official notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice.

[36 FR 7186, Apr. 15, 1971, as amended at 53 FR 49660, Dec. 9, 1988; 88 FR 5792, Jan. 30, 2023]

§ 4.25 Oral argument.

The Director or an Appeals Board may, in their discretion, grant an opportunity for oral argument.

§ 4.26 Subpoena power and witness provisions generally.

(a) *Compulsory attendance of witnesses.* The administrative law judge, on his own motion, or on written application of a party, is authorized to issue subpoenas requiring the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers. Subpoenas will be issued on a form approved by the Director. A subpoena may be served by any person who is not a party and is not less than 18 years of age, and the original subpoena bearing a certificate of service shall be filed with the administrative law judge. A witness may be required to attend a deposition or hearing at a place not more than 100 miles from the place of service.

(b) *Application for subpoena.* Where the file has not yet been transmitted to the administrative law judge, the application for a subpoena may be filed in the office of the officer who made the decision appealed from, or in the office of the Bureau of Land Management in which the complaint was filed, in which cases such offices will forward the application to the administrative law judge.

(c) *Fees payable to witnesses.* (1) Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like service in the District Courts of the United States. The witness fees and mileage shall be paid by the party at whose instance the witness appears.

(2) Any witness who attends any hearing or the taking of any deposition

at the request of any party to the controversy without having been subpoenaed to do so shall be entitled to the same mileage and attendance fees, to be paid by such party, to which he would have been entitled if he had been first duly subpoenaed as a witness on behalf of such party. This paragraph does not apply to Government employees who are called as witnesses by the Government.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5792, Jan. 30, 2023]

§ 4.27 Standards of conduct.

(a) *Inquiries.* All inquiries with respect to any matter pending before the Office of Hearings and Appeals shall be directed to the Director, the Chief Administrative Law Judge, or the Chairman of the appropriate Board.

(b) *Ex parte communication*—(1) *Prohibition.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, there shall be no communication concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding, unless the communication, if oral, is made in the presence of all other parties or their representatives, or, if written, is furnished to all other parties. Proceedings include cases pending before the Office, rulemakings amending this Part 4 that might affect a pending case, requests for reconsideration or review by the Director, and any other related action pending before the Office. The terms ''interested person'' and ''person interested in the proceeding'' include any individual or other person with an interest in the agency proceeding that is greater than the interest that the public as a whole may have. This regulation does not prohibit communications concerning case status or advice concerning compliance with procedural requirements unless the area of inquiry is in fact an area of controversy in the proceeding. Any oral communication made in violation of this regulation shall be reduced to writing in a memorandum to the file by the person receiving the communication and shall be included in the record. Any written communication made in violation of this regulation shall be included in the record. In proceedings other than informal rulemakings copies of the memorandum or communication shall be provided to all parties, who shall be given an opportunity to respond in writing.

(2) *Sanctions.* The administrative law judge, board, or Director who has responsibility for the matter with respect to which a prohibited communication has been knowingly made may impose appropriate sanctions on the offending person or persons, which may include requiring an offending party to show cause why its claim, motion, or interest should not be dismissed, denied, or otherwise adversely affected; disciplining offending Office personnel pursuant to the Department's standards of conduct (43 CFR part 20); and invoking such sanctions against other offending persons as may be appropriate under the circumstances.

(c) *Disqualification.* (1) An Office of Hearings and Appeals deciding official must withdraw from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics.

(2) A party may file a motion seeking the disqualification of a deciding official, setting forth in detail the circumstances that the party believes require disqualification. Any supporting facts must be established by affidavit or other sufficient evidence. A copy of the motion should be sent to the Director.

(3) The head of the appropriate unit within the Office or the Director may decide whether disqualification is required if the deciding official does not withdraw under paragraph (c)(1) of this section or in response to a motion under paragraph (c)(2) of this section.

(4) For purposes of this section, ''deciding official'' includes an attorney decision maker or Indian probate judge as defined in § 4.201, an administrative law judge, an administrative judge, or a member of any Board.

[36 FR 7186, Apr. 15, 1971, as amended at 50 FR 43705, Oct. 29, 1985; 53 FR 49660, Dec. 9, 1988; 70 FR 11812, Mar. 9, 2005]

§ 4.28 Interlocutory appeals.

There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

§ 4.29 Remands from courts.

Whenever any matter is remanded from any court for further proceedings, and to the extent the court's directive and time limitations will permit, the parties shall be allowed an opportunity to submit to the appropriate Appeals Board, a report recommending procedures to be followed in order to comply with the court's order. The Board will review the reports and enter special orders governing the handling of matters remanded to it for further proceedings by any court.

§ 4.30 Information required by forms.

Whenever a regulation of the Office of Hearing and Appeals requires a form approved or prescribed by the Director, the Director may in that form require the submission of any information considered necessary for the effective administration of that regulation.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5792, Jan. 30, 2023]

§ 4.31 Request for limiting disclosure of confidential information.

(a) If any person submitting a document in a proceeding under this part claims that some or all of the information contained in that document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in section 1905 of title 18 of the United States Code (disclosure of confidential information), or is otherwise exempt by law from public disclosure, the person:

(1) Must indicate in the document that it is exempt, or contains information which is exempt, from disclosure;

(2) Must request the presiding officer or appeals board not to disclose such information except to the parties to the proceeding under the conditions provided in paragraphs (b) and (c) of this section, and must serve the request upon the parties to the proceeding. The request shall include the following items:

(i) A copy of the document from which has been deleted the information for which the person requests nondisclosure; if it is not practicable to submit such copy of the document because deletion of the information would render the document unintelligible, a description of the document may be substituted;

(ii) A statement specifying why the information is confidential, if the information for which nondisclosure is requested is claimed to come within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information:

(iii) A statement specifying the justification for nondisclosure, if the information for which nondisclosure is requested is not within the exception in 5 U.S.C. 552(b)(4).

(b) If information is submitted in accordance with paragraph (a) of this section, the information will not be disclosed except as provided in the Freedom of Information Act, in accordance with part 2 of this title, or upon request from a party to the proceeding under the restrictions stated in paragraph (c) of this section.

(c) At any time, a party may request the presiding officer or appeals board to direct a person submitting information under paragraph (a) of this section to provide that information to the party. The presiding officer or board will so direct, unless paragraph (d) of this section is applicable, if the party requesting the information agrees under oath in writing:

(1) Not to use or disclose the information except in the context of the proceeding conducted pursuant to this part; and

(2) Not to retain in any format, and to return all physical copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(d) If any person submitting a document in a proceeding under this Part other than a hearing conducted pursuant to 5 U.S.C. 554 claims that a disclosure of information in that document to another party to the proceeding is prohibited by law, notwithstanding the protection provided under paragraph (c) of this section, such person:

(1) Must indicate in the original document that it contains information of which disclosure is prohibited;

(2) Must request that the presiding officer or appeals board review such evidence as a basis for its decision without disclosing it to the other party or parties, and serve the request upon the parties to the proceeding. The request shall include a copy of the document or description as required by paragraph (a)(2)(i) of this section and state why disclosure is prohibited, citing pertinent statutory or regulatory authority. If the prohibition on disclosure is intended to protect the interest of a person who is not a party to the proceeding, the party making the request must demonstrate that such person refused to consent to the disclosure of the evidence to other parties to the proceeding.

(3) If the presiding officer or an appeals board denies the request, the person who made the request shall be given an opportunity to withdraw the evidence before it is considered by the presiding official or board unless a Freedom of Information Act request, administrative appeal from the denial of a request, or lawsuit seeking release of the information is pending.

(e) If the person submitting a document does not submit the copy of the document or description required by paragraph (a)(2)(i) or (d)(2) of this section, the presiding officer or appeals board may assume that there is no objection to public disclosure of the document in its entirety.

(f) Where a decision by a presiding officer or appeals board is based in whole or in part on evidence not included in the public record or disclosed to all parties, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record.

[53 FR 49661, Dec. 9, 1988, as amended at 88 FR 5792, Jan. 30, 2023]

Subpart C [Reserved]

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; Pub. L. 99–264, 100 Stat. 61, as amended.

CROSS REFERENCE: For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15. For regulations pertaining to the probate of Indian trust estates within the Probate Hearings Division, Office of Hearings and Appeals, see 43 CFR part 30. For regulations pertaining to the authority, jurisdiction, and membership of the Board of Indian Appeals, Office of Hearings and Appeals, see subpart A of this part. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see subpart B of this part.

SCOPE OF SUBPART; DEFINITIONS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.200 How to use this subpart.

(a) The following table is a guide to the relevant contents of this subpart by subject matter.

For provisions relating to . . .	Consult . . .
(1) Appeals to the Board of Indian Appeals generally.	§§ 4.310 through 4.318.
(2) Appeals to the Board of Indian Appeals from decisions of the Probate Hearings Division in Indian probate matters.	§§ 4.201 and 4.320 through 4.326.
(3) Appeals to the Board of Indian Appeals from actions or decisions of BIA.	§§ 4.201 and 4.330 through 4.340.
(4) Review by the Board of Indian Appeals of other matters referred to it by the Secretary, Assistant Secretary-Indian Affairs, or Director-Office of Hearings and Appeals.	§§ 4.201 and 4.330 through 4.340.
(5) Determinations under the White Earth Reservation Land Settlement Act of 1985.	§§ 4.350 through 4.357.

(b) Except as limited by the provisions of this part, the regulations in subparts A and B of this part apply to these proceedings.

[73 FR 67287, Nov. 13, 2008]

§ 4.201 Definitions.

Administrative law judge (ALJ) means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

Agency means:

(1) The Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land and trust personalty; and

(2) Any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

Board means the Interior Board of Indian Appeals within OHA.

Day means a calendar day.

Decedent means a person who is deceased.

Decision or order (or *decision and order*) means:

(1) A written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty;

(2) The decision issued by an attorney decision maker in a summary probate proceeding; or

(3) A decision issued by a judge finding that the evidence is insufficient to determine that a person is deceased by reason of unexplained absence.

Devise means a gift of property by will. Also, to give property by will.

Devisee means a person or entity that receives property under a will.

Estate means the trust or restricted land and trust personalty owned by the decedent at the time of death.

Formal probate proceeding means a proceeding, conducted by a judge, in which evidence is obtained through the testimony of witnesses and the receipt of relevant documents.

Heir means any individual or entity eligible to receive property from a decedent in an intestate proceeding.

Individual Indian Money (IIM) account means an interest-bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

Indian probate judge (IPJ) means an attorney with OHA, other than an ALJ, to whom the Secretary has delegated the authority to hear and decide Indian probate cases.

Interested party means any of the following:

(1) Any potential or actual heir;

(2) Any devisee under a will;

(3) Any person or entity asserting a claim against a decedent's estate;

(4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or

(5) Any co-owner exercising a purchase option.

Intestate means that the decedent died without a valid will as determined in the probate proceeding.

Judge, except as used in the term ''administrative judge,'' means an ALJ or IPJ.

LTRO means the Land Titles and Records Office within BIA.

OHA means Office of Hearings and Appeals, Department of the Interior.

Probate means the legal process by which applicable tribal, Federal, or State law that affects the distribution of a decedent's estate is applied in order to:

(1) Determine the heirs;

(2) Determine the validity of wills and determine devisees;

(3) Determine whether claims against the estate will be paid from trust personalty; and

(4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive them.

Restricted property means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the Secretary's consent. For the purposes of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term ''restricted property'' as used

in this part does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

Secretary means the Secretary of the Interior or an authorized representative.

Trust personalty means all tangible personal property, funds, and securities of any kind that are held in trust in an IIM account or otherwise supervised by the Secretary.

Trust property means real or personal property, or an interest therein, the title to which is held in trust by the United States for the benefit of an individual Indian or tribe.

Will means a written testamentary document that was executed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

[73 FR 67287, Nov. 13, 2008, as amended at 88 FR 5793, Jan. 30, 2023]

§§ 4.202–4.308 [Reserved]

General Rules Applicable to Proceedings on Appeal Before the Interior Board of Indian Appeals

Source: 70 FR 11825, Mar. 9, 2005, unless otherwise noted.

§ 4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is:

(1) For most documents, the date of mailing, the date of personal delivery, or the date of electronic transmission to the Board in accordance with paragraph (f); or

(2) For a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e), the date that the Board receives the motion.

(b) *Serving notices of appeal and other documents.* Any party filing a notice of appeal or other document before the Board must serve copies on all interested parties in the proceeding. Service must be accomplished by personal delivery, mailing, or electronic transmission in accordance with paragraph (f).

(1) Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party.

(2) Where a party is represented by more than one attorney, service on any one attorney is sufficient.

(3) The certificate of service on an attorney or representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document:

(1) The day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included;

(2) The last day of the period is to be included, unless it is a nonbusiness day (*e.g.*, Saturday, Sunday, or Federal holiday), in which event the period runs until the end of the next business day; and

(3) When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal holidays, and other nonbusiness days are excluded from the computation.

(d) *Extensions of time.* (1) The Board may extend the time for filing or serving any document except a notice of appeal.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

(f) *Electronic transmission of documents.* A document may be electronically transmitted under the terms specified in the OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission, if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receiving the notice of docketing. The appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel will have 30 days from receiving the appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other interested parties. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) The appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) BIA is considered an interested party in any proceeding before the Board. The Board may request that BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

§ 4.312 Board decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of an administrative law judge, Indian probate judge, or BIA official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

§ 4.313 Amicus curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene, to join other parties, to appear as amicus curiae, or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. The Board may grant the permission or relief requested for specified purposes and subject to limitations it established. This section will be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

§ 4.314 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration of a Board decision.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party

to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any Federal court to the Board for further proceedings, the Board will remand the matter to an administrative law judge, an Indian probate judge, or BIA. In the alternative, to the extent the court's directive and time limitations permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries about any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems this action appropriate. If, before a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the OHA Director will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

Appeals to the Board of Indian Appeals in Probate Matters

SOURCE: 70 FR 11826, Mar. 9, 2005, unless otherwise noted.

§ 4.320 Who may appeal a judge's decision or order?

Any interested party has a right to appeal to the Board if he or she is adversely affected by a decision or order of a judge under part 30 of this subtitle:

(a) On a petition for rehearing;

(b) On a petition for reopening;

(c) Regarding purchase of interests in a deceased Indian's estate; or

(d) Regarding modification of the inventory of an estate.

[76 FR 7505, Feb. 10, 2011]

§ 4.321 How do I appeal a judge's decision or order?

(a) A person wishing to appeal a decision or order within the scope of § 4.320 must file a written notice of appeal within 30 days after the judge has mailed the decision or order and accurate appeal instructions. We will dismiss any appeal not filed by this deadline.

(b) The notice of appeal must be signed by the appellant, the appellant's attorney, or other qualified representative as provided in § 1.3 of this subtitle, and must be filed with the Board of Indian Appeals.

[73 FR 67288, Nov. 13, 2008, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.322 What must an appeal contain?

(a) Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based. This statement may be included in either the notice of appeal filed under § 4.321(a) or an opening brief filed under § 4.311(a).

(b) The notice of appeal must include the names and addresses of the parties served.

[73 FR 67288, Nov. 13, 2008]

§ 4.323 Who receives service of the notice of appeal?

(a) The appellant must deliver or mail the original notice of appeal to the Board.

(b) A copy of the notice of appeal must be served on the judge whose decision is being appealed, as well as on every other interested party.

(c) The notice of appeal filed with the Board must include a certification that service was made as required by this section.

(d) A notice of appeal may be electronically filed or served in accordance with § 4.310(f).

[73 FR 67288, Nov. 13, 2008, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.324 How is the record on appeal prepared?

(a) On receiving a copy of the notice of appeal, the judge whose decision is being appealed must notify:

(1) The agency concerned; and

(2) The LTRO where the original record was filed under § 30.233 of this subtitle.

(b) If a transcript of the hearing was not prepared, the judge must have a transcript prepared and forwarded to the LTRO within 30 days after receiving a copy of the notice of appeal. The LTRO must include the original transcript in the record.

(c) Within 30 days of the receipt of the transcript, the LTRO must do the following:

(1) Prepare a table of contents for the record;

(2) Make two complete copies of the original record, including the transcript and table of contents;

(3) Certify that the record is complete;

(4) Forward the certified original record, together with the table of contents, to the Board by certified mail, electronic transmission in accordance with § 4.310(f), or other service with delivery confirmation; and

(5) Send one copy of the complete record to the agency.

(d) While the appeal is pending, the copies of the record will be available for inspection at the LTRO and the agency.

(e) Any party may file an objection to the record. The party must file his or her objection with the Board within 15 days after receiving the notice of docketing under § 4.325.

(f) For any of the following appeals, the judge must prepare an administrative record for the decision and a table of contents for the record and must forward them to the Board:

(1) An interlocutory appeal under § 4.28;

(2) An appeal from a decision under §§ 30.126 or 30.127 regarding modification of an inventory of an estate; or

(3) An appeal from a decision under § 30.124 determining that a person for whom a probate proceeding is sought to be opened is not deceased.

[76 FR 7505, Feb. 10, 2011, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.325 How will the appeal be docketed?

The Board will docket the appeal on receiving the probate record from the LTRO or the administrative record from the judge, and will provide a notice of the docketing and the table of contents for the record to all interested parties as shown by the record on appeal. The docketing notice will specify the deadline for filing briefs and will cite the procedural regulations governing the appeal.

[73 FR 67288, Nov. 13, 2008]

§ 4.326 What happens to the record after disposition?

(a) After the Board makes a decision other than a remand, it must forward to the designated LTRO:

(1) The record filed with the Board under § 4.324(d) or (f); and

(2) All documents added during the appeal proceedings, including any transcripts and the Board's decision.

(b) The LTRO must conform the duplicate record retained under § 4.324(b) to the original sent under paragraph (a) of this section and forward the duplicate record to the agency concerned.

[73 FR 67288, Nov. 13, 2008]

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS: ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

SOURCE: 54 FR 6487, Feb. 10, 1989, unless otherwise noted.

§ 4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR chapter 1, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

(1) Tribal enrollment disputes;

(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

§ 4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought; and

(3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision

appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

[54 FR 6487, Feb. 10, 1989, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with the Board shall certify that service was made as required by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing or electronic transmission in accordance with § 4.310(f).

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in § 4.332 of this part, may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

(1) The decision appealed from;

(2) The notice of appeal or copy thereof; and

(3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§ 4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in

its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§ 4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other comments regarding the recommended decision with the Board in accordance with § 4.339 of this part.

§ 4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§ 4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§ 4.350 Authority and scope.

(a) The rules and procedures set forth in §§ 4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99–264 (100 Stat. 61), amended by Public Law 100–153 (101 Stat. 886) and Public Law 100–212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the

Project Director, pursuant to section 8(c) of the Act.

(6) The term *administrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with the administrative judge all data, identifying the purpose for which they are being submitted, shown in the records relative to the family of the decedent.

(b) The data shall include but are not limited to:

(1) A copy of the death certificate if one exists. If there is no death certificate, then another form of official written evidence of the death such as a burial or transportation of remains permit, coroner's report, or church registry of death. Secondary forms of evidence of death such as an affidavit from someone with personal knowledge concerning the fact of death or an obituary or death notice from a newspaper may be used only in the absence of any official proof or evidence of death.

(2) Data for heirship finding and family history, certified by the Project Director. Such data shall contain:

(i) The facts and alleged facts of the decedent's marriages, separations and divorces, with copies of necessary supporting documents;

(ii) The names and last known addresses of probable heirs at law and other known parties in interest;

(iii) Information on whether the relationships of the probable heirs at law to the decedent arose by marriage, blood, or adoption.

(3) Known heirship determinations, including those recognized by the Act determining the heirs of relatives of the decedent, and including those rendered by courts from Minnesota or other states, by tribal courts, or by tribunals authorized by the laws of other countries.

(4) A report of the compensation due the decedent, including interest calculated to the date of death of the decedent, and an outline of the derivation of such compensation, including its real property origins and the succession of the compensation to the deceased, citing all of the intervening heirs at law, their fractional shares, and the amount of compensation attributed to each of them.

(5) A certification by the Project Director or his designee that the addresses provided for the parties in interest were furnished after having made a due and diligent search.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991]

§ 4.352 Determination of administrative judge and notice thereof.

(a) Upon review of all data submitted by the Project Director, the administrative judge will determine whether or not there are any apparent issues of fact that need to be resolved.

(b) If there are no issues of fact requiring determination, the administrative judge will enter a preliminary determination of heirs based upon inheritance laws in accordance with the Act. Such preliminary determination will be entered without a hearing, and, when possible and based upon the data furnished and/or information supplementary thereto, shall include the names, birth dates, relationships to the decedent, and shares of the heirs, or the fact that the decedent died without heirs.

(1) Upon issuing a preliminary determination, the administrative judge shall issue a notice of such action and shall mail a copy of said notice, together with a copy of the preliminary determination, to each party in interest allowing forty (40) days in which to

show cause in writing why the determination should not become final. The administrative judge shall cause a certificate to be made as to the date and manner of such mailing.

(2) The Project Director shall also cause, within seven (7) days of receipt of such notice, the notice of the preliminary determination to be posted in the following sites:

The White Earth Band, Box 418, White Earth, Minnesota 56591
The Minnesota Chippewa Tribe, Box 217, Cass Lake, Minnesota 56633
Minnesota Agency, Bureau of Indian Affairs, Room 418, Federal Building, 522 Minnesota Avenue, NW, Bemidji, Minnesota 56601–3062

and in such other sites as may be deemed appropriate by the Project Director. Such other sites may include, but not be limited to:

Elbow Lake Community Center, R.R. #2, Waubun, Minnesota 56589
Postmaster, Callaway, Minnesota 56521
Community Center, Route 2, Bagley, Minnesota 56621
Community Center, Star Route, Mahnomen, Minnesota 56557
Postmaster, Mahnomen, Minnesota 56557
Rice Lake Community Center, Route 2, Bagley, Minnesota 56621
Postmaster, Ogema, Minnesota 56569
Pine Point Community Center, Ponsford, Minnesota 56575
Postmaster, White Earth, Minnesota 56591
White Earth IHS, White Earth, Minnesota 56591
Postmaster, Ponsford, Minnesota 56575
American Indian Center, 1113 West Broadway, Minneapolis, Minnesota 55411
American Indian Center, 1530 East Franklin Avenue, Minneapolis, Minnesota 55404
American Indian Center, 341 University Avenue, St. Paul, Minnesota 55103
Little Earth of United Tribes Community Services, 2501 Cedar Avenue South, Minneapolis, Minnesota 55404
Naytahwaush Community Center, Naytahwaush, Minnesota 56566

The Project Director shall provide a certificate showing when the notice of the preliminary determination was forwarded for posting, and to which locations. A posting certificate showing the date and place of posting shall be signed by the person or official who performs the act and returned to the Project Director. The Project Director shall file with the administrative judge the original posting certificates and the Project Director's certificate of mailing showing the posting locations and when the notice of the preliminary determination was forwarded for posting.

(3) If no written request for hearing or written objection is received in the office of the administrative judge within the forty (40) days of issuance of the notice, the administrative judge shall issue a final order declaring the preliminary determination to be final thirty (30) days from the date on which the final order is mailed to each party in interest.

(c) When the administrative judge determines either before or after issuance of a preliminary determination that there are issues which require resolution, or when a party objects to the preliminary determination and/or requests a hearing, the administrative judge may either resolve the issues informally or schedule and conduct a prehearing conference and/or a hearing. Any prehearing conference, hearing, or rehearing, conducted by the administrative judge shall be governed insofar as practicable by the regulations applicable to other hearings under this part and the general rules in subpart B of this part. After receipt of the testimony and/or evidence, if any, the administrative judge shall enter a final order determining the heirs of the decedent, which shall become final thirty (30) days from the date on which the final order is mailed to each party in interest.

(d) The final order determining the heirs of the decedent shall contain, where applicable, the names, birth dates, relationships to the decedent, and shares of heirs, or the fact that the decedent died without heirs.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991; 57 FR 2319, Jan. 21, 1992, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.353 Record.

(a) The administrative judge shall lodge the original record with the Project Director.

(b) The record shall contain, where applicable, the following materials:

(1) A copy of the posted public notice of preliminary determination and/or

hearing showing the posting certifications, the administrative judge's certificate of mailing, the posting certificates, and the Project Director's certificate of mailing.

(2) A copy of each notice served on parties in interest, with proof of mailing;

(3) The record of evidence received, including any transcript made of testimony;

(4) Data for heirship finding and family history, and data supplementary thereto;

(5) The final order determining the heirs of the decedent and the administrative judge's notices thereof; and

(6) Any other material or documents deemed relevant by the administrative judge.

§ 4.354 Reconsideration or rehearing.

(a) Any party aggrieved by the final order of the administrative judge may, within thirty (30) days after the date of mailing such decision, file with the administrative judge a written petition for reconsideration and/or rehearing. Such petition must be under oath and must state specifically and concisely the grounds upon which it is based. If it is based upon newly discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new evidence or testimony is to be. It shall also state justifiable reasons for the prior failure to discover and present the evidence.

(b) If proper grounds are not shown, or if the petition is not filed within the time prescribed in paragraph (a) of this section, the administrative judge shall issue an order denying the petition and shall set forth therein the reasons therefor. The administrative judge shall serve copies of such order on all parties in interest.

(c) If the petition appears to show merit, or if the administrative judge becomes aware of sufficient additional evidence to justify correction of error even without the filing of a petition, or upon remand from the Board following an appeal resulting in vacating the final order, the administrative judge shall cause copies of the petition, supporting papers, and other data, or in the event of no petition an order to show cause or decision of the Board vacating the final order in appropriate cases, to be served on all parties in interest. The parties in interest will be allowed a reasonable, specified time within which to submit answers or legal briefs in opposition to the petition or order to show cause or Board decision. The administrative judge shall then reconsider, with or without hearing, the issues of fact and shall issue a final order upon reconsideration, affirming, modifying, or vacating the original final order and making such further orders as are deemed warranted. The final order upon reconsideration shall be served on all parties in interest and shall become final thirty (30) days from the date on which it is mailed.

(d) Successive petitions for reconsideration and/or rehearing shall not be permitted. Nothing herein shall be considered as a bar to the remand of a case by the Board for further reconsideration, hearing, or rehearing after appeal.

§ 4.355 Omitted compensation.

When, subsequent to the issuance of a final order determining heirs under § 4.352, it is found that certain additional compensation had been due the decedent and had not been included in the report of compensation, the report shall be modified administratively by the Project Director. Copies of such modification shall be furnished to all heirs as previously determined and to the appropriate administrative judge.

§ 4.356 Appeals.

(a) A party aggrieved by a final order of an administrative judge under § 4.352, or by a final order upon reconsideration of an administrative judge under § 4.354, may appeal to the Board. A copy of the notice of appeal must also be sent to the Project Director and to the administrative judge whose decision is being appealed.

(b) The notice of appeal must be filed with the Board no later than thirty (30) days from the date on which the final order of the administrative judge was mailed, or, if there has been a petition for reconsideration or rehearing filed, no later than thirty (30) days from the date on which the final order upon reconsideration of the administrative

judge was mailed. A notice of appeal that is not timely filed will be dismissed.

(c) The Project Director shall ensure that the record is expeditiously forwarded to the Board.

(d) Within thirty (30) days after the notice of appeal is filed, the appellant shall file a statement of the reasons why the final order or final order upon reconsideration is in error. If the Board finds that the appellant has set forth sufficient reasons for questioning the final order or final order upon reconsideration, the Board will issue an order giving all parties in interest an opportunity to respond, following which a decision shall be issued. If the Board finds that the appellant has not set forth sufficient reasons for questioning the final order, the Board may issue a decision on the appeal without further briefing.

(e) The Board may issue a decision affirming, modifying, or vacating the final order or final order upon reconsideration. A decision on appeal by the Board either affirming or modifying the final order or final order upon reconsideration shall be final for the Department of the Interior. In the event the final order or final order upon reconsideration is vacated, the proceeding shall be remanded to the appropriate administrative judge for reconsideration and/or rehearing.

[56 FR 61383, Dec. 3, 1991, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5793, Jan. 30, 2023]

§ 4.357 Guardians for minors and incompetents.

Persons less than 18 years of age and other legal incompetents who are parties in interest may be represented at all hearings by legally appointed guardians or by guardians *ad litem* appointed by the administrative judge.

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

AUTHORITY: Sections 4.470 to 4.480 are also issued under authority of 43 U.S.C. 315a.

CROSS REFERENCE: See subpart A for the authority, jurisdiction and membership of the Board of Land Appeals within the Office of Hearings and Appeals. For general rules applicable to proceedings before the Board of Land Appeals as well as the other Appeals Boards of the Office of Hearings and Appeals, see subpart B.

APPEALS PROCEDURES

APPEALS PROCEDURES; GENERAL

§ 4.400 Definitions.

As used in this subpart:

Administrative law judge means an administrative law judge in the Office of Hearings and Appeals, appointed under 5 U.S.C. 3105.

BIA means the Bureau of Indian Affairs.

BLM means the Bureau of Land Management.

Board means the Interior Board of Land Appeals.

BOEM means the Bureau of Ocean Energy Management.

BSEE means the Bureau of Safety and Environmental

Bureau or Office means BIA, BLM, BOEM, BSEE, ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or any successor organization, as appropriate.

Last address of record means the address in a person's most recent filing in an appeal or, if there has not been any filing, the person's address as provided in the Bureau or Office decision under appeal.

ONRR means the Office of Natural Resources Revenue.

Office or *officer* includes ''administrative law judge'' or ''Board'' where the context so requires.

Party includes a party's representative(s) where the context so requires.

Secretary means the Secretary of the Interior or an authorized representative.

[75 FR 64663, Oct. 20, 2010; 75 FR 68704, Nov. 9, 2010, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.401 Documents; filing and service.

(a) *Grace period for filing.* Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was

required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed.

(b) *Transferees and encumbrancers.* Transferees and encumbrancers of land the title to which is claimed or is in the process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the proper land office, become entitled to receive and be given the same notice of any appeal, or other proceeding thereafter initiated affecting such interest which is required to be given to a party to the proceeding. Every such notice of a transfer or encumbrance will be noted upon the records of the land office. Thereafter such transferee or encumbrancer must be made a party to any proceedings thereafter initiated adverse to the entry.

(c) *Service of documents.* (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under § 4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal (including intervenors).

(2) Service on a person or party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the person or party (if unrepresented) or the representative, unless the person, party, or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is . . .	Service may be made by . . .
(i) A notice of appeal	(A) Personal delivery; (B) Registered or certified mail, return receipt requested; (C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic transmission if the person to be served has previously consented to that means in writing.
(ii) Not a notice of appeal	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic transmission if the person to be served has previously consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by . . .	Service is complete when the document is . . .
(i) Personal delivery	Delivered to the party.
(ii) Mail or delivery service	Delivered to the party.
(iii) Electronic transmission	Transmitted to the party, unless the serving party learns that it did not reach the party to be served.

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent. A document is considered sent when it is given to the

U.S. Postal Service (or deposited in one of its mailboxes), properly addressed and with proper postage affixed, or when it is given to a delivery service (or deposited in one of its receptacles), properly addressed and with the delivery cost prepaid.

(d) *Document format.* (1) The format requirements in paragraph (d)(2) of this section apply to any pleading, motion, brief, or other document filed in a case under this subpart, other than an exhibit or attachment or the administrative record. A document filed with the Board by electronic transmission in a case must also comply with the requirements established in the OHA Standing Orders on Electronic Transmission, and the following requirements apply to any pleading, motion, brief, or other document filed in a case under this subpart, other than an exhibit of the administrative record.

(i) An exhibit or attachment must be 8½ by 11 inches in size or, if larger, folded to 8½ by 11 inches and attached to the document.

(ii) Any document that does not comply with the requirements in this paragraph (d) may be rejected.

(2) A document filed in a case must:

(i) Be 8½ by 11 inches in size;

(ii) Be printed on just one side of the page;

(iii) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(iv) Use 11 point font size or larger;

(v) Be double-spaced except for the case caption, argument headings, long quotations, and footnotes, which may be single-spaced;

(vi) Have margins of at least 1 inch;

(vii) Be numbered sequentially, starting on the second page; and

(vii) Be stapled in the upper left-hand corner, if stapled, or bound on the left side, if bound.

(e) *Electronic transmission of documents.* A document may be electronically transmitted under the terms specified in of OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission, if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 68 FR 33803, June 5, 2003; 75 FR 64664, Oct. 20, 2010; 88 FR 5793, Jan. 30, 2023]

§ 4.402 Summary dismissal.

An appeal to the Board will be subject to summary dismissal by the Board for any of the following causes:

(a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required;

(b) If the notice of appeal is not served upon adverse parties within the time required; and

(c) If the statement of reasons, if not contained in the notice of appeal, is not served upon adverse parties within the time required.

(d) If the statement of standing required by § 4.412(b) is not filed with the Board or is not served upon adverse parties within the time required.

[36 FR 7186, Apr. 15, 1971, as amended at 47 FR 26392, June 18, 1982]

§ 4.403 Finality of decision; reconsideration.

(a) The Board's decision is final agency action and is effective on the date it is issued, unless the decision itself provides otherwise.

(b) The Board may reconsider its decision in extraordinary circumstances.

(1) A party that wishes to request reconsideration of a Board decision must file a motion for reconsideration with the Board within 60 days after the date of the decision.

(2) The motion may include a request that the Board stay the effectiveness of its decision.

(3) Any other party to the original appeal may file a response to a motion for reconsideration with the Board within 21 days after service of the motion, unless the Board orders otherwise.

(4) A motion for reconsideration will not stay the effectiveness or affect the finality of the Board's decision unless so ordered by the Board for good cause.

(5) A party does not need to file a motion for reconsideration in order to exhaust its administrative remedies.

(c) A motion for reconsideration must:

(1) Specifically describe the extraordinary circumstances that warrant reconsideration; and

(2) Include all arguments and supporting documents.

(d) Extraordinary circumstances that may warrant granting reconsideration include, but are not limited to:

(1) Error in the Board's interpretation of material facts;

(2) Recent judicial development;

(3) Change in Departmental policy; or

(4) Evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision.

(e) If the motion cites extraordinary circumstances under paragraph (d)(4) of this section, it must explain why the evidence was not provided to the Board during the course of the original appeal.

(f) The Board will not grant a motion for reconsideration that:

(1) Merely repeats arguments made in the original appeal, except in cases of demonstrable error; or

(2) Seeks relief from the legally binding consequences of a statute or regulation.

[75 FR 64664, Oct. 20, 2010]

§ 4.404 Consolidation.

If the facts or legal issues in two or more appeals pending before the Board are the same or similar, the Board may consolidate the appeals, either on motion by a party or at the initiative of the Board.

[75 FR 64665, Oct. 20, 2010]

§ 4.405 Extensions of time.

(a) If a document other than a notice of appeal is required to be filed or served within a definite time, a party may seek additional time by filing with the Board a motion requesting an extension of time.

(b) A motion requesting an extension must be filed no later than the day before the date the document is due, absent compelling circumstances. The motion may be filed and served by facsimile. Section 4.401(a) does not apply to a motion requesting an extension of time.

(c) Except as provided in paragraph (f) of this section, before filing a motion requesting an extension of time, the moving party must make reasonable efforts to contact each other party to determine whether the party opposes the motion. The moving party must state in its motion:

(1) Whether any party it reached opposes the motion; and

(2) What steps it took to contact any party it was unable to reach.

(d) Except as provided in paragraph (f) of this section, the party must support its motion requesting an extension of time by showing there is good cause to grant it.

(e) A Board order granting or denying a motion requesting an extension will state when the document must be filed. Except as provided in paragraph (f) of this section, if the Board does not act on a motion before the document is due, the document must be filed no later than 15 days after the original due date, unless the Board orders otherwise.

(f) A party seeking additional time to file an answer may have one automatic extension, not to exceed 30 days, of the deadline in § 4.414(a) by filing a motion for such extension under paragraphs (a) and (b) of this section.

[75 FR 64665, Oct. 20, 2010]

§ 4.406 Intervention; amicus curiae.

(a) A person who wishes to intervene in an appeal must file a motion to intervene within 30 days after the person knew or should have known that the decision had been appealed to the Board.

(b) A motion to intervene must set forth the basis for the proposed intervention, including:

(1) Whether the person had a right to appeal the decision under § 4.410 or would be adversely affected if the Board reversed, vacated, set aside, or modified the decision; and

(2) How and when the person learned of the appeal.

(c) The Board may:

(1) Grant the motion to intervene;

(2) Deny the motion to intervene for good cause, e.g., where granting it

would disadvantage the rights of the existing parties or unduly delay adjudication of the appeal; or

(3) Grant the motion to intervene but limit the person's participation in the appeal.

(d) A person may file a motion at any time to file a brief as an amicus curiae.

(1) The motion must state the person's interest in the appeal and how its brief will be relevant to the issues involved.

(2) The Board may grant or deny the motion in its discretion. The Board may also allow a person to file a brief as amicus curiae if it denies the person's motion to intervene.

(e) A person granted full or limited intervenor status is a party to the appeal, while an amicus curiae is not. A person granted amicus curiae status must serve its brief on the parties to the appeal.

[75 FR 64665, Oct. 20, 2010]

§4.407 Motions.

(a) Any motion filed with the Board must provide a concise statement of the reasons supporting the motion.

(b) When a person or party files a motion, other than a motion for an extension of time under §4.405, any party has 15 days after service of the motion to file a written response, unless a provision of this subpart or the Board by order provides otherwise.

(c) The Board will rule on any motion as expeditiously as possible.

(d) The requirements of §4.401(d) apply to a motion.

[75 FR 64665, Oct. 20, 2010]

APPEALS TO THE BOARD OF LAND APPEALS

§4.410 Who may appeal.

(a) Any party to a case who is adversely affected by a decision of the Bureau or Office or an administrative law judge has the right to appeal to the Board, except:

(1) As otherwise provided in Group 2400 of chapter II of this title,

(2) To the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under §4.470 and part 4100 of this title,

(3) Where a decision has been approved by the Secretary, and

(4) As provided in paragraph (e) of this section.

(b) A party to a case, as set forth in paragraph (a) of this section, is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, *e.g.*, by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.

(c) Where the Bureau or Office provided an opportunity for participation in its decisionmaking process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues:

(1) Raised by the party in its prior participation; or

(2) That arose after the close of the opportunity for such participation.

(d) A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.

(e) For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.

[47 FR 26392, June 18, 1982, as amended at 68 FR 33803, June 5, 2003; 75 FR 64665, Oct. 20, 2010]

§4.411 Appeal; how taken, mandatory time limit.

(a) A person who wishes to appeal to the Board must file a notice that the person wishes to appeal.

(1) The notice of appeal must be filed in the office of the officer who made the decision (not the Board).

(2) Except as otherwise provided by law:

(i) A person served with the decision being appealed must transmit the notice of appeal in time for it to be received in the appropriate office no

later than 30 days after the date of service of the decision; and

(ii) If a decision is published in the FEDERAL REGISTER, a person not served with the decision must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of publication.

(b) The notice of appeal must give the serial number or other identification of the case. The notice of appeal may include a statement of reasons for the appeal, and a statement of standing if required by § 4.412(b).

(c) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in § 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed during the grace period provided in § 4.401(a) and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the appeal will be dismissed by the Board.

(d) After receiving a timely notice of appeal, the office of the officer who made the decision must promptly forward to the Board:

(1) The notice of appeal;

(2) Any statement of reasons, statement of standing, and other documents included with the notice of appeal; and

(3) The complete administrative record compiled during the officer's consideration of the matter leading to the decision being appealed.

(R.S. 2478, as amended, 43 U.S.C. 1201; sec. 25, Alaska Native Claims Settlement Act, as amended, 43 U.S.C. 1601–1628; and the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*)

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 49 FR 6373, Feb. 21, 1984; 75 FR 64665, Oct. 20, 2010]

§ 4.412 Statement of reasons; statement of standing; reply briefs.

(a) An appellant must file a statement of reasons for appeal with the Board no later than 30 days after the notice of appeal was filed. Unless the Board orders otherwise upon motion for good cause shown, the text of a statement of reasons may not exceed 30 pages, excluding exhibits, declarations, or other attachments.

(b) Where the decision being appealed relates to land selections under the Alaska Native Claims Settlement Act, as amended, the appellant also shall file with the Board a statement of facts upon which the appellant relies for standing under § 4.410(e) within 30 days after filing of the notice of appeal. The statement may be included with the notice of appeal filed pursuant to § 4.411 or the statement of reasons filed pursuant to paragraph (a) of this section or may be filed as a separate document.

(c) Failure to file the statement of reasons and statement of standing within the time required will subject the appeal to summary dismissal as provided in § 4.402, unless the delay in filing is waived as provided in § 4.401(a).

(d) The filing of a reply brief is discouraged. However, an appellant who wishes to file a reply brief may do so within 15 days after service of an answer under § 4.414.

(1) The reply brief is limited to the issues raised in the answer.

(2) Unless the Board orders otherwise upon motion for good cause shown, the text of a reply brief may not exceed 20 pages, excluding exhibits, declarations, or other attachments.

(e) The requirements of § 4.401(d) apply to a statement of reasons and a reply brief.

[47 FR 26392, June 18, 1982, as amended at 67 FR 4368, Jan. 30, 2002; 75 FR 64666, Oct. 20, 2010; 88 FR 5793, Jan. 30, 2023]

§ 4.413 Service of notice of appeal.

(a) The appellant must serve a copy of the notice of appeal on each person named in the decision from which the appeal is taken and on the Office of the Solicitor as identified in paragraphs (c) and (d) of this section. Service must be accomplished and certified as prescribed in § 4.401(c).

(b) Failure to serve a notice of appeal will subject the appeal to summary dismissal as provided in § 4.402.

(c) The appellant must serve a copy of the notice of appeal on the Office of the Solicitor as identified in OHA Standing Orders on Contact Information.

(d) This paragraph (d) applies to any appeal taken from a decision of a BLM

State Office, including all District, Field, and Area Offices within that State Office's jurisdiction. The appellant must serve documents on the Office of the Solicitor as identified in the OHA Standing Orders on Contact Information.

(e) A notice of appeal may be electronically filed or served in accordance with § 4.401(e).

(f) Parties must serve the Office of the Solicitor as required by this section until a particular attorney of the Office of the Solicitor files and serves a Notice of Appearance or Substitution of Counsel. Thereafter, parties must serve the Office of the Solicitor as indicated by the Notice of Appearance or Substitution of Counsel.

(g) The appellant must certify service as provided in § 4.401(c)(5).

[75 FR 64666, Oct. 20, 2010, as amended at 88 FR 5793, Jan. 30, 2023]

§ 4.414 Answers.

(a) Any person served with a notice of appeal who wishes to participate in the appeal must file an answer or appropriate motion with the Board within 30 days after service of the statement of reasons for appeal. The answer must respond to the statement of reasons for appeal.

(b) Unless the Board orders otherwise upon motion for good cause shown:

(1) The text of the answer or motion may not exceed 30 pages, excluding exhibits, declarations, or other attachments; and

(2) The party may not file any further pleading.

(c) Failure to file an answer or motion will not result in a default. If an answer or motion is filed or served after the time required, the Board may disregard it in deciding the appeal, unless the delay in filing is waived as provided in § 4.401(a).

(d) The requirements of § 4.401(d) apply to an answer or motion.

[75 FR 64666, Oct. 20, 2010]

§ 4.415 Motion for a hearing on an appeal involving questions of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided, and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.430 to 4.438 and the general rules in subpart B of this part. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

[75 FR 64666, Oct. 20, 2010]

§ 4.416 Appeals of wildfire management decisions.

The Board must decide appeals from decisions under § 4190.1 and § 5003.1(b) of this title within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.

[68 FR 33803, June 5, 2003]

HEARINGS PROCEDURES

Hearings procedures; general

§ 4.420 Applicability of general rules.

To the extent they are not inconsistent with these special rules, the general rules of the Office of Hearings and Appeals in subpart B of this part are also applicable to hearings, procedures.

§ 4.421 Definitions.

In addition to the definitions in § 4.400, as used in this subpart:

Director means the Director of BLM or a BLM Deputy Director or Assistant Director.

Manager means the BLM official with direct jurisdiction over the public lands that are pertinent to the decision or contest.

Person named in the decision means any of the following persons identified in a final BLM grazing decision: An affected applicant, permittee, lessee, or agent or lienholder of record, or an interested public as defined in § 4100.0–5 of this title.

State Director means the supervising BLM officer for the State in which a particular range lies, or an authorized representative.

[75 FR 64667, Oct. 20, 2010]

§ 4.422 Documents; filing and service.

(a) *Grace period for filing.* Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal or contest in connection with which the document is required to be filed. This paragraph does not apply to requests for postponement of hearings under §§ 4.452–1 and 4.452–2.

(b) *Transferees and encumbrancers.* Transferees and encumbrancers of land, the title to which is claimed or is in the process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the proper land office, become entitled to receive and be given the same notice of any contest, appeal, or other proceeding thereafter initiated affecting such interest which is required to be given to a party to the proceeding. Every such notice of a transfer or encumbrance will be noted upon the records of the land office. Thereafter such transferee or encumbrancer must be made a party to any proceedings thereafter initiated adverse to the entry.

(c) *Service of documents.* (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under § 4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal.

(2) Service on a party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the party (if unrepresented) or the representative, unless the party or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is . . .	Service may be made by . . .
(i) An appeal under § 4.470	(A) Personal delivery; (B) Registered or certified mail, return receipt requested;

If the document is . . .	Service may be made by . . .
	(C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic transmission, if the person to be served has previously consented to that means of service in writing.
(ii) A complaint under § 4.450–4 or 4.451–2.	(A) Any of the methods specified in paragraph (c)(4)(i) of this paragraph; or (B) Publication as specified in § 4.450–5.
(iii) Neither an appeal nor a complaint.	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic transmission, if the person to be served has consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by . . .	Service is complete when . . .
(i) Personal delivery	The document is delivered to the party.
(ii) Mail or delivery service	The document is delivered to the party.
(iii) Electronic transmission	The document is transmitted to the party, unless the serving party learns that it did not reach the party to be served.
(iv) Publication	The final notice is published under § 4.450–5(b)(3).

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent.

(d) The manager or administrative law judge, as the case may be, may extend the time for filing or serving any document in a contest, other than a notice of appeal under § 4.452–9.

(e) *Electronic transmission of documents.* A document may be electronically transmitted under the terms of the OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 68 FR 33803, June 5, 2003; 75 FR 64667, Oct. 20, 2010; 88 FR 5793, Jan. 30, 2023]

§ 4.423 Subpoena power and witness provisions.

The administrative law judge is authorized to issue subpoenas directing the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers, for the purpose of taking testimony but not for discovery. The issuance of subpoenas, service, attendance fees, and similar matters shall be governed by the Act of January 31, 1903 (43 U.S.C. 102–106), and 28 U.S.C. 1821.

HEARINGS ON APPEALS INVOLVING QUESTIONS OF FACT

§ 4.430 Prehearing conferences.

(a) The administrative law judge may, in his discretion, on his own motion or motion of one of the parties or of the Bureau or Office direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider: (1) The possibility of obtaining stipulations, admissions of facts and agreements to the introduction of documents, (2) the

limitation of the number of expert witnesses, and (3) any other matters which may aid in the disposition of the proceedings.

(b) The administrative law judge shall issue an order which recites the action taken at the conference and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements. Such order shall control the subsequent course of the proceeding before the administrative law judge unless modified for good cause, by subsequent order.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010]

§ 4.431 Fixing of place and date for hearing; notice.

The administrative law judge shall fix a place and date for the hearing and notify all parties and the Bureau or Office. All hearings held in connection with land selection appeals arising under the Alaska Native Claims Settlement Act, as amended, shall be conducted within the State of Alaska, unless the parties agree otherwise.

[47 FR 26392, June 18, 1982, as amended at 75 FR 64668, Oct. 20, 2010]

§ 4.432 Postponements.

(a) Postponements of hearings will not be allowed upon the request of any party or the Bureau or Office except upon a showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the administrative law judge at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit the filing of such request prior to the hearing, it may be made orally at the hearing.

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witnesses, it must state what the substance of the testimony of the absent witnesses would be. No postponement will be granted if the adverse party or parties file with the administrative law judge within 5 days after the service of the request a statement admitting that the witnesses on account of whose absence the postponement is desired would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing.

(c) Only one postponement will be allowed to a party on account of the absence of witnesses unless the party requesting a further postponement shall at the time apply for an order to take the testimony of the alleged absent witness by deposition.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010; 88 FR 5794, Jan. 30, 2023]

§ 4.433 Authority of the administrative law judge.

(a) The administrative law judge has general authority to conduct the hearing in an orderly and judicial manner, including authority to:

(1) Administer oaths;

(2) Call and question witnesses;

(3) Subpoena witnesses as specified in paragraph (b) of this section;

(4) Issue findings and decisions as specified in paragraph (c) of this section; and

(5) Take any other actions that the Board may prescribe in referring the case for hearing.

(b) The administrative law judge has authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony but not for discovery. This authority must be exercised in accordance with the Act of January 31, 1903 (32 Stat. 790; 43 U.S.C. 102 through 106).

(c) The administrative law judge has authority to issue any of the following, as specified by the Board under §4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411 within 30 days of receipt of the decision.

(d) The issuance of subpoenas, the attendance of witnesses, and the taking of depositions are governed by §§ 4.423 and 4.26.

[75 FR 64668, Oct. 20, 2010]

§ 4.434 Conduct of hearing.

(a) The administrative law judge may seek to obtain stipulations as to material facts.

(b) Unless the administrative law judge directs otherwise:

(1) The appellant will first present its evidence on the facts at issue; and

(2) The other parties and the Bureau or Office will then present their evidence on such issues.

[75 FR 64668, Oct. 20, 2010]

§ 4.435 Evidence.

(a) All oral testimony shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge may question any witnesses. Documentary evidence may be received if pertinent to any issue. The administrative law judge will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

(b) Objections to evidence will be ruled upon by the administrative law judge. Such rulings will be considered, but need not be separately ruled upon, by the Board in connection with its decision. Where a ruling of an administrative law judge sustains an objection to the admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the substance of the excluded evidence and the objecting party may then make an offer of proof in rebuttal.

§ 4.436 Reporter's fees.

Reporter's fees shall be borne by the Bureau or Office.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010]

§ 4.437 Copies of transcript.

Each party must pay for any copies of the transcript that the party requests. The Bureau or Office will file the original transcript with the case record.

[75 FR 64668, Oct. 20, 2010]

§ 4.438 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of proposed findings or a recommended decision to file exceptions with the Board.

[75 FR 64668, Oct. 20, 2010]

CONTEST AND PROTEST PROCEEDINGS

§ 4.450 Private contests and protests.

§ 4.450–1 By whom private contest may be initiated.

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended (43 U.S.C. 185), or the Act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau

of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

§ 4.450–2 Protests.

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

§ 4.450–3 Initiation of contest.

Any person desiring to initiate a private contest must file a complaint in the proper land office (see § 1821.2–1 of chapter II of this title). The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by § 4.422(c), in the office where the complaint was filed within 30 days after service.

§ 4.450–4 Complaints.

(a) *Contents of complaint.* The complaint shall contain the following information, under oath:

(1) The name and address of each party interested;

(2) A legal description of the land involved;

(3) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest, in such land:

(4) A statement in clear and concise language of the facts constituting the grounds of contest;

(5) A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so;

(6) A statement that the proceeding is not collusive or speculative but is insitituted and will be diligently pursued in good faith;

(7) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated;

(8) The office in which the complaint is filed and the address to which documents shall be sent for service on the contestant; and

(9) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed.

(b) *Amendment of complaint.* Except insofar as the manager, administrative law judge, Director, Board or Secretary may raise issues in connection with deciding a contest, issues not raised in a complaint may not be raised later by the contestant unless the administrative law judge permits the complaint to be amended after due notice to the other parties and an opportunity to object.

(c) *Corroboration required.* All allegations of fact in the complaint which are not matters of official record or capable of being judicially noticed and which, if proved, would invalidate the adverse interest must be corroborated under oath by the statement of witnesses. Each such allegation of fact must be corroborated by the statement of at least one witness having personal knowledge of the alleged fact and such fact must be set forth in the statement. All statements by witnesses shall be attached to the complaint.

(d) *Filing fee.* Each complaint must be accompanied by a filing fee of $10 and a deposit of $20 toward reporter's fees. Any complaint which is not accompanied by the required fee and deposit will not be accepted for filing.

(e) *Waiver of issues.* Any issue not raised by a private contestant in accordance with the provisions of paragraph (b) of this section, which was known to him, or could have been known to him by the exercise of reasonable diligence, shall be deemed to have been waived by him, and he shall thereafter be forever barred from raising such issue.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.450–5 Service.

The complaint must be served upon every contestee in the manner provided in § 4.422(c)(1). Proof of service must be made in the manner provided in § 4.422(c)(2). In certain circumstances, service may be made by publication as

provided in paragraph (b)(1) of this section. When the contest is against the heirs of a deceased entryman, the notice must be served on each heir. If the person to be personally served is an infant or a person who has been legally adjudged incompetent, service of notice must be made by delivering a copy of the notice to the legal guardian or committee, if there is one, of such infant or incompetent person. If there is no guardian or committee, then service must be by delivering a copy of the notice to the person having the infant or incompetent person in charge.

(a) *Summary dismissal; waiver of defect in service.* If a complaint when filed does not meet all the requirements of § 4.450–4(a) and (c), or if the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the manager and no answer need be filed. However, where prior to the summary dismissal of a complaint a contestee answers without questioning the service or proof of service of the complaint, any defect in service will be deemed waived as to such answering contestee.

(b) *Service by publication*—(1) *When service may be made by publication.* When the contestant has made diligent search and inquiry to locate the contestee, and cannot locate him, the contestant may proceed with service by publication after first filing with the manager an affidavit which shall:

(i) State that the contestee could not be located after diligent search and inquiry made within 15 days prior to the filing of the affidavit;

(ii) Be corroborated by the affidavits of two persons who live in the vicinity of the land which state that they have no knowledge of the contestee's whereabouts or which give his last known address;

(iii) State the last known address of the contestee; and

(iv) State in detail the efforts and inquiries made to locate the party sought to be served.

(2) *Contents of published notice.* The published notice must give the names of the parties to the contest, legal description of the land involved, the substance of the charges contained in the complaint, the office in which the contest is pending, and a statement that upon failure to file an answer in such office within 30 days after the completion of publication of such notice, the allegations of the complaint will be taken as confessed. The published notice shall also contain a statement of the dates of publication.

(3) *Publication, mailing and posting of notice.* (i) Notice by publication shall be made by publishing notice at least once a week for 5 successive weeks in some newspaper of general circulation in the county in which the land in contest lies.

(ii) Within 15 days after the first publication of a notice, the contestant shall send a copy of the notice and the complaint by registered or certified mail, return receipt requested, to the contestee at his last known address and also to the contestee in care of the post office nearest the land. The return receipts shall be filed in the office in which the contest is pending.

(iii) A copy of the notice as published shall be posted in the office where the contest is pending and also in a conspicuous place upon the land involved. Such postings shall be made within 15 days after the first publication of the notice.

(c) *Proof of service.* (1) Proof of publication of the notice shall be made by filing in the office where the contest is pending a copy of the notice as published and the affidavit of the publisher or foreman of the newspaper publishing the same showing the publication of the notice in accordance with paragraph (b)(3) of this section.

(2) Proof of posting of the notice shall be by affidavit of the person who posted the notice on the land and by the certificate of the manager or the Director of the Bureau of Land Management as to posting in his office.

(3) Proof of the mailing of notice shall be by affidavit of the person who mailed the notice to which shall be attached the return receipt.

[36 FR 7186, Apr. 15, 1971, as amended at 68 FR 33803, June 5, 2003]

§ 4.450–6 Answer to complaint.

Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending

an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in §4.450–5(b)(3). The answer shall contain or be accompanied by the address to which all notices or other documents shall be sent for service upon contestee.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.450–7 Action by manager.

(a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing.

(b) If an answer is filed and unless all parties waive a hearing, the manager will refer the case to an administrative law judge upon determining that the elements of a private contest appear to have been established.

§ 4.450–8 Amendment of answer.

At the hearing, any allegation not denied by the answer will be considered admitted. The administrative law judge may permit the answer to be amended after due notice to other parties and an opportunity to object.

§ 4.451 Government contests.

§ 4.451–1 How initiated.

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim.

§ 4.451–2 Proceedings in Government contests.

The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests with the following exceptions:

(a) No corroboration shall be required of a Government complaint and the complaint need not be under oath.

(b) A Government contest complaint will not be insufficient and subject to dismissal for failure to name all parties interested, or for failure to serve every party who has been named.

(c) No filing fee or deposit toward reporter's fee shall be required of the Government.

(d) Any action required of the contestant may be taken by any authorized Government employee.

(e) The statements required by §4.450–4(a) (5) and (6) need not be included in the complaint.

(f) No posting of notice of publication on the land in issue shall be required of the Government.

(g) Where service is by publication, the affidavits required by §4.450–5(b)(1) need not be filed. The contestant shall file with the manager a statement of diligent search which shall state that the contestee could not be located after diligent search and inquiry, the last known address of the contestee and the detail of efforts and inquiries made to locate the party sought to be served. The diligent search shall be concluded not more than 15 days prior to the filing of the statement.

(h) In lieu of the requirements of §4.450–5(b)(3)(ii) the contestant shall, as part of the diligent search before the publication or within 15 days after the first publication send a copy of the complaint by certified mail, return receipt requested, to the contestee at the last address of record. The return receipts shall be filed in the office in which the contest is pending.

(i) The affidavit required by §4.450–5(c)(3) need not be filed.

(j) The provisions of paragraph (e) of §4.450–4(e) shall be inapplicable.

§ 4.452 Proceedings before the administrative law judge.

§ 4.452–1 Prehearing conferences.

(a) The administrative law judge may in his discretion, on his own motion or on motion of one of the parties, or of the Bureau, direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider:

(1) The simplification of the issues,

(2) The necessity of amendments to the pleadings,

(3) The possibility of obtaining stipulations, admissions of facts and agreements to the introduction of documents,

(4) The limitation of the number of expert witnesses, and

(5) Such other matters as may aid in the disposition of the proceedings.

(b) The administrative law judge shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements. Such order shall control the subsequent course of the proceedings before the administrative law judge unless modified for good cause, by subsequent order.

§ 4.452–2 Notice of hearing.

The administrative law judge shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted. All hearings held in connection with land selection appeals arising under the Alaska Native Claims Settlement Act, as amended, shall be conducted within the state of Alaska, unless the parties agree otherwise.

[47 FR 26392, June 18, 1982]

§ 4.452–3 Postponements.

(a) Postponements of hearings will not be allowed upon the request of any party or the Bureau except upon a showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the administrative law judge at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit the filing of such request prior to the hearing, it may be made orally at the hearing.

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witnesses, it must state what the substance of the testimony of the absent witnesses would be. No postponement will be granted if the adverse party or parties file with the administrative law judge within 5 days after the service of the request a statement admitting that the witnesses on account of whose absence the postponement is desired would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing.

(c) Only one postponement will be allowed to a party on account of the absence of witnesses unless the party requesting a further postponement shall at the time apply for an order to take the testimony of the alleged absent witness by deposition.

§ 4.452–4 Authority of administrative law judge.

The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner, including authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of tasking testimony but not for discovery in accordance with the act of January 31, 1903 (43 U.S.C. 102–106), to administer oaths, to call and question witnesses, and to make a decision. The issuance of subpoenas, the attendance of witnesses and the taking of depositions shall be governed by §§ 4.423 and 4.26 of the general rules in subpart B of this part.

§ 4.452–5 Conduct of hearing.

So far as not inconsistent with a prehearing order, the administrative law judge may seek to obtain stipulations as to material facts and the issues involved and may state any other issues on which he may wish to have evidence presented. He may exclude irrelevant issues. The contestant will then present his case following which the other parties (and in private contests the Bureau, if it intervenes) will present their cases.

§ 4.452–6 Evidence.

(a) All oral testimony shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge may question any witness. Documentary evidence may be received if pertinent to any issue. The administrative law judge will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

(b) Objections to evidence will be ruled upon by the administrative law judge. Such rulings will be considered, but need not be separately ruled upon, by the Board in connection with its decision. Where a ruling of an administrative law judge sustains an objection to the admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the substance of the excluded evidence, and the objecting party may then make an offer of proof in rebuttal.

§ 4.452–7 Reporter's fees.

(a) The Government agency initiating the proceedings will pay all reporting fees in hearings in Government contest proceedings, in hearings under the Surface Resources Act of 1955, as amended, in hearings under the Multiple Mineral Development Act of 1954, as amended, where the United States is a party, and in hearings under the Mining Claims Rights Restoration Act of 1955, regardless of which party is ultimately successful.

(b) In the case of a private contest, each party will be required to pay the reporter's fees covering the party's direct evidence and cross-examination of witnesses, except that if the ultimate decision is adverse to the contestant, he must in addition pay all the reporter's fees otherwise payable by the contestee.

(c) Each party to a private contest shall be required by the administrative law judge to make reasonable deposits for reporter's fees from time to time in advance of taking testimony. Such deposits shall be sufficient to cover all reporter's fees for which the party may ultimately be liable under paragraph (b) of this section. Any part of a deposit not used will be returned to the depositor upon the final determination of the case except that deposits which are required to be made when a complaint is filed will not be returned if the party making the deposit does not appear at the hearing, but will be used to pay the reporter's fee. Reporter's fees will be at the rates established for the local courts, or, if the reporting is done pursuant to a contract, at rates established by the contract.

§ 4.452–8 Findings and conclusions; decision by administrative law judge.

(a) At the conclusion of the testimony the parties at the hearing shall be given a reasonable time by the administrative law judge, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law and reasons in support thereof or to stipulate to a waiver of such findings and conclusions.

(b) As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge shall make findings of fact and conclusions of law (unless waiver has been stipulated), giving the reasons therefor, upon all the material issues of fact, law, or discretion presented on the record. The administrative law judge may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. He must rule upon each proposed finding and conclusion submitted by the parties and such ruling shall be shown in the record. The administrative law judge will render a written decision in the case which shall become a part of the record and shall include a statement of his findings and conclusions, as well as the reasons or basis therefor, and his rulings upon the findings and conclusions proposed by the parties if such rulings do not appear elsewhere in the record. A copy of the decision will be served upon all parties to the case.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.452–9 Appeal to Board.

Any party, including the Government, adversely affected by the decision of the administrative law judge may appeal to the Board as provided in

§ 4.410, and the general rules in Subpart B of this part. No further hearing will be allowed in connection with the appeal to the Board but the Board, after considering the evidence, may remand any case for further hearing if it considers such action necessary to develop the facts.

GRAZING PROCEDURES (INSIDE AND OUTSIDE GRAZING DISTRICTS)

SOURCE: 44 FR 41790, July 18, 1979, unless otherwise noted.

§ 4.470 How to appeal a final BLM grazing decision to an administrative law judge.

(a) Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge within 30 days after receiving it or within 30 days after a proposed decision becomes final as provided in § 4160.3(a) of this title. To do so, the person must file an appeal with the BLM field office that issued the decision and serve a copy of the appeal on any person named in the decision.

(b) The appeal must state clearly and concisely the reasons why the appellant thinks the BLM grazing decision is wrong.

(c) Any ground for appeal not included in the appeal is waived. The appellant may not present a waived ground for appeal at the hearing unless permitted or ordered to do so by the administrative law judge.

(d) Any person who, after proper notification, does not appeal a final BLM grazing decision within the period provided in paragraph (a) of this section may not later challenge the matters adjudicated in the final BLM decision.

(e) Filing an appeal does not by itself stay the effectiveness of the final BLM decision. To request a stay of the final BLM decision pending appeal, *see* § 4.471.

[68 FR 68770, Dec. 10, 2003]

§ 4.471 How to petition for a stay of a final BLM grazing decision.

(a) An appellant under § 4.470 may petition for a stay of the final BLM grazing decision pending appeal by filing a petition for a stay together with the appeal under § 4.470 with the BLM field office that issued the decision.

(b) Within 15 days after filing the appeal and petition for a stay, the appellant must serve copies on—

(1) Any other person named in the decision from which the appeal is taken; and

(2) The appropriate office of the Office of the Solicitor, in accordance with § 4.413(a) and (c).

(c) A petition for a stay of a final BLM grazing decision pending appeal under paragraph (a) of this section must show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied;

(2) The likelihood of the appellant's success on the merits;

(3) The likelihood of immediate and irreparable harm if the stay is not granted; and

(4) Whether the public interest favors granting the stay.

(d) The appellant requesting a stay bears the burden of proof to demonstrate that a stay should be granted.

[68 FR 68770, Dec. 10, 2003]

§ 4.472 Action on an appeal and petition for a stay.

(a) BLM must transmit any documents received under §§ 4.470 and 4.471, within 10 days after receipt, to the Hearings Division, Office of Hearings and Appeals. If a petition for a stay has been filed, the transmittal must also include any response BLM wishes to file to a petition for a stay and the following documents from the case file: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under § 4160.2; the final BLM grazing decision; and any other documents that BLM wishes the administrative law judge to consider in deciding the petition for a stay. BLM must serve a copy of any such response on the appellant and any other person named in the decision from which the appeal is taken.

(b) Any person named in the decision from which an appeal is taken (other than the appellant) who wishes to file a response to the petition for a stay may

file with the Hearings Division a motion to intervene in the appeal, together with the response, within 10 days after receiving the petition. Within 15 days after filing the motion to intervene and response, the person must serve copies on the appellant, the appropriate office of the Office of the Solicitor in accordance with § 4.413(a) and (c), and any other person named in the decision.

(c) If a petition for a stay has not been filed, BLM must promptly transmit the following documents from the case file to the administrative law judge assigned to the appeal, once the appeal has been docketed by the Hearings Division: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under § 4160.2; and the final BLM grazing decision.

(d) Within 45 days after the expiration of the time for filing a notice of appeal, an administrative law judge must grant or deny—

(1) A petition for a stay filed under § 4.471(a), in whole or in part; and

(2) A motion to intervene filed with a response to the petition under paragraph (b) of this section.

(e) Any final BLM grazing decision that is not already in effect and for which a stay is not granted will become effective immediately after the administrative law judge denies a petition for a stay or fails to act on the petition within the time set forth in paragraph (d) of this section.

(f) At any appropriate time, any party may file with the Hearings Division a motion to dismiss the appeal or other appropriate motion. The appellant and any other party may file a response to the motion within 30 days after receiving a copy.

(g) Within 15 days after filing a motion or response under paragraph (f) of this section, any moving or responding party must serve a copy on every other party. Service on BLM must be made on the appropriate office of the Office of the Solicitor in accordance with § 4.413(a) and (c).

[68 FR 68770, Dec. 10, 2003, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.473 Time and place of hearing; notice; intervenors.

At least 30 days before the date set by the administrative law judge the authorized officer will notify the appellant of the time and place of the hearing within or near the district. Any other person who in the opinion of the authorized officer may be directly affected by the decision on appeal will also be notified of the hearing; such person may himself appear at the hearing, or by attorney, and upon a proper showing of interest, may be recognized by the administrative law judge as an intervenor in the appeal.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003]

§ 4.474 Authority of administrative law judge.

(a) The administrative law judge is vested with the duty and general authority to conduct the hearing in an orderly, impartial, and judicial manner, including authority to subpoena witnesses, recognize intervenors, administer oaths and affirmations, call and question witnesses, regulate the course and order of the hearing, rule upon offers of proof and the relevancy of evidence, and to make findings of fact, conclusions of law, and a decision. The administrative law judge shall have authority to take or to cause depositions to be taken. Subpoenas, depositions, the attendance of witnesses, and witness and deposition fees shall be governed by § 4.26 of the general rules in Subpart B of this part, to the extent such regulations are applicable.

(b) The administrative law judge also may grant or order continuances, and set the times and places of further hearings. Continuances shall be granted in accordance with § 4.452–3.

(c) The administrative law judge may consider and rule on all motions and petitions, including a petition for a stay of a final BLM grazing decision.

(d) An administrative law judge may consolidate two or more appeals for purposes of hearing and decision when they involve a common issue or issues.

[44 FR 41790, July 18, 1979. Redesignated and amended at 68 FR 68770, 68771, Dec. 10, 2003]

§ 4.475 Service.

Service of notice or other documents required under this subpart shall be governed by §§ 4.413 and 4.422. Proof of such service shall be filed in the same office where the notice or document was filed within 15 days after such service, unless filed with the notice or document.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003]

§ 4.476 Conduct of hearing; reporter's fees; transcript.

(a) The appellant, the State Director or his representative, and recognized intervenors will stipulate so far as possible all material facts and the issue or issues involved. The administrative law judge will state any other issues on which he may wish to have evidence presented. Issues which appear to the administrative law judge to be unnecessary to a proper disposition of the case will be excluded; but the party asserting such issue may state briefly for the record the substance of the proof which otherwise would have been offered in support of the issue. Issues not covered by the appellant's specifications of error may not be admitted except with the consent of the State Director or his representative, unless the administrative law judge rules that such issue is essential to the controversy and should be admitted. The parties will then be given an opportunity to submit offers of settlement and proposals of adjustment for the consideration of the administrative law judge and of the other parties.

(b) Unless the administrative law judge orders otherwise, the State Director or his representative will then make the opening statement, setting forth the facts leading to the appeal. Upon the conclusion of the opening statement, the appellant shall present his case, consistent with his specifications of error. (In the case of a show cause, the State Director shall set forth the facts leading to the issuance of the show cause notice and shall present his case following the opening statement.) Following the appellant's presentation, or upon his failure to make such presentation, the administrative law judge, upon his own motion or upon motion of any of the parties, may order summary dismissal of the appeal with prejudice because of the inadequacy or insufficiency of the appellant's case, to be followed by a written order setting forth the reasons for the dismissal and taking such other action under this subpart as may be proper and warranted. An appeal may be had from such order as well as from any other final determination made by the administrative law judge.

(c) In the absence or upon denial of such motion the State Director or his representative and recognized intervenors may present evidence if such a presentation appears to the administrative law judge to be necessary for a proper disposition of the matters in controversy, adhering as closely as possible to the issues raised by the appellant. All oral testimony shall be under oath or affirmation, and witnesses shall be subject to cross-examination by any party to the proceeding. The administrative law judge may question any witness whenever it appears necessary. Documentary evidence will be received by the administrative law judge and made a part of the record, if pertinent to any issue, or may be entered by stipulation. No exception need be stated or noted and every ruling of the administrative law judge will be subject to review on appeal. The party affected by an adverse ruling sustaining an objection to the admission of evidence, may insert in the record, as a tender of proof, a brief written statement of the substance of the excluded evidence; and the opposing party may then make an offer of proof in rebuttal. The administrative law judge shall summarily stop examination and exclude testimony on any issue which he determines has been adjudicated previously in an appeal involving the same preference and the same parties or their predecessors in interest, or which is obviously irrelevant and immaterial to the issues in the case. At the conclusion of the testimony the parties at the hearing shall be given a reasonable opportunity, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and

conclusions of law, and reasons in support thereof, or to stipulate to a waiver of such findings and conclusions.

(d) The reporter's fees will be borne by the Government. Each party must pay for any copies of the transcript that the party requests. The Government will file the original transcript with the case record.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.477 Findings and conclusions; decision by administrative law judge.

As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge will make findings of fact and conclusions of law, unless waiver has been stipulated, and will render a decision upon all issues of material fact and law presented on the record. In doing so, he or she may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. The reasons for the findings, conclusions, and decision made will be stated, and along with the findings, conclusions, and decision, will become a part of the record in any further appeal. A copy of the decision must be sent by certified mail to all the parties or by electronic transmission if the parties consented to such means under the terms of OHA Standing Orders on Electronic Transmission.

[75 FR 64669, Oct. 20, 2010, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.478 Appeals to the Board of Land Appeals; judicial review.

(a) Any person who has a right of appeal under § 4.410 or other applicable regulation may appeal to the Board from an order of an administrative law judge granting or denying a petition for a stay in accordance with § 4.411.

(b) As an alternative to paragraph (a) of this section, any party other than BLM may seek judicial review under 5 U.S.C. 704 of a final BLM grazing decision if the administrative law judge denies a petition for a stay, either directly or by failing to meet the deadline in § 4.472(d).

(c) If a party appeals under paragraph (a) of this section, the Board must issue an expedited briefing schedule and decide the appeal promptly.

(d) Unless the Board or a court orders otherwise, an appeal under paragraph (a) of this section does not—

(1) Suspend the effectiveness of the decision of the administrative law judge; or

(2) Suspend further proceedings before the administrative law judge.

(e) Any party adversely affected by the administrative law judge's decision on the merits has the right to appeal to the Board under the procedures in this part.

[68 FR 68771, Dec. 10, 2003, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.479 Effectiveness of decision during appeal.

(a) Consistent with the provisions of §§ 4.21(a) and 4.472(e) and except as provided in paragraphs (b) and (c) of this section or other applicable regulation, a final BLM grazing decision will not be effective—

(1) Until the expiration of the time for filing an appeal under § 4.470(a); and

(2) If a petition for a stay is filed under § 4.471(a), until the administrative law judge denies the petition for a stay or fails to act on the petition within the time set forth in § 4.472(d).

(b) Consistent with the provisions of §§ 4160.3 and 4190.1 of this title and notwithstanding the provisions of § 4.21(a), a final BLM grazing decision may provide that the decision will be effective immediately. Such a decision will remain effective pending a decision on an appeal, unless a stay is granted by an administrative law judge under § 4.472 or by the Board under § 4.478(a).

(c) Notwithstanding the provisions of § 4.21(a), when the public interest requires, an administrative law judge may provide that the final BLM grazing decision will be effective immediately.

(d) An administrative law judge or the Board may change or revoke any action that BLM takes under a final BLM grazing decision on appeal.

(e) In order to ensure exhaustion of administrative remedies before resort to court action, a BLM grazing decision is not final agency action subject to judicial review under 5 U.S.C. 704 unless—

(1) A petition for a stay of the BLM decision has been timely filed and the BLM decision has been made effective under § 4.472(e), or

(2) The BLM decision has been made effective under paragraphs (b) or (c) of this section or other applicable regulation, and a stay has not been granted.

(f) Exhaustion of administrative remedies is not required if a stay would not render the challenged portion of the BLM decision inoperative under subpart 4160 of this title.

[68 FR 68771, Dec. 10, 2003]

§ 4.480 Conditions of decision action.

(a) *Record as basis of decision; definition of record.* No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative, and substantial evidence. The transcript of testimony and exhibits, together with all documents and requests filed in the proceedings, shall constitute the exclusive record for decision.

(b) *Effect of substantial compliance.* No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of part 4100 of this title.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003 as amended at 88 FR 5794, Jan. 30, 2023]

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

AUTHORITY: 5 U.S.C. 504(c)(1).

SOURCE: 71 FR 6366, Feb. 8, 2006, unless otherwise noted.

GENERAL PROVISIONS

§ 4.601 What is the purpose of this subpart?

(a) The Equal Access to Justice Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department of the Interior. Under the Act, an eligible party may receive an award when it prevails over the Department or other agency, unless the position of the Department or other agency was substantially justified or special circumstances make an award unjust. The regulations in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Office of Hearings and Appeals will use in ruling on those applications.

(b) The regulations in this subpart apply to any application for an award of attorney fees and other expenses that is:

(1) Pending on February 8, 2006; or

(2) Filed on or after February 8, 2006.

§ 4.602 What definitions apply to this subpart?

As used in this subpart:

Act means section 203(a)(1) of the Equal Access to Justice Act, Public Law 96–481, 5 U.S.C. 504, as amended.

Adjudicative officer means the deciding official(s) who presided at the adversary adjudication, or any successor official(s) assigned to decide the application.

Adversary adjudication means any of the following:

(1) An adjudication under 5 U.S.C. 554 in which the position of the Department or other agency is presented by an attorney or other representative who enters an appearance and participates in the proceeding;

(2) Any hearing conducted under section 6103(a) of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*); or

(3) Any hearing or appeal involving the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb *et seq.*).

Affiliate means:

(1) Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant; or

(2) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest.

Demand means the express demand of the Department or other agency that

led to the adversary adjudication, but does not include a recitation by the Department or other agency of the maximum statutory penalty:

(1) In the administrative complaint; or

(2) Elsewhere when accompanied by an express demand for a lesser amount.

Department means the Department of the Interior or the component of the Department that is a party to the adversary adjudication (e.g., Bureau of Land Management).

Final disposition means the date on which either of the following becomes final and unappealable, both within the Department and to the courts:

(1) A decision or order disposing of the merits of the proceeding; or

(2) Any other complete resolution of the proceeding, such as a settlement or voluntary dismissal.

Other agency means any agency of the United States or the component of the agency that is a party to the adversary adjudication before the Office of Hearings and Appeals, other than the Department of the Interior and its components.

Party means a party as defined in 5 U.S.C. 551(3).

Position of the Department or other agency means:

(1) The position taken by the Department or other agency in the adversary adjudication; and

(2) The action or failure to act by the Department or other agency upon which the adversary adjudication is based.

Proceeding means an adversary adjudication as defined in this section.

You means a party to an adversary adjudication.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.603 What proceedings are covered by this subpart?

(a) The Act applies to adversary adjudications conducted by the Office of Hearings and Appeals, including proceedings to modify, suspend, or revoke licenses if they are otherwise adversary adjudications.

(b) The Act does not apply to:

(1) Other hearings and appeals conducted by the Office of Hearings and Appeals, even if the Department uses procedures comparable to those in 5 U.S.C. 554 in such cases;

(2) Any proceeding in which the Department or other agency may prescribe a lawful present or future rate; or

(3) Proceedings to grant or renew licenses.

(c) If a hearing or appeal includes both matters covered by the Act and matters excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 4.604 When am I eligible for an award?

(a) To be eligible for an award of attorney fees and other expenses under the Act, you must:

(1) Be a party to the adversary adjudication for which you seek an award; and

(2) Show that you meet all conditions of eligibility in this section.

(b) You are an eligible applicant if you are any of the following:

(1) An individual with a net worth of $2 million or less;

(2) The sole owner of an unincorporated business who has a net worth of $7 million or less, including both personal and business interests, and 500 or fewer employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with 500 or fewer employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with 500 or fewer employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of $7 million or less and 500 or fewer employees; or

(6) For purposes of § 4.605(c), a small entity as defined in 5 U.S.C. 601(6).

(c) For the purpose of eligibility, your net worth and the number of your employees must be determined as of the date the proceeding was initiated.

(1) Your employees include all persons who regularly perform services for remuneration under your direction and control.

(2) Part-time employees must be included on a proportional basis.

(d) You are considered an ''individual'' rather than a ''sole owner of an unincorporated business'' if:

(1) You own an unincorporated business; and

(2) The issues on which you prevail are related primarily to personal interests rather than to business interests.

(e) To determine your eligibility, your net worth and the number of your employees must be aggregated with the net worth and the number of employees of all of your affiliates. However, this paragraph does not apply if the adjudicative officer determines that aggregation would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities.

(f) The adjudicative officer may determine that financial relationships other than those described in the definition of ''affiliate'' in § 4.602 constitute special circumstances that would make an award unjust.

(g) If you participate in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible, you are not eligible for an award.

§ 4.605 Under what circumstances may I receive an award?

(a) You may receive an award for your fees and expenses in connection with a proceeding if:

(1) You prevailed in the proceeding or in a significant and discrete substantive portion of a proceeding; and

(2) The position of the Department or other agency over which you prevailed was not substantially justified. The Department or other agency has the burden of proving that its position was substantially justified.

(b) An award will be reduced or denied if you have unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(c) This paragraph applies to an adversary adjudication arising from an action by the Department or other agency to enforce compliance with a statutory or regulatory requirement:

(1) If the demand of the Department or other agency in the action is excessive and unreasonable compared with the adjudicative officer's decision, then the adjudicative officer must award you your fees and expenses related to defending against the excessive demand, unless:

(i) You have committed a willful violation of law;

(ii) You have acted in bad faith; or

(iii) Special circumstances make an award unjust.

(2) Fees and expenses awarded under this paragraph will be paid only if appropriations to cover the payment have been provided in advance.

§ 4.606 What fees and expenses may be allowed?

(a) If the criteria in §§ 4.603 through 4.605 are met, you may receive an award under this subpart only for the fees and expenses of your attorney(s) and expert witness(es).

(b) The adjudicative officer must base an award on rates customarily charged by persons engaged in the business of acting as attorneys and expert witnesses, even if the services were made available to you without charge or at a reduced rate.

(1) The maximum that can be awarded for the fee of an attorney is $125 per hour.

(2) The maximum that can be awarded for the fee of an expert witness is the highest rate at which the Department or other agency pays expert witnesses with similar expertise.

(3) An award may also include the reasonable expenses of the attorney or expert witness as a separate item, if the attorney or expert witness ordinarily charges clients separately for those expenses.

(c) The adjudicative officer may award only reasonable fees and expenses under this subpart. In determining the reasonableness of the fee for an attorney or expert witness, the adjudicative officer must consider the following:

(1) If the attorney or expert witness is in private practice, his or her customary fee for similar services;

(2) If the attorney or expert witness is your employee, the fully allocated cost of the services;

(3) The prevailing rate for similar services in the community in which the attorney or expert witness ordinarily performs services;

(4) The time actually spent in representing you in the proceeding;

(5) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(6) Any other factors that bear on the value of the services provided.

(d) The adjudicative officer may award the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on your behalf to the extent that:

(1) The charge for the service does not exceed the prevailing rate for similar services; and

(2) The study or other matter was necessary for preparation of your case.

INFORMATION REQUIRED FROM APPLICANTS

§ 4.610 What information must my application for an award contain?

(a) Your application for an award of fees and expenses under the Act must:

(1) Identify you;

(2) Identify the proceeding for which an award is sought;

(3) Show that you have prevailed;

(4) Specify the position of the Department or other agency that you allege was not substantially justified;

(5) Unless you are an individual, state the number of your employees and those of all your affiliates, and describe the type and purpose of your organization or business;

(6) State the amount of fees and expenses for which you seek an award;

(7) Be signed by you or your authorized officer or attorney;

(8) Contain or be accompanied by a written verification under oath or under penalty of perjury that the information in the application is true and correct; and

(9) Unless one of the exceptions in paragraph (b) of this section applies, include a statement that:

(i) Your net worth does not exceed $2 million, if you are an individual; or

(ii) Your net worth and that of all your affiliates does not exceed $7 million in the aggregate, if you are not an individual.

(b) You do not have to submit the statement of net worth required by paragraph (a)(9) of this section if you do any of the following:

(1) Attach a copy of a ruling by the Internal Revenue Service that you qualify as a tax-exempt organization described in 26 U.S.C. 501(c)(3);

(2) Attach a statement describing the basis for your belief that you qualify under 26 U.S.C. 501(c)(3), if you are a tax-exempt organization that is not required to obtain a ruling from the Internal Revenue Service on your exempt status;

(3) State that you are a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)); or

(4) Seek fees and expenses under § 4.605(c) and provide information demonstrating that you qualify as a small entity under 5 U.S.C. 601.

(c) You may also include in your application any other matters that you wish the adjudicative officer to consider in determining whether and in what amount an award should be made.

§ 4.611 What information must I include in my net worth exhibit?

(a) Unless you meet one of the criteria in § 4.610(b), you must file with your application a net worth exhibit that meets the requirements of this section. The adjudicative officer may also require that you file additional information to determine your eligibility for an award.

(b) The exhibit must show your net worth and that of any affiliates when the proceeding was initiated. The exhibit may be in any form that:

(1) Provides full disclosure of your and your affiliates' assets and liabilities; and

(2) Is sufficient to determine whether you qualify under the standards in this subpart.

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if you object to public disclosure of information in any portion of the exhibit and believe there are legal grounds for withholding it from disclosure, you may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure.

(1) The motion must describe the information sought to be withheld and explain, in detail:

(i) Why it falls within one or more of the exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b);

(ii) Why public disclosure of the information would adversely affect you; and

(iii) Why disclosure is not required in the public interest.

(2) You must serve the net worth exhibit and motion on counsel representing the agency against which you seek an award, but you are not required to serve it on any other party to the proceeding.

(3) If the adjudicative officer finds that the information should not be withheld from disclosure, it must be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit will be disposed of in accordance with the Department's procedures under the Freedom of Information Act, 43 CFR 2.7 *et seq*.

§ 4.612 What documentation of fees and expenses must I provide?

(a) Your application must be accompanied by full documentation of the fees and expenses for which you seek an award, including the cost of any study, analysis, engineering report, test, project, or similar matter.

(b) You must submit a separate itemized statement for each professional firm or individual whose services are covered by the application, showing:

(1) The hours spent in connection with the proceeding by each individual;

(2) A description of the specific services performed;

(3) The rates at which each fee has been computed;

(4) Any expenses for which reimbursement is sought;

(5) The total amount claimed; and

(6) The total amount paid or payable by you or by any other person or entity for the services provided.

(c) The adjudicative officer may require you to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, in accordance with § 4.624.

§ 4.613 When may I file an application for an award?

(a) You may file an application whenever you have prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding. You must file the application no later than 30 days after the final disposition of the proceeding.

(b) Consideration of an application for an award must be stayed if:

(1) Any party seeks review or reconsideration of a decision in a proceeding in which you believe you have prevailed; or

(2) The Department or other agency (or the United States on its behalf) appeals an adversary adjudication to a court.

(c) A stay under paragraph (b)(1) of this section will continue until there has been a final disposition of the review or reconsideration of the decision. A stay under paragraph (b)(2) of this section will continue until either:

(1) A final and unreviewable decision is rendered by the court on the appeal; or

(2) The underlying merits of the case have been finally determined.

Procedures for Considering Applications

§ 4.620 How must I file and serve documents?

(a) You must file and serve all documents related to an application for an award under this subpart on all other parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 4.611(c) for confidential information. The Department or other agency and all other parties must likewise file and serve their pleadings and related documents on you and on each other, in the same manner as other pleadings in the proceeding.

(b) A document may be electronically transmitted under the terms specified in the OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.621 When may the Department or other agency file an answer?

(a) Within 30 days after service of an application, the Department or other agency against which an award is sought may file an answer to the application. However, if consideration of an application has been stayed under § 4.613(b), the answer is due within 30 days after the final disposition of the review or reconsideration of the decision.

(1) Except as provided in paragraph (a)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested. In such case, the adjudicative officer will issue a decision in accordance with § 4.625 based on the record before him or her.

(2) Failure to file an answer within the 30-day period will not be treated as a consent to the award requested if the Department or other agency either:

(i) Requests an extension of time for filing; or

(ii) Files a statement of intent to negotiate under paragraph (b) of this section.

(b) If the Department or other agency and you believe that the issues in the fee application can be settled, you may jointly file a statement of intent to negotiate a settlement. Filing this statement will extend for an additional 30 days the time for filing an answer, and the adjudicative officer may grant further extensions if you and the agency counsel so request.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on to support the Department's or other agency's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Department or other agency must include with the answer either supporting affidavits or a request for further proceedings under § 4.624.

§ 4.622 When may I file a reply?

Within 15 days after service of an answer, you may file a reply. If your reply is based on any alleged facts not already in the record of the proceeding, you must include with the reply either supporting affidavits or a request for further proceedings under § 4.624.

§ 4.623 When may other parties file comments?

Any party to a proceeding other than the applicant and the Department or other agency may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in the proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 4.624 When may further proceedings be held?

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, the adjudicative officer may order further proceedings, which will be held only when necessary for full and fair resolution of the issues and will be conducted as promptly as possible.

(b) The adjudicative officer may order further proceedings on his or her own initiative or in response to a request by you or by the Department or other agency. A request for further proceedings under this section must:

(1) Identify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to resolve the issues.

(c) As to issues other than substantial justification (such as your eligibility or substantiation of fees and expenses), further proceedings under this section may include an informal conference, oral argument, additional written submissions, pertinent discovery, or an evidentiary hearing.

(d) The adjudicative officer will determine whether the position of the

Department or other agency was substantially justified based on the administrative record of the adversary adjudication as a whole.

§ 4.625 How will my application be decided?

The adjudicative officer must issue a decision on the application promptly after completion of proceedings on the application. The decision must include written findings and conclusions on all of the following that are relevant to the decision:

(a) Your eligibility and status as a prevailing party;

(b) The amount awarded, and an explanation of the reasons for any difference between the amount requested and the amount awarded;

(c) Whether the position of the Department or other agency was substantially justified;

(d) Whether you unduly protracted the proceedings; and

(e) Whether special circumstances make an award unjust.

§ 4.626 How will an appeal from a decision be handled?

(a) If the adjudicative officer is an administrative law judge, you or the Department or other agency may appeal his or her decision on the application to the appeals board that would have jurisdiction over an appeal involving the merits of the proceeding. The appeal will be subject to the same regulations and procedures that would apply to an appeal involving the merits of the proceeding. The appeals board will issue the final Departmental or other agency decision on the application.

(b) If the adjudicative officer is a panel of appeals board judges, their decision on the application is final for the Department or other agency.

§ 4.627 May I seek judicial review of a final decision?

You may seek judicial review of a final Departmental or other agency decision on an award as provided in 5 U.S.C. 504(c)(2).

§ 4.628 How will I obtain payment of an award?

(a) To obtain payment of an award against the Department or other agency, you must submit:

(1) A copy of the final decision granting the award; and

(2) A certification that no party is seeking review of the underlying decision in the United States courts, or that the process for seeking review of the award has been completed.

(b) If the award is against the Department:

(1) You must submit the material required by paragraph (a) of this section to the following address:

Director, Office of Financial Management, Policy, Management and Budget, U.S. Department of the Interior, Washington, DC 20240.

(2) Payment will be made by electronic funds transfer whenever possible. A representative of the Department will contact you for the information the Department needs to process the electronic funds transfer.

(c) If the award is against another agency, you must submit the material required by paragraph (a) of this section to the chief financial officer or other disbursing official of that agency. Agency counsel must promptly inform you of the title and address of the appropriate official.

(d) The Department or other agency will pay the amount awarded to you within 60 days of receiving the material required by this section.

Subpart G—Special Rules Applicable to Other Appeals and Hearings

AUTHORITY: 5 U.S.C. 301.

§ 4.700 Who may appeal.

Any party aggrieved by an adjudicatory action or decision of a Departmental official relating to rights or privileges based upon law in any case or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision, should direct his appeal to the Director, Office of Hearings and Appeals, if the case is not one which lies within the appellate review

jurisdiction of an established Appeals Board and is not excepted from the review authority delegated to the Director. No appeal will lie when the action of the Departmental official was based solely upon administrative or discretionary authority of such official.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971]

§ 4.701 Notice of appeal.

The appellant shall file a written notice of appeal, signed by him or by his attorney or other qualified representative, in the Office of the Director, within 30 days from the date of mailing of the decision from which the appeal is taken. The notice shall contain an identification of the action or decision appealed from and give a concise but complete statement of the facts relied upon and the relief sought. The appellant shall mail a or electronically transmit under the terms of OHA Standing Orders copy of the notice of appeal, any accompanying statement of reasons therefor, and any written arguments or briefs, to each party to the proceedings or whose rights are involved in the case, and to the Departmental official whose action or decision is being appealed. The notice of appeal shall contain a certificate setting forth the names of the parties served, their addresses, and the dates of mailing.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.702 Transmittal of appeal file.

Within 10 days after receipt of a copy of the notice of appeal, the Departmental official whose action or decision is being appealed shall transmit to the Office of the Director the entire official file in the matter, including all records, documents, transcripts of testimony, and other information compiled during the proceedings leading to the decision being appealed.

§ 4.703 Documents; filing and service.

(a) If the parties wish to file briefs, they must comply with the following requirements: Appellant shall have 30 days from the date of filing of his notice of appeal within which to file an opening brief, and the opposing parties shall have 30 days from the date of receipt of appellant's brief in which to file an answering brief. Additional or rebuttal briefs may be filed upon permission first obtained from the Director or the Ad Hoc Appeals Board appointed by him to consider and decide the particular appeal. Copies of all briefs shall be served upon all other parties or their attorneys of record or other qualified representatives, and a certificate to that effect shall be filed with said brief.

(b) A document may be electronically transmitted under the terms specified in the OHA Standing Orders on Electronic Transmission issued by the Director. When done in accordance with the Standing Orders, a document may be:

(1) Filed by electronic transmission; and

(2) Served on or transmitted to a person or party by electronic transmission if that person or party has consented to such means.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.704 Decisions on appeals.

The Director, or an Ad Hoc Appeals Board appointed by the Director to consider and decide the particular appeal, will review the record and take such action as the circumstances call for. The Director or the Ad Hoc Appeals Board may direct a hearing on the entire matter or specified portions thereof, may decide the appeal forthwith upon the record already made, or may make other disposition of the case. Upon request and for good cause shown, the Director or an Ad Hoc Appeals Board may grant an opportunity for oral argument. Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an administrative law judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

[36 FR 7186, Apr. 15, 1971, as amended at 39 FR 2366, Jan. 21, 1974]

Subpart H [Reserved]

Subpart I—Special Procedural Rules Applicable to Practice and Procedure for Hearings, Decisions, and Administrative Review Under Part 17 of This Title—Nondiscrimination in Federally Assisted Programs of the Department of the Interior—Effectuation of Title VI of the Civil Rights Act of 1964

AUTHORITY: 43 CFR 17.8 and 5 U.S.C. 301.

SOURCE: 38 FR 21162, Aug. 6, 1973, unless otherwise noted.

CROSS REFERENCE: See subpart A for the organization, authority and jurisdiction of the Office of Hearings and Appeals, including its Hearings Division. To the extent they are not inconsistent with these special rules, the general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals, contained in subpart B of this part, are applicable also to proceedings under these regulations.

GENERAL

§ 4.800 Scope and construction of rules.

(a) The rules of procedure in this subpart I supplement part 17 of this title and are applicable to the practice and procedure for hearings, decisions, and administrative review conducted by the Department of the Interior, pursuant to title VI of the Civil Rights Act of 1964 (section 602, 42 U.S.C. 2000d–1) and part 17 of this title, concerning nondiscrimination in Federally-assisted programs in connection with which Federal financial assistance is extended under laws administered in whole or in part by the Department of the Interior.

(b) These regulations shall be liberally construed to secure the just, prompt, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved and full protection of the rights of all interested parties including the Government.

§ 4.801 Suspension of rules.

Upon notice to all parties, the responsible Department official or the administrative law judge, with respect to matters pending before him, may modify or waive any rule in this part upon his determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

§ 4.802 Definitions.

(a) The definitions set forth in § 17.12 of this title apply also to this subpart.

(b) *Director* means the Director, Office for Equal Opportunity, Department of the Interior.

(c) *Administrative law judge* means an administrative law judge designated by the Office of Hearings and Appeals, Office of the Secretary, in accordance with 5 U.S.C. 3105 and 3344.

(d) *Notice* means a notice of hearing in a proceeding instituted under Part 17 of this title and these regulations.

(e) *Party* means a recipient or applicant; the Director; and any person or organization participating in a proceeding pursuant to § 4.808.

§ 4.803 Computation of time.

Except as otherwise provided by law, in computing any period of time under these rules or in any order issued hereunder, the time begins with the day following the act or event, and includes the last day of the period, unless it is a Saturday, Sunday, or Federal legal holiday, or other nonbusiness day, in which event it includes the next following day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the period of time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation.

§ 4.804 Extensions of time.

A request for extension of time should be made to the designated administrative law judge or other appropriate Departmental official with respect to matters pending before him. Such request shall be served on all parties and set forth the reasons for the request. Extensions may be granted upon a showing of good cause by the applicant. Answers to such requests are permitted if made promptly.

§ 4.805 Reduction of time to file documents.

For good cause, the responsible Departmental official or the administrative law judge, with respect to matters pending before him, may reduce any time limit prescribed by the rules in this part, except as provided by law or in part 17 of this title.

DESIGNATION AND RESPONSIBILITIES OF ADMINISTRATIVE LAW JUDGE

§ 4.806 Designation.

Hearings shall be held before an administrative law judge designated by the Office of Hearings and Appeals.

§ 4.807 Authority and responsibilities.

The administrative law judge shall have all powers necessary to preside over the parties and the proceedings, conduct the hearing, and make decisions in accordance with 5 U.S.C. 554 through 557. His powers shall include, but not be limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(b) Require parties to state their position with respect to the various issues in the proceedings.

(c) Establish rules for media coverage of the proceedings.

(d) Rule on motions and other procedural items in matters before him.

(e) Regulate the course of the hearing, the conduct of counsel, parties, witnesses, and other participants.

(f) Administer oaths, call witnesses on his own motion, examine witnesses, and direct witnesses to testify.

(g) Receive, rule on, exclude, or limit evidence.

(h) Fix time limits for submission of written documents in matters before him.

(i) Take any action authorized by these regulations, by 5 U.S.C. 556, or by other pertinent law.

APPEARANCE AND PRACTICE

§ 4.808 Participation by a party.

Subject to the provisions contained in part 1 of this subtitle, a party may appear in person, by representative, or by counsel, and participate fully in any proceeding held pursuant to part 17 of this title and these regulations. A State agency or any instrumentality thereof, a political subdivision of the State or instrumentality thereof, or a corporation may appear by any of its officers or employees duly authorized to appear on its behalf.

§ 4.809 Determination of parties.

(a) The affected applicant or recipient to whom a notice of hearing or a notice of an opportunity for hearing has been mailed in accordance with part 17 of this title and § 4.815, and the Director, are the initial parties to the proceeding.

(b) Other persons or organizations shall have the right to participate as parties if the final decision could directly and adversely affect them or the class they represent, and if they may contribute materially to the disposition of the proceedings.

(c) A person or organization wishing to participate as a party under this section shall submit a petition to the administrative law judge within 15 days after the notice has been served. The petition should be filed with the administrative law judge and served on the affected applicant or recipient, on the Director, and on any other person or organization who has been made a party at the time of filing. Such petition shall concisely state: (1) Petitioner's interest in the proceeding, (2) how his participation as a party will contribute materially to the disposition of the proceeding, (3) who will appear for petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.

(d) The administrative law judge shall promptly ascertain whether there are objections to the petition. He shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraphs (a) and (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate

a single representative, or he may recognize one or more of such petitioners to represent all such petitioners. The administrative law judge shall give each such petitioner written notice of the decision on his petition. If the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The administrative law judge shall give written notice to each party of each petition granted.

(e) Persons or organizations whose petition for party participation is denied may appeal the decision to the Director, Office of Hearings and Appeals, within 7 days of receipt of denial. The Director, Office of Hearings and Appeals, will make the final decision for the Department to grant or deny the petition.

§ 4.810 Complainants not parties.

A person submitting a complaint pursuant to §17.6 of this title is not a party to the proceedings governed by part 17 of this title and these regulations, but may petition, after proceedings are initiated, to become an amicus curiae. In any event a complainant shall be advised of the time and place of the hearing.

§ 4.811 Determination and participation of amici.

(a) Any interested person or organization wishing to participate as amicus curiae in the proceeding shall file a petition before the commencement of the hearing. Such petition shall concisely state the petitioner's interest in the hearing and who will represent petitioner.

(b) The administrative law judge will grant the petition if he finds that the petitioner has an interest in the proceedings and may contribute materially to the disposition of the proceedings. The administrative law judge shall give the petitioner written notice of the decision on his petition.

(c) An amicus curiae is not a party and may not introduce evidence at a hearing but may only participate as provided in paragraph (d) of this section.

(d) An amicus curiae may submit a written statement of position to the administrative law judge at any time prior to the beginning of a hearing, and shall serve a copy on each party. He may also file a brief or written statement on each occasion a decision is to be made or a prior decision is subject to review. His brief or written statement shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(e) When all parties have completed their initial examination of a witness, any amicus curiae may request the administrative law judge to propound specific questions to the witness. The administrative law judge, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

Form and Filing of Documents

§ 4.812 Form.

Documents filed pursuant to a proceeding herein shall show the docket description and title of the proceeding, the party or amicus submitting the document, the dates signed, and the title, if any, and address of the signatory. The original will be signed in ink by the party representing the party or amicus. Copies need not be signed, but the name of the person signing the original shall be reproduced.

§ 4.813 Filing and service.

(a) All documents submitted in a proceeding shall be served on all parties. The original and two copies of each document shall be submitted for filing. Filings shall be made with the administrative law judge or other appropriate Departmental official before whom the proceeding is pending. With respect to exhibits and transcripts of testimony, only originals need be filed.

(b) Service upon a party or amicus shall be made by delivering one copy of each document requiring service in person or by certified mail, return receipt requested, properly addressed with postage prepaid, to the party or

amicus or his attorney, or designated representative. Filing will be made in person or by certified mail, return receipt requested, to the administrative law judge or other appropriate Departmental official before whom the proceeding is pending.

(c) The date of filing or of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person.

(d) A document may be electronically transmitted under the terms specified in § 4.22, subpart B.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.814 Certificate of service.

The original of every document filed and required to be served upon parties shall be endorsed with a certificate of service signed by the party or amicus curiae making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service.

PROCEDURES

§ 4.815 How proceedings are commenced.

Proceedings are commenced by the Director by mailing to an applicant or recipient a notice of alleged noncompliance with the Act and the regulations thereunder. The notice shall include either a notice of hearing fixing a date therefor or a notice of an opportunity for a hearing as provided in § 17.8 of this title. The notice shall advise the applicant or recipient of the action proposed to be taken, the specific provisions of part 17 of this title under which the proposed action is to be taken, and the matters of fact or law asserted as the basis of the action.

§ 4.816 Notice of hearing and response thereto.

A notice of hearing shall fix a date not less than 30 days from the date of service of the notice of a hearing on matters alleged in the notice. If the applicant recipient does not desire a hearing, he should so state in writing, in which case the applicant or recipient shall have the right to further participate in the proceeding. Failure to appear at the time set for a hearing, without good cause, shall be deemed a waiver of the right to a hearing under section 602 of the Act and the regulations thereunder and consent to the making of a decision on such information as is available which may be presented for the record.

§ 4.817 Notice of opportunity to request a hearing and response thereto.

A notice of opportunity to request a hearing shall set a date not less than 20 days from service of said notice within which the applicant or recipient may file a request for a hearing, or may waive a hearing and submit written information and argument for the record, in which case, the applicant or recipient shall have the right to further participate in the proceeding. When the applicant or recipient elects to file a request for a hearing, a time shall be set for the hearing at a date not less than 20 days from the date applicant or recipient is notified of the date set for the hearing. Failure of the applicant or recipient to request a hearing or to appear at the date set shall be deemed a waiver of the right to a hearing, under section 602 of the Act and the regulations thereunder and consent to the making of a decision on such information as is available which may be presented for the record.

§ 4.818 Answer.

In any case covered by § 4.816 or § 4.817, the applicant or recipient shall file an answer. Said answer shall admit or deny each allegation of the notice, unless the applicant or recipient is without knowledge, in which case the answer shall so state, and the statement will be considered a denial. Failure to file an answer shall be deemed an admission of all allegations of fact in the notice. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged in the answer as affirmative defenses shall be separately stated and numbered. The answer under § 4.816 shall be filed within 20 days from the date of service of the notice of hearing. The answer under § 4.817 shall be filed within 20 days of service of the notice of opportunity to request a hearing.

§ 4.819 Amendment of notice or answer.

The Director may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer is filed, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Other amendments of the notice or of the answer to the notice shall be made only by leave of the administrative law judge. An amended notice shall be answered within 10 days of its service, or within the time for filing an answer to the original notice, whichever period is longer.

§ 4.820 Consolidated or joint hearings.

As provided in § 17.8(e) of this title, the Secretary may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceedings consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 4.821 Motions.

Motions and petitions shall state the relief sought, the basis for relief and the authority relied upon. If made before or after the hearing itself, these matters shall be in writing. If made at the hearing, they may be stated orally; but the administrative law judge may require that they be reduced to writing and filed and served on all parties. Within 8 days after a written motion or petition is served, any party may file a response to a motion or petition. An immediate oral response may be made to an oral motion. Oral argument on motions will be at the discretion of the administrative law judge.

§ 4.822 Disposition of motions.

The administrative law judge may not grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately.

§ 4.823 Interlocutory appeals.

Except as provided in § 4.809(e), a ruling of the administrative law judge may not be appealed to the Director, Office of Hearings and Appeals, prior to consideration of the entire proceeding by the administrative law judge unless permission is first obtained from the Director, Office of Hearings and Appeals, and the administrative law judge has certified the interlocutory ruling on the record or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Director, Office of Hearings and Appeals. If an appeal is allowed, any party may file a brief within such period as the Director, Office of Hearings and Appeals, directs. Upon affirmance, reversal, or modification of the administrative law judge's interlocutory ruling or order, by the Director, Office of Hearings and Appeals, the case will be remanded promptly to the administrative law judge for further proceedings.

§ 4.824 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing, if the administrative law judge so directs. Proposed exhibits not so exchanged in accordance with the administrative law judge's order may be denied admission as evidence. The authenticity of all exhibits submitted prior to the hearing, under direction of the administrative law judge, will be deemed admitted unless written objection thereto is filed and served on all parties, or unless good cause is shown for failure to file such written objection.

§ 4.825 Admissions as to facts and documents.

Not later than 15 days prior to the date of the hearing any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within a period of 10 days, the party to whom the request is directed serves upon the requesting party a statement either (a) denying specifically the matters as to which an admission is requested, or (b) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

§ 4.826 Discovery.

(a) *Methods.* Parties may obtain discovery as provided in these rules by depositions, written interrogatories, production of documents, or other items; or by permission to enter property, for inspection and other purposes.

(b) *Scope.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the hearing.

(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to limit or condition discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(d) *Sequence and timing.* Methods of discovery may be used in any sequence. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(e) *Time limit.* Discovery by all parties will be completed within such time as the administrative law judge directs, from the date the notice of hearing is served on the applicant or recipient.

§ 4.827 Depositions.

(a) A party may take the testimony of any person, including a party, by deposition upon oral examination. This may be done by stipulation or by notice, as set forth in paragraph (b) of this section. On motion of any party or other person upon whom the notice is served, the administrative law judge may for cause shown enlarge or shorten the time for the deposition, change the place of the deposition, limit the scope of the deposition or quash the notice. Depositions of persons other than parties or their representatives shall be upon consent of the deponent.

(b)(1) The party will give reasonable notice in writing to every other party of the time and place for taking depositions, the name and address of each person to be examined, if known, or a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The notice to a deponent may be accompanied by a request for the production of documents and tangible things at the taking of the deposition.

(3) A party may name as the deponent a corporation, partnership, association, or governmental agency and may designate a particular person within the organization whose testimony is desired and the matters on which examination is requested. If no particular person is named, the organization shall designate one or more agents to testify on its behalf, and may set forth the matters on which each will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(c) Examination and cross-examination of witnesses may proceed as permitted at the hearing. The witness shall be placed under oath by a disinterested person qualified to administer oaths by the laws of the United States or of the place where the examination is held, and the testimony taken by such person shall be recorded verbatim.

(d) During the taking of a deposition a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the administrative law judge for a ruling on his objections to the deposition conduct or

proceedings. The administrative law judge may then limit the scope or manner of the taking of the deposition.

(e) The officer shall certify the deposition and promptly file it with the administrative law judge. Documents or true copies of documents and other items produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition.

(f) The party taking the deposition shall give prompt notice of its filing to all other parties.

§ 4.828 Use of depositions at hearing.

(a) Any part or all of a deposition so far as admissible under § 4.835 applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof as follows:

(1) Any deposition may be used for contradiction or impeachment of the deponent as a witness.

(2) The deposition of a party, or of an agent designated to testify on behalf of a party, may be used by an adverse party for any purpose.

(3) The deposition of any witness may be used for any purpose if the party offering the deposition has been unable to procure the attendance of the witness because he is dead; or if the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or if the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(b) If only part of a deposition is offered in evidence, the remainder becomes subject to introduction by any party.

(c) Objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

§ 4.829 Interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories after the notice of hearing has been filed. If the party served is a corporation, partnership, association, or governmental agency, an agent shall furnish such information as is available to the party.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections shall be made within 30 days after the service of the interrogatories. The party submitting the interrogatories may move for an order under § 4.831 with respect to any objection to or other failure to answer an interrogatory.

(c) Interrogatories shall relate to any matter not privileged which is relevant to the subject matter of the hearing.

§ 4.830 Production of documents and things and entry upon land for inspection and other purposes.

(a) After the notice of hearing has been filed, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any designated documents, phonorecords, and other data compilations from which information can be obtained and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After the notice of hearing has been filed, any party may serve on any other party a request to permit entry upon designated property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 15 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections in which case the reasons for each objection shall be stated. The party submitting the request may move for an order under § 4.831 with respect to any objection to or other failure to respond.

§ 4.831 Sanctions.

(a) A party, upon reasonable notice to other parties and all persons affected thereby, may move for an order as follows:

(1) If a deponent fails to answer a question propounded or submitted under § 4.827(c), or a corporation or other entity fails to make a designation under § 4.827(b)(3), or a party fails to answer an interrogatory submitted under § 4.829, or if a party, under § 4.830 fails to respond that inspection will be permitted or fails to permit inspection, the discovering party may move for an order compelling an answer, a designation, or inspection.

(2) An evasive or incomplete answer is to be treated as a failure to answer.

(b) If a party or an agent designated to testify fails to obey an order to permit discovery, the administrative law judge may make such orders as are just, including:

(1) That the matters regarding which the order was made or any other designated facts shall be established in accordance with the claim of the party obtaining the order;

(2) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(c) If a party or an agent designated to testify fails after proper service (1) to appear for his deposition, (2) to serve answers or objections to interrogatories submitted under § 4.829 or (3) to serve a written response to a request for inspection, submitted under § 4.830, the administrative law judge on motion may make such orders as are just, including those authorized under paragraphs (b) (1) and (2) of this section.

§ 4.832 Consultation and advice.

(a) The administrative law judge shall not consult any person, or party, on any fact in issue or on the merits of the matter before him unless upon notice and opportunity for all parties to participate.

(b) No employee or agent of the Federal Government engaged in the investigation and prosecution of a proceeding governed by these rules shall participate or advise in the rendering of any recommended or final decision, except as witness or counsel in the proceeding.

[38 FR 21162, Aug. 6, 1973, as amended at 50 FR 43706, Oct. 29, 1985]

PREHEARING

§ 4.833 Prehearing conferences.

(a) Within 15 days after the answer has been filed, the administrative law judge will establish a prehearing conference date for all parties including persons or organizations whose petition requesting party status has not been ruled upon. Written notice of the prehearing conference shall be sent by the administrative law judge.

(b) At the prehearing conference the following matters, among others, shall be considered: (1) Simplification and delineation of the issues to be heard; (2) stipulations; (3) limitation of number of witnesses; and exchange of witness lists; (4) procedure applicable to the proceeding; (5) offers of settlement; and (6) scheduling of the dates for exchange of exhibits. Additional prehearing conferences may be scheduled at the discretion of the administrative law judge, upon his own motion or the motion of a party.

HEARING

§ 4.834 Purpose.

(a) The hearing is directed primarily to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. A hearing will be held only in cases where issues of

fact must be resolved in order to determine whether the applicant or recipient has failed to comply with one or more applicable requirements of title VI of the Civil Rights Act of 1964 (sec. 602, 42 U.S.C. 2000d–1) and part 17 of this title. However, this shall not prevent the parties from entering into a stipulation of the facts.

(b) If all facts are stipulated, the proceedings shall go to conclusion in accordance with part 17 of this title and the rules in this subpart.

(c) In any case where it appears from the answer of the applicant or recipient to the notice of hearing or notice of opportunity to request a hearing, from his failure timely to answer, or from his admissions or stipulations in the record that there are no matters of material fact in dispute, the administrative law judge may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for the submission of evidence by the Government for the record. Thereafter, the proceedings shall go to conclusion in accordance with part 17 of this title and the rules in this subpart. An appeal from such order may be allowed in accordance with the rules for interlocutory appeal in § 4.823.

§ 4.835 Evidence.

Formal rules of evidence will not apply to the proceeding. Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded from the record of a hearing. Hearsay evidence shall not be inadmissible as such.

§ 4.836 Official notice.

Whenever a party offers a public document, or part thereof, in evidence, and such document, or part thereof, has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof. Official notice may also be taken of other matters, at the discretion of the administrative law judge.

§ 4.837 Testimony.

Testimony shall be given under oath by witnesses at the hearing. A witness shall be available for cross-examination, and, at the discretion of the administrative law judge, may be cross-examined without regard to the scope of direct examination as to any matter which is material to the proceeding.

§ 4.838 Objections.

Objections to evidence shall be timely, and the party making them shall briefly state the ground relied upon.

§ 4.839 Exceptions.

Exceptions to rulings of the administrative law judge are unnecessary. It is sufficient that a party, at the time the ruling of the administrative law judge is sought, makes known the action which he desires the administrative law judge to take, or his objection to an action taken, and his ground therefor.

§ 4.840 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the administrative law judge excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony. If the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 4.841 Official transcript.

An official reporter will be designated for all hearings. The official transcripts of testimony and argument taken, together with any exhibits, briefs, or memoranda of law filed therewith, shall be filed with the administrative law judge. Transcripts may be obtained by the parties and the public from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter. Upon notice to all parties, the administrative law judge may authorize such corrections to the transcript as are necessary to accurately reflect the testimony.

POSTHEARING PROCEDURES

§ 4.842 Proposed findings of fact and conclusions of law.

Within 30 days after the close of the hearing each party may file, or the administrative law judge may request, proposed findings of fact and conclusions of law together with supporting briefs. Such proposals and briefs shall be served on all parties and amici. Reply briefs may be submitted within 15 days after receipt of the initial proposals and briefs. Reply briefs should be filed and served on all parties and amici.

§ 4.843 Record for decision.

The administrative law judge will make his decision upon the basis of the record before him. The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, shall constitute the record for decision and may be inspected and copied.

§ 4.844 Notification of right to file exceptions.

The provisions of §17.9 of this title govern the making of decisions by administrative law judges, the Director, Office of Hearings and Appeals, and the Secretary. An administrative law judge shall, in any initial decision made by him, specifically inform the applicant or recipient of his right under §17.9 of this title to file exceptions with the Director, Office of Hearings and Appeals. In instances in which the record is certified to the Director, Office of Hearings and Appeals, or he reviews the decision of an administrative law judge, he shall give the applicant or recipient a notice of certification or notice of review which specifically informs the applicant or recipient that, within a stated period, which shall not be less than 30 days after service of the notice, he may file briefs or other written statements of his contentions.

§ 4.845 Final review by Secretary.

Paragraph (f) of §17.9 of this title requires that any final decision of an administrative law judge or of the Director, Office of Hearings and Appeals, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under part 17 of this title or the Act, shall be transmitted to the Secretary. The applicant or recipient shall have 20 days following service upon him of such notice to submit to the Secretary exceptions to the decision and supporting briefs or memoranda suggesting remission or mitigation of the sanctions proposed. The Director shall have 10 days after the filing of the exceptions and briefs in which to reply.

Subpart J—Special Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties and Related Matters

AUTHORITY: 5 U.S.C. 301 *et seq.;* 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.;* 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.;* 31 U.S.C 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

SOURCE: 64 FR 26259, May 13, 1999, unless otherwise noted.

§ 4.901 What is the purpose of this subpart?

This subpart tells you how the time limits of 30 U.S.C. 1724(h) apply to appeals subject to this subpart.

§ 4.902 What appeals are subject to this subpart?

(a) This subpart applies to appeals under 30 CFR part 1290, and 43 CFR part 4, subpart E, of Office of Natural Resources Revenue (ONRR) or delegated State orders or portions of orders concerning payment (or computation and payment) of royalties and other payments due, and delivery or taking of royalty in kind, under Federal oil and gas leases.

(b) This subpart does not apply to appeals of orders, or portions of orders, that

(1) Involve Indian leases or Federal leases for minerals other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

[64 FR 26259, May 13, 1999, as amended at 79 FR 62051, Oct. 16, 2014]

§ 4.903 What definitions apply to this subpart?

For the purposes of this subpart only:

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Delegated State means a State to which ONRR has delegated authority to perform royalty management functions under an agreement or agreements under 30 CFR part 1227.

Designee means the person designated by a lessee under 30 CFR 1218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

IBLA means the Interior Board of Land Appeals.

Lease means any agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease,'' including any:

(1) Contract;

(2) Net profit share arrangement; or

(3) Joint venture.

Lessee means any person to whom the United States issues a Federal oil and gas lease, or any person to whom all or part of the lessee's interest or operating rights in a Federal oil and gas lease has been assigned.

Monetary obligation means a lessee's, designee's or payor's duty to pay, or to compute and pay, any obligation in any order, or the Secretary's duty to pay, refund, offset, or credit the amount of any obligation that is the subject of a decision by the ONRR or a delegated State denying a lessee's, designee's, or payor's written request for the payment, refund, offset, or credit. To determine the amount of any monetary obligation, for purposes of the default rule of decision in § 4.906 and 30 U.S.C. 1724(h):

(1) If an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation;

(2) If an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1) of this definition, constitute separate monetary obligations; and

(3) If an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2) of this definition, together constitutes a single monetary obligation.

Nonmonetary obligation means any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.

Notice of Order means the notice that ONRR or a delegated State issues to a lessee that informs the lessee that ONRR or the delegated State has issued an order to the lessee's designee.

Obligation means:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver oil or gas royalty in kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest.

OHA means Office of Hearings and Appeals, Department of the Interior.

Order means any document or portion of a document issued by ONRR or a delegated State that contains mandatory or ordering language regarding any monetary or nonmonetary obligation under any Federal oil and gas lease or leases.

(1) Order includes:

(i) An order to pay (Order to Pay) or to compute and pay (Order to Perform a Restructured Accounting); and

(ii) An ONRR or delegated State decision to deny a lessee's, designee's, or payor's written request that asserts an obligation due the lessee, designee, or payor.

(2) Order does not include:

(i) A non-binding request, information, or guidance, such as:

(A) Advice or guidance on how to report or pay, including valuation determination, unless it contains mandatory or ordering language; and

(B) A policy determination;

(ii) A subpoena;

(iii) An order to pay that ONRR issues to a refiner or other person involved in disposition of royalty taken in kind; or

(iv) A Notice of Noncompliance or a Notice of Civil Penalty issued under 30 U.S.C. 1719 and 30 CFR part 1241, or a decision of an administrative law judge or of the IBLA following a hearing on the record on a Notice of Noncompliance or Notice of Civil Penalty.

(v) A ''Dear Payor,'' ''Dear Operator,'' or ''Dear Reporter'' letter unless it explicitly includes the right to appeal in writing; or

(vi) Any correspondence that does not include the right to appeal in writing.

Party means ONRR, any person who files a Notice of Appeal under 30 CFR part 290 in effect prior to May 13, 1999 and contained in the 30 CFR, parts 200 to 699, edition revised as of July 1, 1998, 30 CFR part 1290, or 43 CFR part 4, subpart E, and any person who files a Notice of Joinder in an appeal under 30 CFR part 1290.

Payor means any person responsible for reporting and paying royalties for Federal oil and gas leases.

[64 FR 26259, May 13, 1999, as amended at 79 FR 62051, 62052, Oct. 16, 2014; 88 FR 5794, Jan. 30, 2023]

§ 4.904 When does my appeal commence and end?

For purposes of the period in which the Department must issue a final decision in your appeal under § 4.906:

(a) Your appeal commences on the date ONRR receives your Notice of Appeal.

(b) Your appeal ends on the same day of the 33rd calendar month after your appeal commenced under paragraph (a) of this section, plus the number of days of any applicable time extensions under § 4.909 or 30 CFR 1290.109. If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month.

[79 FR 62052, Oct. 16, 2014]

§ 4.905 What if a due date falls on a day the Department or relevant office is not open for business?

If a due date under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), the due date is the next day the relevant office is open for business.

§ 4.906 What if the Department does not issue a decision by the date my appeal ends?

(a) If the IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision by the date an appeal ends under § 4.904(d), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(b)(1) If your appeal ends before the ONRR Director issues a decision in your appeal, then the provisions of paragraph (a) of this section apply to the monetary and nonmonetary obligations in the order that you contested in your appeal to the Director.

(2) If the ONRR Director issues a decision in your appeal before your appeal ends, and if you appealed the Director's decision to IBLA under 43 CFR part 4, subpart E, then the provisions of paragraph (a) of this section apply to the monetary and nonmonetary obligations in the Director's decision that you contested in your appeal to IBLA.

(3) If the ONRR Director issues an order or a decision in your appeal, and if you do not appeal the Director's order or decision to IBLA within the time required under 30 CFR part 1290, then the ONRR Director's order or decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

(c) If the IBLA issues a decision before the date your appeal ends, that decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application. A petition for reconsideration does not extend or renew the 33-month period.

(d) If any part of the principal amount of any monetary obligation is not specifically stated in an order or ONRR Director's decision and must be computed to comply with the order or ONRR Director's decision, then the principal amount referred to in paragraph (a) of this section means the principal amount ONRR estimates you would be required to pay as a result of the computation required under the order, plus any amount due stated in the order.

[64 FR 26259, May 13, 1999, as amended at 79 FR 62051, 62052, Oct. 16, 2014]

§ 4.907 What if an IBLA decision requires ONRR or a delegated State to recalculate royalties or other payments?

(a) An IBLA decision modifying an order or an ONRR Director's decision and requiring ONRR or a delegated State to recalculate royalties or other payments is a final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h).

(b) ONRR or the delegated State must provide to IBLA and all parties any recalculation IBLA requires under paragraph (a) of this section within 60 days of receiving IBLA's decision.

(c) There is no further appeal within the Department from ONRR's or the State's recalculation under paragraph (b) of this section.

(d) The IBLA decision issued under paragraph (a) of this section together with recalculation under paragraph (b) of this section are the final action of the Department that is judicially reviewable under 5 U.S.C. 704.

[64 FR 26259, May 13, 1999, as amended at 79 FR 62051, Oct. 16, 2014]

§ 4.908 What is the administrative record for my appeal if it is deemed decided?

If your appeal is deemed decided under § 4.906, the record for your appeal consists of:

(a) The record established in an appeal before the ONRR Director;

(b) Any additional correspondence or submissions to the ONRR Director;

(c) The ONRR Director's decision in an appeal;

(d) Any pleadings or submissions to the IBLA; and

(e) Any IBLA orders and decisions.

[64 FR 26259, May 13, 1999, as amended at 79 FR 62051, Oct. 16, 2014]

§ 4.909 How do I request an extension of time?

(a) If you are a party to an appeal subject to this subpart before the IBLA, and you need additional time after an appeal commences for any purpose, you may obtain an extension of time under this section.

(b) You must submit a written request for an extension of time before the required filing date.

(1) You must submit your request to the IBLA at Interior Board of Land Appeals, using the U.S. Postal Service, a private delivery or courier service, hand delivery or electronic transmission under the terms of OHA Standing Orders on Electronic Transmission;

(2) If you file a document by telefax, you must send an additional copy of your document to the IBLA using the U.S. Postal Service, a private delivery or courier service or hand delivery so that it is received within 5 business days of your telefax transmission.

(c) If you are an appellant, in addition to meeting the requirements of paragraph (b) of this section, you must agree in writing in your request to extend the period in which the Department must issue a final decision in your appeal under § 4.906 by the amount of time for which you are requesting an extension.

(d) If you are any other party, the IBLA may require you to submit a

written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under § 4.906 by the amount of time for which you are requesting an extension.

(e) The IBLA has the discretion to decline any request for an extension of time.

(f) You must serve your request on all parties to the appeal.

(g) A document may be electronically transmitted under the terms specified in the OHA Standing Orders on Electronic Transmissions.

[64 FR 26259, May 13, 1999, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5794, Jan. 30, 2023]

Subpart K—Hearing Process Concerning Acknowledgment of American Indian Tribes

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1.

SOURCE: 80 FR 48459, Aug. 13, 2015, unless otherwise noted.

GENERAL PROVISIONS

§ 4.1001 What terms are used in this subpart?

As used in this subpart:

ALJ means an administrative law judge in DCHD appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process.

Assistant Secretary means the Assistant Secretary—Indian Affairs within the Department of the Interior, or that officer's authorized representative, but does not include representatives of OFA.

Day means a calendar day. Computation of time periods is discussed in § 4.1004.

Department means the Department of the Interior, including the Assistant Secretary and OFA.

DCHD means the Departmental Cases Hearings Division, Office of Hearings and Appeals, Department of the Interior.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

Full intervenor means a person granted leave by the ALJ to intervene as a full party under § 4.1021.

Hearing process means the process by which DCDH handles a case forwarded to DCHD by OFA pursuant to 25 CFR 83.39(a), from receipt to issuance of a recommended decision as to whether the petitioner should be acknowledged as a federally recognized Indian tribe for purposes of federal law.

OFA means the Office of Federal Acknowledgment within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior.

OHA means Office of Hearings and Appeals, Department of the Interior.

Party means the petitioner, OFA, or a full intervenor.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any federal, state, tribal, county, district, territorial, or local government or agency.

Petitioner means an entity that has submitted a documented petition to OFA requesting Federal acknowledgment as a federally recognized Indian tribe under 25 CFR part 83 and has elected to have a hearing under 25 CFR 83.38.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 4.1010.

Secretary means the Secretary of the Interior or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2641.104.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.1002 What is the purpose of this subpart?

(a) The purpose of this subpart is to establish rules of practice and procedure for the hearing process available under 25 CFR 83.38(a)(1) and 83.39 to a petitioner for Federal acknowledgment

that receives from OFA a negative proposed finding on Federal acknowledgment and elects to have a hearing before an ALJ. This subpart includes provisions governing prehearing conferences, discovery, motions, an evidentiary hearing, briefing, and issuance by the ALJ of a recommended decision on Federal acknowledgment for consideration by the Assistant Secretary—Indian Affairs (AS–IA).

(b) This subpart will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved.

§ 4.1003 Which rules of procedure and practice apply?

(a) The rules which apply to the hearing process under this subpart are the provisions of §§ 4.1001 through 4.1051.

(b) Notwithstanding the provisions of § 4.20, the general rules in subpart B of this part, do not apply to the hearing process, except as provided in § 4.1017(a).

§ 4.1004 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or other day on which the Federal government is closed for business, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or other day on which the Federal government is closed for business that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a motion for intervention under § 4.1021.

(2) An extension of time to file any other document under this subpart may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 4.1018 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the recommended decision under § 4.1051.

REPRESENTATIVES

§ 4.1010 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either act as his or her own representative in the hearing process under this subpart or authorize an attorney to act as his or her representative.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to act as its representative:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or full-time employee, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a federal, state, tribal, county, district, territorial, or local government or component.

(c) *OFA.* OFA's representative will be an attorney from the Office of the Solicitor.

(d) *Appearance.* A representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 4.1011;

(2) Include the name and address of the person on whose behalf the appearance is made;

(3) If the representative is an attorney (except for an attorney with the Office of the Solicitor), include a statement that he or she is a member in good standing of the bar of the highest

court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

DOCUMENT FILING AND SERVICE

§ 4.1011 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under this subpart must:

(1) Measure 8–1/2 by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8–1/2 by 11 inches and attached to the document;

(2) Be printed on just one side of the page;

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 12-point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document must begin with a caption that includes:

(1) The name of the case under this subpart and the docket number, if one has been assigned;

(2) The name and docket number of the proceeding to which the case under this subpart relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that:

(1) He or she has read the document;

(2) The statements in the document are true to the best of his or her knowledge, information, and belief; and

(3) The document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 4.1012 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with DCHD. DCHD's contact information is identified in the OHA Standing Orders on Contact Information

(b) *Method of filing.* (1) Unless otherwise ordered by the ALJ, a document must be filed with DCHD using one of the following methods:

(i) By hand delivery of the original document;

(ii) By sending the original document by express mail or courier service for delivery on the next business day;

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document is sent by regular mail on the same day.

(2) Parties are encouraged, but not required, to supplement any filing made under paragraphs (b)(1)(i) through (iii) of this section by providing the appropriate office with an electronic copy of the document.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received by DCHD after 5 p.m. is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected. If the defect is minor, the filer may be notified of the defect and given a chance to correct it.

(e) A document may be electronically transmitted under the terms specified

in OHA Standing Orders on Electronic Transmission.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

§ 4.1013 How must documents be served?

(a) *Filed documents.* Any document related to a case under this subpart must be served at the same time the document is delivered or sent for filing. Copies must be served on each party, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by DCHD or the ALJ.* A complete copy of any notice, order, recommended decision, or other document issued by DCHD or the ALJ under this subpart must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

(2) By sending the document by express mail or courier service for delivery on the next business day; or

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By transmitting the document electronically if there is electronic confirmation that the transmission was successful and if under the terms specified in OHA Standing Orders.

(d) *Certificate of service.* A certificate of service must be attached to each document filed under this subpart. The certificate must be signed by the serving party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (4) of this section, if applicable; and

(3) The date of service.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5794, Jan. 30, 2023]

ALJ's Powers, Unavailability, Disqualification, and Communications

§ 4.1014 What are the powers of the ALJ?

The ALJ has all powers necessary to conduct the hearing process in a fair, orderly, expeditious, and impartial manner, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas to the extent authorized by law;

(c) Rule on motions;

(d) Authorize discovery under exceptional circumstances as provided in this subpart;

(e) Hold hearings and conferences;

(f) Regulate the course of hearings;

(g) Call and question witnesses;

(h) Exclude any person from a hearing or conference for misconduct or other good cause;

(i) Impose non-monetary sanctions for a person's failure to comply with an ALJ order or provision of this subpart;

(j) Issue a recommended decision; and

(k) Take any other action authorized by law.

§ 4.1015 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 4.1014, DCHD will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 4.1016 When can an ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's recommended decision, any

party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a recommended decision.

§ 4.1017 Are ex parte communications allowed?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with § 4.27(b).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

MOTIONS

§ 4.1018 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after DCHD issues the docketing notice.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be written.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of this subpart with respect to form, content, filing, and service; and

(iii) Not exceed 10 pages, unless the ALJ orders otherwise.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this subpart or by order of the ALJ, any other party may file a response to a written motion within 14 days after service of the motion. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as feasible, either orally on the record or in writing. The ALJ may summarily deny any dilatory, repetitive, or frivolous motion.

PRIOR DECISIONS

§ 4.1019 How may a party submit prior Departmental final decisions?

A party may submit as an appendix to a motion, brief, or other filing a prior Departmental final decision in support of a finding that the evidence or methodology is sufficient to satisfy one or more criteria for Federal acknowledgment of the petitioner because the Department found that evidence or methodology sufficient to satisfy the same criteria in the prior decision.

HEARING PROCESS

DOCKETING, INTERVENTION, PREHEARING CONFERENCES, AND SUMMARY DECISION

§ 4.1020 What will DCHD do upon receiving the election of hearing from a petitioner?

Within 5 days after petitioner files its election of hearing under 25 CFR 83.38(a), the actions required by this section must be taken.

(a) DCHD must:

(1) Docket the case;

(2) Assign an ALJ to preside over the hearing process and issue a recommended decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case.

(b) The ALJ assigned under paragraph (a)(2) of this section must issue a notice setting the time, place, and method for conducting an initial prehearing conference under §4.1022(a). This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 4.1021 What are the requirements for motions for intervention and responses?

(a) *General.* A person may file a motion for intervention within 30 days after OFA issues the notice of the election of hearing under 25 CFR 83.39(a)(1).

(b) *Content of the motion.* The motion for intervention must contain the following:

(1) A statement setting forth the interest of the person and, if the person seeks intervention under paragraph (d) of this section, a showing of why that interest may be adversely affected by the final determination of the Assistant Secretary under 25 CFR 83.43;

(2) An explanation of the person's position with respect to the issues of law and issues of material fact raised in the election of hearing in no more than five pages; and

(3) A list of the witnesses and exhibits the person intends to present at the hearing, other than solely for impeachment purposes, including:

(i) For each witness listed, his or her name, address, telephone number, and qualifications and a brief narrative summary of his or her expected testimony; and

(ii) For each exhibit listed, a statement specifying where the exhibit is located in the administrative record reviewed by OFA.

(c) *Timing of response to a motion.* Any response to a motion for intervention must be filed by a party within 7 days after service of the motion.

(d) *Intervention of right.* The ALJ will grant intervention where the person has an interest that may be adversely affected by the Assistant Secretary's final determination under 25 CFR 83.43.

(e) *Permissive intervention.* If paragraph (d) of this section does not apply, the ALJ will consider the following in determining whether intervention is appropriate:

(1) The nature of the issues;

(2) The adequacy of representation of the person's interest which is provided by the existing parties to the proceeding; and

(3) The ability of the person to present relevant evidence and argument.

(f) *How an intervenor may participate.* (1) A person granted leave to intervene under paragraph (d) of this section may participate as a full party or in a capacity less than that of a full party.

(2) If the intervenor wishes to participate in a limited capacity or if the intervenor is granted leave to intervene under paragraph (e) of this section, the extent and the terms of the participation will be determined by the ALJ.

(3) An intervenor may not raise issues of law or issues of material fact beyond those raised in the election of hearing under 25 CFR 83.38(a)(1).

§ 4.1022 How are prehearing conferences conducted?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the docketing notice under §4.1020, within 55 days after issuance of the docketing notice.

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To discuss the evidence on which each party intends to rely at the hearing; and

(iii) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss pending or anticipated motions, if any; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 180 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference.

(d) *Method.* A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(e) *Representatives' preparation and authority.* Each party's representative must be fully prepared during the prehearing conference for a discussion of all procedural and substantive issues properly raised. The representative must be authorized to commit the party that he or she represents respecting those issues.

(f) *Parties' meeting.* Before the initial prehearing conference, the parties' representatives must make a good faith effort:

(1) To meet in person, by telephone, or by other appropriate means; and

(2) To reach agreement on the schedule of remaining steps in the hearing process.

(g) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(h) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(i) *Order.* Within 3 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

§ 4.1023 What are the requirements for motions for recommended summary decision, responses, and issuance of a recommended summary decision?

(a) *Motion for recommended summary decision or partial recommended summary decision.* A party may move for a recommended summary decision, identifying each issue on which summary decision is sought. The ALJ may issue a recommended summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a recommended decision as a matter of law. The ALJ should state on the record the reasons for granting or denying the motion.

(b) *Time to file a motion.* Except as otherwise ordered by the ALJ, a party may file a motion for recommended summary decision on all or part of the proceeding at any time after DCHD issues a docketing notice under § 4.1020.

(c) *Procedures*—(1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(i) Citing to particular parts of materials in the hearing process record, including affidavits or declarations, stipulations (including those made for purposes of the motion only), or other materials; or

(ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The ALJ need consider only the cited materials, but the ALJ may consider other materials in the hearing process record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the ALJ may:

(1) Defer considering the motion or deny it;

(2) Allow time to obtain affidavits or declarations or, under extraordinary circumstances, to take discovery; or

(3) Issue any other appropriate order.

(e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the ALJ may:

(1) Give an opportunity to properly support or address the fact;

(2) Consider the fact undisputed for purposes of the motion;

(3) Issue a recommended summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) Issue any other appropriate order.

(f) *Issuing a recommended summary decision independent of the motion.* After giving notice and a reasonable time to respond, the ALJ may:

(1) Issue a recommended summary decision for a nonmovant;

(2) Grant a motion for recommended summary decision on grounds not raised by a party; or

(3) Consider issuing a recommended summary decision on his or her own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to grant all the requested relief.* If the ALJ does not grant all the relief requested by the motion, the ALJ may enter an order stating any material fact that is not genuinely in dispute and treating the fact as established in the case.

INFORMATION DISCLOSURE

§ 4.1030 What are the requirements for OFA's witness and exhibit list?

Within 14 days after OFA issues the notice of the election of hearing under 25 CFR 83.39(a)(1), OFA must file a list of the witnesses and exhibits it intends to present at the hearing, other than solely for impeachment purposes, including:

(a) For each witness listed, his or her name, address, telephone number, qualifications, and a brief narrative summary of his or her expected testimony; and

(b) For each exhibit listed, a statement specifying where the exhibit is in the administrative record reviewed by OFA.

§ 4.1031 Under what circumstances will the ALJ authorize a party to obtain discovery of information?

(a) *General.* A party may obtain discovery of information to assist in preparing or presenting its case only if the ALJ determines that the party has met the criteria set forth in paragraph (b) of this section and authorizes the discovery in a written order or during a prehearing conference. Available methods of discovery are:

(1) Written interrogatories;

(2) Depositions; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* The ALJ may authorize discovery only under extraordinary circumstances and if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the scope of the discovery is not unduly burdensome;

(3) That the method to be used is the least burdensome method available;

(4) That any confidential information can be adequately safeguarded; and

(5) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law.

(c) *Motions.* A party seeking the ALJ's authorization for discovery must file a motion that:

(1) Briefly describes the proposed methodology, purpose, and scope of the discovery;

(2) Explains how the discovery meets the criteria in paragraph (b) of this section; and

(3) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* Any discovery motion under paragraph (c) of this section must be filed:

(1) Within 30 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between the petitioner and OFA; and

(2) Within 50 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between a full intervenor and another party.

(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 10 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraph (b) of this section.

§ 4.1032 When must a party supplement or amend information?

(a) *Witnesses and exhibits.* (1) Each party must file an updated version of the list of witnesses and exhibits required under 25 CFR 83.38(a)(2), § 4.1021(b)(3), or § 4.1030 by no later than 15 days prior to the hearing date, unless otherwise ordered by the ALJ.

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under 25 CFR 83.38(a)(2), § 4.1021(b)(3), or § 4.1030.

(b) *Failure to disclose.* (1) A party that fails to disclose information required under 25 CFR 83.38(a)(2), § 4.1021(b)(3), § 4.1030, or paragraph (a)(1) of this section will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose.

(2) Paragraph (b)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) Before or during the hearing, a party may object under paragraph (b)(1) of this section to the admission of evidence.

(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (b)(1) through (3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 4.1033 Under what circumstances will the ALJ authorize a party to depose a witness to preserve testimony?

(a) *General.* A party may depose a witness to preserve testimony only if the ALJ determines that the party has met the criteria set forth in paragraph (b) of this section and authorizes the deposition in a written order or during a prehearing conference. Authorization of depositions for discovery purposes is governed by § 4.1031.

(b) *Criteria.* (1) The ALJ may authorize a deposition to preserve testimony only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (b)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee of OFA only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her official duties.

(c) *Motion and notice.* A party seeking the ALJ's authorization to take a deposition to preserve testimony must file a motion which explains how the criteria in paragraph (b) of this section have been met and states:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

§ 4.1034 What are the procedures for limiting disclosure of information which is confidential or exempt by law from public disclosure?

(a) A party or a prospective witness or deponent may file a motion requesting a protective order to limit from disclosure to other parties or to the public a document or testimony containing information which is confidential or exempt by law from public disclosure.

(b) In the motion the person must describe the information sought to be protected from disclosure and explain in detail:

(1) Why the information is confidential or exempt by law from public disclosure;

(2) Why disclosure of the information would adversely affect the person; and

(3) Why disclosure is not required in the public interest.

(c) If the person seeks non-disclosure of information in a document:

(1) The motion must include a copy of the document with the confidential information deleted. If it is not practicable to submit such a copy of the document because deletion of the information would render the document unintelligible, a description of the document may be substituted.

(2) The ALJ may require the person to file a sealed copy of the document for in camera inspection.

(d) Ordinarily, documents and testimony introduced into the public hearing process are presumed to be public. In issuing a protective order, the ALJ may make any order which justice requires to protect the person, consistent with the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552(b), and other applicable law.

§ 4.1035 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may file a motion requesting the ALJ to issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may subpoena an OFA employee if the employee participated in the preparation of the negative proposed finding, except that if the OFA employee is a senior Department employee, the party must show:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth the date, time, and manner of service or the reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed to do so is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to federal employees who are called as witnesses by OFA.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is

less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires evidence beyond the limits on witnesses and evidence found in §§ 4.1042 and 4.1046;

(iii) Requires evidence during discovery that is not discoverable; or

(iv) Requires evidence during a hearing that is privileged or irrelevant.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

HEARING, BRIEFING, AND RECOMMENDED DECISION

§ 4.1040 When and where will the hearing be held?

(a) *Time and place.* (1) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 4.1022(a)(1)(iii), generally within 90 days after the date DCHD issues the docketing notice under § 4.1020(a)(3).

(2) The ALJ will consider the convenience of all parties, their representatives, and witnesses in setting the time and place for hearing.

(b) *Change.* On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 4.1041 What are the parties' rights during the hearing?

Consistent with the provisions of this subpart, and as necessary to ensure full and accurate disclosure of the facts, each party may exercise the following rights during the hearing:

(a) Present direct and rebuttal evidence;

(b) Make objections, motions, and arguments; and

(c) Cross-examine witnesses, including OFA staff, and conduct re-direct and re-cross examination as permitted by the ALJ.

§ 4.1042 Who may testify?

(a) Except as provided in paragraph (b) of this section, each party may present as witnesses the following persons only:

(1) Persons who qualify as expert witnesses; and

(2) OFA staff who participated in the preparation of the negative proposed finding, except that if the OFA employee is a senior Department employee, any party other than OFA must first obtain a subpoena for that employee under § 4.1035.

(b) The ALJ may authorize testimony from witnesses in addition to those identified in paragraph (a) of this section only under extraordinary circumstances.

§ 4.1043 What are the methods for testifying?

Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath with an opportunity for all parties to question the witness. The witness must testify in the presence of the ALJ unless the ALJ authorizes the witness to testify by telephonic conference call. The ALJ may issue a subpoena under § 4.1035 directing a witness to testify by telephonic conference call.

§ 4.1044 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the judge.

(2) The judge will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Video-recorded deposition.* If the deposition was video recorded and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 4.1045 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (d) and (e) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *ALJ exhibits.* (1) At any time prior to issuance of the recommended decision, the ALJ, on his or her own initiative, may admit into evidence as an exhibit any document from the administrative record reviewed by OFA.

(2) If the ALJ admits a document under paragraph (b)(1) of this section, the ALJ must notify the parties and give them a brief opportunity to submit comments on the document.

(c) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent feasible; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(d) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of the Department, except materials in the administrative record reviewed by OFA.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(e) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 4.1046 What evidence is admissible at the hearing?

(a) *Scope of evidence.* (1) The ALJ may admit as evidence only documentation in the administrative record reviewed by OFA, including comments on OFA's proposed finding and petitioner's responses to those comments, and testimony clarifying or explaining the information in that documentation, except as provided in paragraph (a)(2) of this section.

(2) The ALJ may admit information outside the scope of paragraph (a)(1) of this section only if the party seeking to admit the information explains why the information was not submitted for inclusion in the administrative record reviewed by OFA and demonstrates that extraordinary circumstances exist justifying admission of the information.

(3) Subject to the provisions of § 4.1032(b) and paragraphs (a)(1) and (2) of this section, the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(b) *General.* (1) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(2) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(3) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(c) *Objections.* Any party objecting to the admission or exclusion of evidence shall concisely state the grounds. A ruling on every objection must appear in the record.

§ 4.1047 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing must be transcribed verbatim.

(1) DCHD will secure the services of a reporter and pay the reporter's fees to provide an original transcript to DCHD on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as feasible after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 4.1048 What is the standard of proof?

The ALJ will consider a criterion to be met if the evidence establishes a reasonable likelihood of the validity of the facts related to the criteria. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

§ 4.1049 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Except as provided in § 4.1045(b)(1), evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 4.1047(b).

§ 4.1050 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 20 days after the close of the hearing, unless the ALJ sets a different deadline.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted into evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 30 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 4.1051 What are the requirements for the ALJ's recommended decision?

(a) *Timing.* The ALJ must issue a recommended decision within 180 days after issuance of the docketing notice under § 4.1020(a)(3), unless the ALJ issues an order finding good cause to issue the recommended decision at a later date.

(b) *Content.* (1) The recommended decision must contain all of the following:

(i) Recommended findings of fact on all disputed issues of material fact;

(ii) Recommended conclusions of law:

(A) Necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(B) As to whether the applicable criteria for Federal acknowledgment have been met; and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(c) *Service.* Promptly after issuing a recommended decision, the ALJ must:

(1) Serve the recommended decision on each party to the hearing process; and

(2) Forward the complete hearing record to the Assistant Secretary—Indian Affairs, including the recommended decision.

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AUTHORITY: 30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

SOURCE: 43 FR 34386, Aug. 3, 1978, unless otherwise noted.

GENERAL PROVISIONS

§ 4.1100 Definitions.

As used in the regulations in this subpart, the term—

Act means the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 *et seq.*, 30 U.S.C. 1201 *et seq.*

Administrative law judge means an administrative law judge in the Hearings Division of the Office of Hearings and Appeals appointed under 5 U.S.C. 3105 (1970).

Board means the Board of Land Appeals in the Office of Hearings and Appeals.

Hearings Division means the Departmental Cases Hearings Division, Office of Hearings and Appeals.

OHA means the Office of Hearings and Appeals, Department of the Interior.

OSM and *OSMRE* mean the Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1488, Jan. 11, 1994; 67 FR 61509, Oct. 1, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1101 Jurisdiction of the Board.

(a) The jurisdiction of the Board, as set forth in § 4.1(b)(3), and subject to §§ 4.21(d) and 4.5, includes the authority to exercise the final decisionmaking power of the Secretary under the act pertaining to—

(1) Applications for review of decisions by OSM regarding determinations concerning permits for surface coal mining operations pursuant to section 514 of the act;

(2) Petitions for review of proposed assessments of civil penalties issued by OSM pursuant to section 518 of the act;

(3) Applications for review of notices of violation and orders of cessation or modifications, vacations, or terminations thereof, issued pursuant to section 521(a)(2) or section 521(a)(3) of the act;

(4) Proceedings for suspension or revocation of permits pursuant to section 521(a)(4) of the act;

(5) Applications for review of alleged discriminatory acts filed pursuant to section 703 of the act;

(6) Applications for temporary relief;

(7) Petitions for award of costs and expenses under section 525(e) of the act;

(8) Preliminary findings concerning a demonstrated pattern of willful violations under section 510(c) of the act;

(9) Suspension or rescission of improvidently-issued permits;

(10) Challenges to ownership or control listings or findings;

(11) Determinations under 30 CFR part 761;

(12) Appeals from orders or decisions of administrative law judges; and

(13) All other appeals and review procedures under the act which are permitted by these regulations.

(b) In performing its functions under paragraph (a) of this section, the Board is authorized to—

(1) Order hearings; and

(2) Issue orders to secure the just and prompt determination of all proceedings.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61509, Oct. 1, 2002]

§ 4.1102 Construction.

These rules shall be construed to achieve the just, timely, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved.

§ 4.1103 Eligibility to practice.

(a) An administrative law judge or the Board may determine the eligibility of persons to practice before OHA in any proceeding under the act pursuant to 43 CFR part 1.

(b) If an administrative law judge or the Board determines that any person is not qualified to practice before OHA, the administrative law judge or the Board shall disqualify the person and report the disqualification to the Director of OHA.

(c) Upon receipt of a report under paragraph (b) of this section, the Director of OHA may request the Solicitor to initiate a disciplinary proceeding under 43 CFR 1.6.

§ 4.1104 General rules relating to procedure and practice.

Proceedings in OHA under the act are subject to the general rules relating to procedures and practice in subpart B of this part.

§ 4.1105 Parties.

(a) All persons indicated in the act as parties to administrative review proceedings under the act shall be considered statutory parties. Such statutory parties include—

(1) In a civil penalty proceeding under § 4.1150, OSM, as represented by the Office of the Solicitor, Department of the Interior, and any person against whom a proposed assessment is made who files a petition;

(2) In a review proceeding under §§ 4.1160 through 4.1171, 4.1180 through 4.1187, 4.1300 through 4.1309, 4.1350 through 4.1356, 4.1360 through 4.1369, 4.1370 through 4.1377, 4.1380 through 4.1387 or 4.1390 through 4.1394 of this part, OSM, as represented by the Office of the Solicitor, Department of the Interior, and—

(i) If an applicant, operator, or permittee files an application or request for review, the applicant, operator, or permittee; and

(ii) If any other person having an interest which is or may be adversely affected files an application or request for review, the applicant, operator, or permittee and the person filing such application or request;

(3) In a proceeding to suspend or revoke a permit under § 4.1190 *et seq*. OSM, as represented by the Office of the Solicitor, Department of the Interior, and the permittee who is ordered to show cause why the permit should not be suspended or revoked; and

(4) In a discriminatory discharge proceeding under § 4.1200 *et seq*. OSM, as represented by the Office of the Solicitor, Department of the Interior, any employee or any authorized representative of employees who files an application for review, and the alleged discriminating party, except where the applicant files a request for the scheduling of a hearing under § 4.1201(c) only such applicant and the alleged discriminating party.

(5) In an appeal to the Board in accordance with 43 CFR 4.1280 through 4.1286 from a determination of the Director of OSM or his or her designee under 30 CFR 842.15(d) or a determination of an authorized representative under 30 CFR 843.12(i), the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM. A person who wishes his or her identity kept confidential under 30 CFR 842.12(b) is responsible for maintaining that confidentiality when serving documents in accordance with § 4.1109.

(b) Any other person claiming a right to participate as a party may seek

leave to intervene in a proceeding by filing a petition to do so pursuant to § 4.1110.

(c) If any person has a right to participate as a full party in a proceeding under the act and fails to exercise that right by participating in each stage of the proceeding, that person may become a participant with the rights of a party by order of an administrative law judge or the Board.

[43 FR 34386, Aug. 3, 1978, as amended at 56 FR 2142, Jan. 22, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 54362, Oct. 28, 1994]

§ 4.1106 Hearing sites.

Unless the act requires otherwise, hearings shall be held in a location established by the administrative law judge; however, the administrative law judge shall give due regard to the convenience of the parties or their representatives and witnesses.

§ 4.1107 Filing of documents.

(a) Any initial pleadings in a proceeding to be conducted or being conducted by an administrative law judge under these rules shall be filed with the Hearings Division by hand or by mail under the terms specified in the Standing Orders on Contact Information or by electronic transmission under the terms specified in OHA Standing Orders on Electronic Transmission.

(b) Where a proceeding has been assigned to an administrative law judge, the parties will be notified by the Chief Administrative Law Judge of the name and address of the administrative law judge assigned to the case and thereafter all further documents shall be filed with the Administrative Law Judge, Office of Hearings and Appeals, at the address designated in the notice.

(c) Any notice of appeal, petition for review or other documents in a proceeding to be conducted or being conducted by the Board shall be filed with the Board of Land Appeals by hand or by mail under the terms specified in the OHA Standing Orders on Contact Information or by electronic transmission under the terms specified in OHA Standing Orders on Electronic Transmission.

(d) Any person filing initial pleadings with the Hearings Division or a notice of appeal with the Board by hand or by mail shall furnish an original and one copy. Any person filing other documents with OHA by hand or by mail shall furnish only an original.

(e) Any person who has initiated a proceeding under these rules before the Hearings Division or filed a notice of appeal with the Board shall file proof of service with the same in the form of a return receipt where service is by registered or certified mail, or an acknowledgement by the party served or a verified return where service is made personally. A certificate of service shall accompany all other documents filed by a party in any proceeding.

(f) The effective filing date for documents initiating proceedings before the Hearings Division, OHA, Arlington, VA, shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail, or the date of electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission.

(g) The effective filing date for a notice of appeal or a petition for discretionary review filed with the Board shall be the date of mailing or the date of personal delivery or the date of electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission, except the effective filing date for a notice of appeal from a decision in an expedited review of a cessation order proceeding or from a decision in a suspension or revocation proceeding shall be the date of receipt of the document by the Board. The burden of establishing the date of mailing shall be on the person filing the document.

(h) The effective filing date for all other documents filed with an administrative law judge or with the Board shall be the date of mailing or personal delivery or electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission. The burden of establishing the date of mailing shall be on the person filing the document.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 46 FR 6942, Jan. 22, 1981; 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1108 Form of documents.

(a) Any document filed with OHA in any proceeding brought under the act shall be captioned with—

(1) The names of the parties;

(2) The name of the mine to which the document relates; and

(3) If review is being sought under section 525 of the act, identification by number of any notice or order sought to be reviewed.

(b) After a docket number has been assigned to the proceeding by OHA, the caption shall contain such docket number.

(c) The caption may include other information appropriate for identification of the proceeding, including the permit number or OSM identification number.

(d) Each document shall contain a title that identifies the contents of the document following the caption.

(e) The original of any document filed with OHA shall be signed by the person submitting the document or by that person's attorney.

(f) The address and telephone number of the person filing the document or that person's attorney shall appear beneath the signature.

(g) Documents filed under this subpart must conform to the requirements of § 4.401(d).

[43 FR 34386, Aug. 3, 1978, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.1109 Service.

(a)(1) Any party initiating a proceeding in OHA under the Act shall, on the date of filing, simultaneously serve copies of the initiating documents on the officer in the Office of the Solicitor, U.S. Department of the Interior, representing OSMRE in the state in which the mining operation at issue is located, and on any other statutory parties specified under § 4.1105 of this part.

(2) The jurisdictions, addresses, and telephone numbers of the applicable officers of the Office of the Solicitor to be served under paragraph (a)(1) of this section are identified in the OHA Standing Orders on Contact Information.

(3) Any party or other person who subsequently files any other document with OHA in the proceeding shall simultaneously serve copies of that document on all other parties and persons participating in the proceeding.

(b) Copies of documents by which any proceeding is initiated shall be served on all statutory parties personally or by registered or certified mail, return receipt requested, or by electronic transmission under the terms of the OHA Standing Orders on Electronic Transmission. All subsequent documents shall be served personally or by first class mail or by electronic transmission under the terms of the OHA Standing Orders on Electronic Transmission.

(c) Service of copies of all documents is complete at the time of personal service or, if service is made by mail, upon receipt, or, if service is made by electronic transmission, at the time of transmission.

(d) Whenever an attorney has entered an appearance for a party in a proceeding before an administrative law judge or the Board, service thereafter shall be made upon the attorney.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 52 FR 39526, Oct. 22, 1987; 56 FR 2142, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 42774, Aug. 19, 1994; 60 FR 58243, Nov. 27, 1995; 61 FR 40348, Aug. 2, 1996; 67 FR 61510, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010; 88 FR 5795, Jan. 30, 2023]

§ 4.1110 Intervention.

(a) Any person, including a State, or OSM may petition for leave to intervene at any stage of a proceeding in OHA under the act.

(b) A petitioner for leave to intervene shall incorporate in the petition a statement setting forth the interest of the petitioner and, where required, a showing of why his interest is or may be adversely affected.

(c) The administrative law judge or the Board shall grant intervention where the petitioner—

(1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or

(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

(d) If neither paragraph (c)(1) nor (c)(2) of this section apply, the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate—

(1) The nature of the issues;

(2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;

(3) The ability of the petitioner to present relevant evidence and argument; and

(4) The effect of intervention on the agency's implementation of its statutory mandate.

(e) Any person, including a State, or OSM granted leave to intervene in a proceeding may participate in such proceeding as a full party or, if desired, in a capacity less than that of a full party. If an intervenor wishes to participate in a limited capacity, the extent and the terms of the participation shall be in the discretion of the administrative law judge or the Board.

§ 4.1111 Voluntary dismissal.

Any party who initiated a proceeding before OHA may seek to withdraw by moving to dismiss at any stage of a proceeding and the administrative law judge or the Board may grant such a motion.

§ 4.1112 Motions.

(a) Except for oral motions made in proceedings on the record, or where the administrative law judge otherwise directs, each motion shall—

(1) Be in writing; and

(2) Contain a concise statement of supporting grounds.

(b) Unless the administrative law judge or the Board orders otherwise, any party to a proceeding in which a motion is filed under paragraph (a) of this section shall have 15 days from service of the motion to file a statement in response.

(c) Failure to make a timely motion or to file a statement in response may be construed as a waiver of objection.

(d) An administrative law judge or the Board shall rule on all motions as expeditiously as possible.

§ 4.1113 Consolidation of proceedings.

When proceedings involving a common question of law or fact are pending before an administrative law judge or the Board, such proceedings are subject to consolidation pursuant to a motion by a party or at the initiative of an administrative law judge or the Board.

§ 4.1114 Advancement of proceedings.

(a) Except in expedited review proceedings under § 4.1180, or in temporary relief proceedings under § 4.1266, at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.

(b) Except as otherwise directed by the administrative law judge or the Board, any party filing a motion under this section shall—

(1) Make the motion in writing;

(2) Describe the exigent circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery or telephonic communication followed by mail or by electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission. Service is complete upon mailing or, if service is made by electronic transmission, at the time of transmission.

(d) Unless otherwise directed by the administrative law judge or the Board, all parties to the proceeding in which the motion is filed shall have 10 days from the date of service of the motion to file a statement in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may schedule a hearing regarding the motion. If the motion is granted, the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: *Provided*, A hearing on the merits shall not be scheduled with less than 5 working days notice to the parties, unless all parties consent to an earlier hearing.

(f) If the motion is granted, the Board may, if it deems such action to be appropriate, advance the appeal on its calendar and order such other advancement as may be appropriate, including an abbreviated schedule for briefing or oral argument.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5795, Jan. 30, 2023]

§ 4.1115 Waiver of right to hearing.

Any person entitled to a hearing before an administrative law judge under the act may waive such right in writing. Where parties are directed by any rule in these regulations to file a responsive pleading on or before a specified time, any party who fails to file such responsive pleading by the time specified, may be deemed to have waived his right to a hearing. Unless all parties to a proceeding who are entitled to a hearing waive, or are deemed to have waived such right, a hearing will be held.

§ 4.1116 Status of notices of violation and orders of cessation pending review by the Office of Hearings and Appeals.

Except where temporary relief is granted pursuant to section 525(c) or section 526(c) of the act, notices of violation and orders of cessation issued under the act shall remain in effect during the pendency of review before an administrative law judge or the Board.

§ 4.1117 Reconsideration.

A party may file a motion for reconsideration of any decision of the Board under this subpart within 60 days after the date of the decision. The provisions of § 4.403 apply to a motion filed under this paragraph.

[75 FR 64669, Oct. 20, 2010]

EVIDENTIARY HEARINGS

§ 4.1120 Presiding officers.

An administrative law judge in the Office of Hearings and Appeals shall preside over any hearing required by the act to be conducted pursuant to 5 U.S.C. 554 (1970).

§ 4.1121 Powers of administrative law judges.

(a) Under the regulations of this part, an administrative law judge may—

(1) Administer oaths and affirmations;

(2) Issue subpoenas;

(3) Issue appropriate orders relating to discovery;

(4) Rule on procedural requests or similar matters;

(5) Hold conferences for settlement or simplification of the issues;

(6) Regulate the course of the hearing;

(7) Rule on offers of proof and receive relevant evidence;

(8) Take other actions authorized by this part, by 5 U.S.C. 556 (1970), or by the act; and

(9) Make or recommend decisions in accordance with 5 U.S.C. 557 (1970).

(b) An administrative law judge may order a prehearing conference—

(1) To simplify and clarify issues;

(2) To receive stipulations and admissions;

(3) To explore the possibility of agreement disposing of any or all of the issues in dispute; and

(4) For such other purposes as may be appropriate.

(c) Except as otherwise provided in these regulations, the jurisdiction of an administrative law judge shall terminate upon—

(1) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;

(2) The issuance of an order of the Board granting a petition for review; or

(3) The expiration of the time period within which a petition for review or an appeal to the Board may be filed.

§ 4.1122 Conduct of administrative law judges.

Administrative law judges shall adhere to the ''Code of Judicial Conduct.''

§ 4.1123 Notice of hearing.

(a) An administrative law judge shall give notice to the parties of the time, place and nature of any hearing.

(b) Except for expedited review proceedings and temporary relief proceedings where time is of the essence, notice given under this section shall be in writing.

(c) In an expedited proceeding when there is only opportunity to give oral notice, the administrative law judge shall enter that fact contemporaneously on the record by a signed and dated memorandum describing the notice given.

§ 4.1124 Certification of interlocutory ruling.

Upon motion or upon the initiative of an administrative law judge, the judge may certify to the Board a ruling which does not finally dispose of the case if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge.

§ 4.1125 Summary decision.

(a) At any time after a proceeding has begun, a party may move for summary decision of the whole or part of a case.

(b) The moving party under this section shall verify any allegations of fact with supporting affidavits, unless the moving party is relying upon depositions, answers to interrogatories, admissions, or documents produced upon request to verify such allegations.

(c) An administrative law judge may grant a motion under this section if the record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that—

(1) There is no disputed issue as to any material fact; and

(2) The moving party is entitled to summary decision as a matter of law.

(d) If a motion for summary decision is not granted for the entire case or for all the relief requested and an evidentiary hearing is necessary, the administrative law judge shall, if practicable, and upon examination of all relevant documents and evidence before him, ascertain what material facts are actually and in good faith controverted. He shall thereupon, issue an order specifying the facts that appear without substantial controversy and direct such further proceedings as deemed appropriate.

§ 4.1126 Proposed findings of fact and conclusions of law.

The administrative law judge shall allow the parties to a proceeding an opportunity to submit proposed findings of fact and conclusions of law together with a supporting brief at a time designated by the administrative law judge.

§ 4.1127 Initial orders and decisions.

An initial order or decision disposing of a case shall incorporate—

(a) Findings of fact and conclusions of law and the basis and reasons therefore on all the material issues of fact, law, and discretion presented on the record; and

(b) An order granting or denying relief.

§ 4.1128 Effect of initial order or decision.

An initial order or decision shall become final if that order or decision is not timely appealed to the Board under § 4.1270 or § 4.1271.

§ 4.1129 Certification of record.

Except in expedited review proceedings under § 4.1180, within 5 days after an initial decision has been rendered, the administrative law judge shall certify the official record of the proceedings, including all exhibits, and transmit the official record for filing in the Hearings Division, Office of Hearings and Appeals.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5795, Jan. 30, 2023]

DISCOVERY

§ 4.1130 Discovery methods.

Parties may obtain discovery by one or more of the following methods—

(a) Depositions upon oral examination or upon written interrogatories;

(b) Written interrogatories;

(c) Production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and

(d) Requests for admission.

§ 4.1131 Time for discovery.

Following the initiation of a proceeding, the parties may initiate discovery at any time as long as it does not interfere with the conduct of the hearing.

§ 4.1132 Scope of discovery.

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(d) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following—

(1) The discovery not be had;

(2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(5) Discovery be conducted with no one present except persons designated by the administrative law judge; or

(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

§ 4.1133 Sequence and timing of discovery.

Unless the administrative law judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

§ 4.1134 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows—

(a) A party is under a duty to supplement timely his response with respect to any question directly addressed to—

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify and the substance of his testimony.

(b) A party is under a duty to amend timely a prior response if he later obtains information upon the basis of which—

(1) He knows the response was incorrect when made; or

(2) He knows that the response though correct when made is no longer true and the circumstances are such

that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the administrative law judge or agreement of the parties.

§ 4.1135 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded, or a party upon whom a request is made pursuant to § 4.1140, or a party upon whom answers to interrogatories are served fails to adequately respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the administrative law judge for an order compelling a response or inspection in accordance with the request.

(b) The motion shall set forth—

(1) The nature of the questions or request;

(2) The response or objection of the party upon whom the request was served; and

(3) Arguments in support of the motion.

(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.

(d) In ruling on a motion made pursuant to this section, the administrative law judge may make such a protective order as he is authorized to make on a motion made pursuant to § 4.1132(d).

§ 4.1136 Failure to comply with orders compelling discovery.

If a party or an officer, director, or other agent of a party fails to obey an order to provide or permit discovery, the administrative law judge before whom the action is pending may make such orders in regard to the failure as are just, including but not limited to the following—

(a) An order that the matters sought to be discovered or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; or

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

§ 4.1137 Depositions upon oral examination or upon written questions.

(a) Any party desiring to take the testimony of any other party or other person by deposition upon oral examination or written questions shall, without leave of the administrative law judge, give reasonable notice in writing to every other party, to the person to be examined and to the administrative law judge of—

(1) The proposed time and place of taking the deposition;

(2) The name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the particular group or class to which he belongs;

(3) The matter upon which each person will be examined; and

(4) The name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) A deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(c) The actual taking of the deposition shall proceed as follows—

(1) The deposition shall be on the record;

(2) The officer before whom the deposition is to be taken shall put the witness on oath or affirmation;

(3) Examination and cross-examination shall proceed as at a hearing;

(4) All objections made at the time of the examination shall be noted by the officer upon the deposition;

(5) The officer shall not rule on objections to the evidence, but evidence objected to shall be taken subject to the objections.

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature, unless examination

and signature is waived by the deponent. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign.

(e) Where the deposition is to be taken upon written questions, the party taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within 30 days after service, any other party may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

§ 4.1138 Use of depositions.

At the hearing, any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition, or who had reasonable notice thereof, in accordance with any of the following provisions—

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated to testify on behalf of a public or private corporation, partnership, or association or governmental agency which is a party may be used by an adverse party for any purpose; or

(c) The deposition of a witness, whether or not a party, may be used by a party for any purpose if the administrative law judge finds that—

(1) The witness is dead;

(2) The witness is at a distance greater than 100 miles from the place of hearing, or is outside the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(3) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(4) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(5) Such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be used.

§ 4.1139 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on the administrative law judge and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answer and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 30 days after service of the interrogatories, or within such shorter or longer period as the administrative law judge may allow.

(c) Interrogatories may relate to any matters which can be inquired into

under §4.1132. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

§ 4.1140 Production of documents and things and entry upon land for inspection and other purposes.

(a) Any party may serve on any other party a request to—

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things within the scope of §4.1132 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property (including the air, water, and soil) or any designated object or operation thereon, within the scope of §4.1132.

(b) The request may be served on any party without leave of the administrative law judge.

(c) The request shall—

(1) Set forth the items to be inspected either by individual item or by category;

(2) Describe each item or category with reasonable particularity; and

(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within 30 days after service of the request.

(e) The response shall state, with respect to each item or category—

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

§ 4.1141 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within 30 days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party—

(1) A sworn statement denying specifically the relevant matters of which an admission is requested;

(2) A sworn statement setting forth in detail the reasons why he can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

(d) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, he shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

(f) Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

PETITIONS FOR REVIEW OF PROPOSED ASSESSMENTS OF CIVIL PENALTIES

§ 4.1150 Who may file.

Any person charged with a civil penalty may file a petition for review of a proposed assessment of that penalty with the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1151 Time for filing.

(a) A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment; or

(b) If a timely request for a conference has been made pursuant to 30 CFR 723.18 or 845.18, a petition for review must be filed within 30 days from service of notice by the conference officer that the conference is deemed completed.

(c) No extension of time will be granted for filing a petition for review of a proposed assessment of a civil penalty as required by paragraph (a) or (b) of this section. If a petition for review is not filed within the time period provided in paragraph (a) or (b) of this section, the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act to review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

§ 4.1152 Contents of petition; payment required.

(a) The petition shall include—

(1) A short and plain statement indicating the reasons why either the amount of the penalty or the fact of the violation is being contested;

(2) If the amount of penalty is being contested based upon a misapplication of the civil penalty formula, a statement indicating how the civil penalty formula contained in 30 CFR part 723 or 845 was misapplied, along with a proposed civil penalty utilizing the civil penalty formula;

(3) Identification by number of all violations being contested;

(4) The identifying number of the cashier's check, certified check, bank draft, personal check, or bank money order accompanying the petition; and

(5) A request for a hearing site.

(b) The petition shall be accompanied by—

(1) Full payment of the proposed assessment in the form of a cashier's check, certified check, bank draft, personal check or bank money order made payable to—Assessment Office, OSM—to be placed in an escrow account pending final determination of the assessment; and

(2) On the face of the payment an identification by number of the violations for which payment is being tendered.

(c) As required by section 518(c) of the act, failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) No extension of time will be granted for full payment of the proposed assessment. If payment is not made within the time period provided in § 4.1151 (a) or (b), the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act of review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

§ 4.1153 Answer.

OSM shall have 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA.

§ 4.1154 Review of waiver determination.

(a) Within 10 days of the filing of a petition under this part, petitioner may move the administrative law judge to review the granting or denial of a waiver of the civil penalty formula pursuant to 30 CFR 723.16 or 845.16.

(b) The motion shall contain a statement indicating all alleged facts relevant to the granting or denial of the waiver;

(c) Review shall be limited to the written determination of the Director of OSM granting or denying the waiver, the motion and responses to the motion. The standard of review shall be abuse of discretion.

(d) If the administrative law judge finds that the Director of OSM abused his discretion in granting or denying the waiver, the administrative law judge shall hold the hearing on the petition for review of the proposed assessment required by section 518(b) of the act and make a determination pursuant to § 4.1157.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§ 4.1155 Burdens of proof in civil penalty proceedings.

In civil penalty proceedings, OSM shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty. The person who petitioned for review shall have the ultimate burden of persuasion as to the fact of the violation.

[53 FR 47694, Nov. 25, 1988]

§ 4.1156 Summary disposition.

(a) In a civil penalty proceeding where the person against whom the proposed civil penalty is assessed fails to comply on time with any prehearing order of an administrative law judge, the administrative law judge shall issue an order to show cause why—

(1) That person should not be deemed to have waived his right to a hearing; and

(2) The proceedings should not be dismissed and referred to the assessment officer.

(b) If the order to show cause is not satisfied as required, the administrative law judge shall order the proceedings summarily dismissed and shall refer the case to the assessment officer who shall enter the assessment as the final order of the Department.

(c) Where the person against whom the proposed civil penalty is assessed fails to appear at a hearing, that person will be deemed to have waived his right to a hearing and the administration law judge may assume for purposes of the assessment—

(1) That each violation listed in the notice of violation or order occurred; and

(2) The truth of any facts alleged in such notice or order.

(d) In order to issue an initial decision assessing the appropriate penalty when the person against whom the proposed civil penalty is assessed fails to appear at the hearing, an administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

(e) Nothing in this section shall be construed to deprive the person against whom the penalty is assessed of his opportunity to have OSM prove the violations charged in open hearing with confrontation and cross-examination of witnesses, except where that person fails to comply with a prehearing order or fails to appear at the scheduled hearing.

§ 4.1157 Determination by administrative law judge.

(a) The administrative law judge shall incorporate in his decision concerning the civil penalty, findings of fact on each of the four criteria set forth in 30 CFR 723.13 or 845.13, and conclusions of law.

(b) If the administrative law judge finds that—

(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to

the point system and conversion table contained in 30 CFR 723.13 and 723.14 or 845.13 and 845.14, except that the administrative law judge may waive the use of such point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act; or

(2) No violation occurred, he shall issue an order that the proposed assessment be returned to the petitioner.

(c) If the administrative law judge makes a finding that no violation occurred or if the administrative law judge reduces the amount of the civil penalty below that of the proposed assessment and a timely petition for review of his decision is not filed with the Board or the Board refuses to grant such a petition, the Department of the Interior shall have 30 days from the expiration of the date for filing a petition with the Board if no petition is filed, or 30 days from the date the Board refuses to grant such a petition, within which to remit the appropriate amount to the person who made the payment, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater.

(d) If the administrative law judge increases the amount of the civil penalty above that of the proposed assessment, the administrative law judge shall order payment of the appropriate amount within 30 days of receipt of the decision.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§ 4.1158 Appeals.

Any party may petition the Board to review the decision of an administrative law judge concerning an assessment according to the procedures set forth in § 4.1270.

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

§ 4.1160 Scope.

These regulations govern applications for review of—

(a) Notices of violation or the modification, vacation, or termination of a notice of violation under section 521(a)(3) of the Act; and

(b) Orders of cessation which are not subject to expedited review under § 4.1180 or the modification, vacation, or termination of such an order of cessation under section 521(a)(2) or section 521(a)(3).

§ 4.1161 Who may file.

A permittee issued a notice or order by the Secretary pursuant to the provisions of section 521(a)(2) or section 521(a)(3) of the Act or any person having an interest which is or may be adversely affected by a notice or order subject to review under § 4.1160 may file an application for review with the Hearings Division, OHA.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1162 Time for filing.

(a) Any person filing an application for review under § 4.1160 *et seq.* shall file that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order. Any person not served with a copy of the document shall file the application for review within 40 days of the date of issuance of the document.

(b) No extension of time will be granted for filing an application for review as provided by paragraph (a) of this section. If an application for review is not filed within the time period provided in paragraph (a) of this section, the application shall be dismissed.

[51 FR 16321, May 2, 1986]

§ 4.1163 Effect of failure to file.

Failure to file an application for review of a notice of violation or order of cessation shall not preclude challenging the fact of violation during a civil penalty proceeding.

§ 4.1164 Contents of application.

Any person filing an application for review shall incorporate in that application regarding each claim for relief—

(a) A statement of facts entitling that person to administrative relief;
(b) A request for specific relief;
(c) A copy of any notice or order sought to be reviewed;
(d) A statement as to whether the person requests or waives the opportunity for an evidentiary hearing; and
(e) Any other relevant information.

§ 4.1165 Answer.

(a) Where an application for review is filed by a permittee, OSM as well as any other person granted leave to intervene pursuant to § 4.1110 shall file an answer within 20 days of service of a copy of such application.
(b) Where an application for review is filed by a person other than a permittee, the following shall file an answer within 20 days of service of a copy of such application—
(1) OSM;
(2) The permittee; or
(3) Any other person granted leave to intervene pursuant to § 4.1110.

§ 4.1166 Contents of answer.

An answer to an application for review shall incorporate—
(a) A statement specifically admitting or denying the alleged facts stated by the applicant;
(b) A statement of any other relevant facts;
(c) A statement whether an evidentiary hearing is requested or waived; and
(d) Any other relevant information.

§ 4.1167 Notice of hearing.

Pursuant to section 525(a)(2) of the act, the applicant and other interested persons shall be given written notice of the time and place of the hearing at least 5 working days prior thereto.

§ 4.1168 Amendments to pleadings.

(a) An application for review may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the administrative law judge upon proper motion.
(b) Upon receipt of an initial or amended application for review or subsequent to granting leave to amend, the administrative law judge shall issue an order setting a time for filing an amended answer if the judge determines that such an answer is appropriate.

§ 4.1169 Failure to state a claim.

Upon proper motion or after the issuance of an order to show cause by the administrative law judge, an administrative law judge may dismiss at any time an application for review which fails to state a claim upon which administrative relief may be granted.

§ 4.1170 Related notices or orders.

(a) An applicant for review shall file a copy of any subsequent notice or order which modifies, vacates, or terminates the notice or order sought to be reviewed within 10 days of receipt.
(b) An applicant for review of a notice shall file a copy of an order of cessation for failure timely to abate the violation which is the subject of the notice under review within 10 days of receipt of such order.
(c) If an applicant for review desires to challenge any subsequent notice or order, the applicant must file a separate application for review.
(d) Applications for review of related notices or orders are subject to consolidation.

§ 4.1171 Burden of proof in review of section 521 notices or orders.

(a) In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.
(b) The ultimate burden of persuasion shall rest with the applicant for review.

Expedited Review of Section 521(a)(2) or 521(a)(3) Orders of Cessation

§ 4.1180 Purpose.

The purpose of §§ 4.1180–4.1187 is to govern applications filed under section 525(b) of the act for expedited review of orders of cessation for which temporary relief has not been granted under section 525(c) or section 526(c) of

the act. If a person is qualified to receive a 30-day decision under these regulations, he may waive that right and file an application under § 4.1164, and the procedures in § 4.1160 *et seq.* shall apply. If there is a waiver as set forth in § 4.1186, the final administrative decision shall be issued within 120 days of the filing of the application.

§ 4.1181 Who may file.

(a) An application for review of an order of cessation may be filed under this section, whenever temporary relief has not been granted under section 525(c) or section 526(c) of the act, by—

(1) A permittee who has been issued an order of cessation under section 521(a)(2) or section 521(a)(3) of the act; or

(2) Any person having an interest which is or may be adversely affected by the issuance of an order of cessation under section 521(a)(2) or section 521(a)(3) of the act.

(b) A permittee or any person having an interest which is or may be adversely affected by a section 521(a)(2) or section 521(a)(3) order of cessation waives his right to expedited review upon being granted temporary relief pursuant to section 525(c) or section 526(c) of the act.

§ 4.1182 Where to file.

The application shall be filed in the Hearings Division.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1183 Time for filing.

(a) Any person intending to file an application for expedited review under section 525(b) of the act shall notify the field solicitor, Department of the Interior, for the region in which the mine site is located, within 15 days of receipt of the order. Any person not served with a copy of the order shall file notice of intention to file an application for review within 20 days of the date of issuance of the order.

(b) Any person filing an application for review under § 4.1184 shall file the application within 30 days of receipt of the order. Any person not served with a copy of the order shall file an application for review within 40 days of the date of issuance of the order.

§ 4.1184 Contents of application.

(a) Any person filing an application for expedited review under section 525(b) of the act shall incorporate in that application regarding each claim for relief—

(1) A statement of facts entitling that person to administrative relief;

(2) A request for specific relief;

(3) A specific statement which delineates each issue to be addressed by the applicant during the expedited proceeding;

(4) A copy of the order sought to be reviewed;

(5) A list identifying each of applicant's witnesses by name, address, and place of employment, including expert witnesses and the area of expertise to which they will address themselves at the hearing, and a detailed summary of their testimony;

(6) Copies of all exhibits and other documentary evidence that the applicant intends to introduce as evidence at the hearing and descriptions of all physical exhibits and evidence which is not capable of being copied or attached; and

(7) Any other relevant information.

(b) If any applicant fails to comply with all the requirements of § 4.1184(a), the administrative law judge may find that the applicant has waived the 30-day decision requirement or the administrative law judge shall order that the application be perfected and the application shall not be considered filed for purposes of the 30-day decision until perfected. Failure to timely comply with the administrative law judge's order shall constitute a waiver of the 30-day decision.

§ 4.1185 Computation of time for decision.

In computing the 30-day time period for administrative decision, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.

§ 4.1186 Waiver of the 30-day decision requirement.

(a) Any person qualified to receive a 30-day decision may waive that right—

(1) By filing an application pursuant to § 4.1160–71;

(2) By failing to comply with all the requirements of § 4.1184(a); or

(3) In accordance with § 4.1187(j).

(b) Any person qualified to receive a 30-day decision shall waive that right—

(1) By obtaining temporary relief pursuant to section 525(c) or section 526(c) of the act;

(2) By failing to perfect an application pursuant to § 4.1184(b); or

(3) In accordance with § 4.1187(i).

§ 4.1187 Procedure if 30-day decision requirement is not waived.

If the applicant does not waive the 30-day decision requirement of section 525(b) of the act, the following special rules shall apply—

(a) The applicant shall serve all known parties with a copy of the application simultaneously with the filing of the application with OHA. If service is accomplished by mail, the applicant shall inform all known parties by telephone at the time of mailing that an application is being filed and shall inform the administrative law judge by telephone that such notice has been given. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge.

(b) Any party desiring to file a response to the application for review shall file a written response within 5 working days of service of the application.

(c) If the applicant has requested a hearing, the administrative law judge shall act immediately upon receipt of the application to notify the parties of the time and place of the hearing at least 5 working days prior to the hearing date.

(d) The administrative law judge may require the parties to submit proposed findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or, where proposed findings of fact and conclusions of law have not been submitted at the hearing, they may be orally presented for the record at the hearing.

(e) The administrative law judge shall make an initial decision. He shall either rule from the bench on the application, orally stating the reasons for his decision or he shall issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision. The decision of the administrative law judge must be issued within 15 days of the filing of the perfected application under § 4.1184.

(f) If any party desires to appeal to the Board, such party shall—

(1) If the administrative law judge makes an oral ruling, make an oral statement, within a time period as directed by the administrative law judge, that the decision is being appealed and request that the administrative law judge certify the record to the Board; or

(2) If the administrative law judge issues a written decision after the close of the hearing, file a notice of appeal with the administrative law judge and with the Board within 2 working days of receipt of the administrative law judge's decision.

(g) If the decision of the administrative law judge is appealed, the Board shall act immediately to issue an expedited briefing schedule, and the Board shall act expeditiously to review the record and issue its decision. The decision of the Board must be issued within 30 days of the date the perfected application is filed with OHA pursuant to § 4.1184.

(h) If all parties waive the opportunity for a hearing and the administrative law judge determines that a hearing is not necessary, but the applicant does not waive the 30-day decision requirement, the administrative law judge shall issue an initial decision on the application within 15 days of receipt of the application. The decision shall contain findings of fact and an order disposing of the application. The decision shall be served upon all the parties and the parties shall have 2 working days from receipt of such decision within which to appeal to the

Board. The Board shall issue its decision within 30 days of the date the perfected application is filed with OHA pursuant to § 4.1184.

(i) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to comply with any requirement of § 4.1187(a), such action shall constitute a waiver of the 30-day requirement of section 525(b) of the act.

(j) If the applicant seeks to offer witnesses, exhibits, or testimony at the hearing in addition to those identified, submitted, described, or summarized in the application for expedited review perfected in accordance with the requirements of § 4.1184, upon objection by an opposing party to such offer, the administrative law judge may allow such objecting party additional time in order to prepare for cross-examination of unidentified witnesses or to identify and prepare rebuttal evidence or otherwise uncover any additional prejudice which may result to such party. The administrative law judge may rule that the running of the 30-day time for decision is stayed for the period of any additional time allowed pursuant to this subsection or may determine that the applicant has waived his right to the 30-day decision.

PROCEEDINGS FOR SUSPENSION OR REVOCATION OF PERMITS UNDER SECTION 521(a)(4) OF THE ACT

§ 4.1190 Initiation of proceedings.

(a) A proceeding on a show cause order issued by the Director of OSM pursuant to section 521(a)(4) of the Act shall be initiated by the Director of OSM filing a copy of such an order with the Hearings Division, OHA, promptly after the order is issued to the permittee.

(b) A show cause order filed with OHA shall set forth—

(1) A list of the unwarranted or willful violations which contribute to a pattern of violations;

(2) A copy of each order or notice which contains one or more of the violations listed as contributing to a pattern of violations;

(3) The basis for determining the existence of a pattern or violations; and

(4) Recommendations whether the permit should be suspended or revoked, including the length and terms of a suspension.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1191 Answer.

The permittee shall have 30 days from receipt of the order within which to file an answer with the Hearings Division, OHA.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5795, Jan. 30, 2023]

§ 4.1192 Contents of answer.

The permittee's answer to a show cause order shall contain a statement setting forth—

(a) The reasons in detail why a pattern of violations does not exist or has not existed, including all reasons for contesting—

(1) The fact of any of the violations alleged by OSM as constituting a pattern of violations;

(2) The willfulness of such violations; or

(3) Whether such violations were caused by the unwarranted failure of the permittee;

(b) All mitigating factors the permittee believes exist in determining the terms of the revocation or the length and terms of the suspension;

(c) Any other alleged relevant facts; and

(d) Whether a hearing on the show cause order is desired.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1193 Notice of hearing.

If a hearing on the show cause order is requested, or if no hearing is requested but the administrative law judge determines that a hearing is necessary, the administrative law judge shall give thirty days written notice of the date, time, and place of the hearing to the Director, the permittee, the State regulatory authority, if any, and any intervenor.

[67 FR 61510, Oct. 1, 2002]

§ 4.1194 Burden of proof in suspension or revocation proceedings.

In proceedings to suspend or revoke a permit, OSM shall have the burden of going forward to establish a prima facie case for suspension or revocation of the permit. The ultimate burden of persuasion that the permit should not be suspended or revoked shall rest with the permittee.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1195 Determination by the administrative law judge.

(a) Upon a determination by the administrative law judge that a pattern of violations exists or has existed, the administrative law judge shall order the permit either suspended or revoked. In making such a determination, the administrative law judge need not find that all the violations listed in the show cause order occurred, but only that sufficient violations occurred to establish a pattern.

(b) If the permit is suspended, the minimum suspension period shall be 3 working days unless the administrative law judge finds that imposition of the minimum suspension period would result in manifest injustice and would not further the purposes of the act. Also, the administrative law judge may impose preconditions to be satisfied prior to the suspension being lifted.

(c) The decision of the administrative law judge shall be issued within 20 days following the date the hearing record is closed by the administrative law judge or within 20 days of receipt of the answer, if no hearing is requested by any party and the administrative law judge determines that no hearing is necessary.

(d) At any stage of a suspension or revocation proceeding being conducted by an administrative law judge, the parties may enter into a settlement, subject to the approval of the administrative law judge.

[43 FR 34386, Aug. 3, 1978. Redesignated and amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1196 Summary disposition.

(a) In a proceeding under this section where the permittee fails to appear at a hearing, the permittee shall be deemed to have waived his right to a hearing and the administrative law judge may assume for purposes of the proceeding that—

(1) Each violation listed in the order occurred;

(2) Such violations were caused by the permittee's unwarranted failure or were willfully caused; and

(3) A pattern of violations exists.

(b) In order to issue an initial decision concerning suspension or revocation of the permit when the permittee fails to appear at the hearing, the administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1197 Appeals.

Any party desiring to appeal the decision of the administrative law judge shall have 5 days from receipt of the administrative law judge's decision within which to file a notice of appeal with the Board. The Board shall act immediately to issue an expedited briefing schedule. The decision of the Board shall be issued within 60 days of the date the hearing record is closed by the administrative law judge or, if no hearing is held, within 60 days of the date the answer is filed.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

Applications for Review of Alleged Discriminatory Acts Under Section 703 of the Act

§ 4.1200 Filing of the application for review with the Office of Hearings and Appeals.

(a) Pursuant to 30 CFR 865.13, within 7 days of receipt of an application for review of alleged discriminatory acts, OSM shall file a copy of the application in the Hearings Division, OHA. OSM shall also file in the Hearings Division, OHA, a copy of any answer submitted in response to the application for review.

(b) The application for review, as filed in the Hearings Division, OHA, shall be held in suspense until one of the following takes place—

(1) A request for temporary relief is filed pursuant to § 4.1203;

(2) A request is made by OSM for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(3) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(4) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(b);

(5) A request is made by OSM that OHA close the case because OSM, the applicant, and the alleged discriminating person have entered into an agreement in resolution of the discriminatory acts and there has been compliance with such agreement.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1201 Request for scheduling of a hearing.

(a) If OSM determines that a violation of section 703(a) of the act has probably occurred and was not resolved at the informal conference, it shall file with the Hearings Division, OHA, a request on behalf of the applicant that a hearing be scheduled. The request shall be filed within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference. Where OSM makes such a request, it shall represent the applicant in the administrative proceedings, unless the applicant desires to be represented by private counsel.

(b) If OSM declines to request that a hearing be scheduled and to represent the applicant, it shall within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference, notify the applicant of his right to request the scheduling of a hearing on his own behalf. An applicant shall file a request for the scheduling of a hearing in the Hearings Division, OHA, within 30 days of service of such notice from OSM.

(c) If no request for the scheduling of a hearing has been made pursuant to paragraph (a) or (b) of this section and 60 days have elapsed from the filing of the application for review with OSM, the applicant may file on his own behalf a request for the scheduling of a hearing with the main office of OHA. Where such a request is made, the applicant shall proceed on his own behalf, but OSM may intervene pursuant to § 4.1110.

§ 4.1202 Response to request for the scheduling of a hearing.

(a) Any person served with a copy of the request for the scheduling of a hearing shall file a response with the Hearings Division, OHA, within 20 days of service of such request.

(b) If the alleged discriminating person has not filed an answer to the application, such person shall include with the response to the request for the scheduling of a hearing, a statement specifically admitting or denying the alleged facts set forth in the application.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5795, Jan. 30, 2023]

§ 4.1203 Application for temporary relief from alleged discriminatory acts.

(a) On or after 10 days from the filing of an applicant for review under this part, any party may file an application for temporary relief from alleged discriminatory acts.

(b) The application shall be filed in the Hearings Division, OHA.

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A showing that the complaint of discrimination was not frivolously brought;

(3) A description of any exigent circumstances justifying temporary relief; and

(4) A statement of the specific relief requested.

(d) All parties to the proceeding to which the application relates shall have 5 days from receipt of the application to file a written response.

(e) The administrative law judge may convene a hearing on any issue raised by the application if he deems it appropriate.

(f) The administrative law judge shall expeditiously issue an order or decision granting or denying such relief.

(g) If all parties consent, before or after the commencement of any hearing on the application for temporary relief, the administrative law judge may order the hearing on the application for review of alleged discriminatory - acts to be advanced and consolidated with the hearing on the application for temporary relief.

[36 FR 7186, Apr. 15, 1971, as amended at 88 FR 5795, Jan. 30, 2023]

§ 4.1204 Determination by administrative law judge.

Upon a finding of a violation of section 703 of the act or 30 CFR 865.11, the administrative law judge shall order the appropriate affirmative relief, including but not limited to—

(a) The rehiring or reinstatement of the applicant to his former position with full rights and privileges, full backpay, and any special damages sustained as a result of the discrimination; and

(b) All other relief which the administrative law judge deems appropriate to abate the violation or to prevent recurrence of discrimination.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1205 Appeals.

Any party aggrieved by a decision of an administrative law judge concerning an application for review of alleged discriminatory acts may appeal to the Board under procedures set forth in § 4.1271 *et seq*.

APPLICATIONS FOR TEMPORARY RELIEF

§ 4.1260 Scope.

These regulations contain the procedures for seeking temporary relief in section 525 review proceedings under the act. The special procedures for seeking temporary relief from an order of cessation are set forth in § 4.1266. Procedures for seeking temporary relief from alleged discrimina- tory acts are covered in § 4.1203.

§ 4.1261 When to file.

An application for temporary relief may be filed by any party to a proceeding at any time prior to decision by an administrative law judge.

§ 4.1262 Where to file.

The application shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, OHA.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1263 Contents of application.

The application shall include—

(a) A detailed written statement setting forth the reasons why relief should be granted;

(b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;

(c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;

(d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the act, a statement of whether the requirement of section 525(c) of the act for decision on the application within 5 days is waived; and

(e) A statement of the specific relief requested.

§ 4.1264 Response to application.

(a) Except as provided in § 4.1266(b), all parties to the proceeding to which the application relates shall have 5 days from the date of receipt of the application to file a written response.

(b) Except as provided in § 4.1266(b), the administrative law judge may hold a hearing on any issue raised by the application if he deems it appropriate.

§ 4.1265 Determination on application concerning a notice of violation issued pursuant to section 521(a)(3) of the act.

Where an application has been filed requesting temporary relief from a notice of violation issued under section 521(a)(3) of the act, the administrative law judge shall expeditiously issue an order or decision granting or denying such relief.

§ 4.1266 Determination on application concerning an order of cessation.

(a) If the 5-day requirement of section 525(c) of the act is waived, the administrative law judge shall expeditiously conduct a hearing and render a decision on the application.

(b) If there is no waiver of the 5-day requirement of section 525(c) of the act, the following special rules shall apply—

(1) The 5-day time for decision shall not begin to run until the application is filed pursuant to § 4.1262 or a copy of the application is received by the field solicitor for the region in which the mine site subject to the order is located, whichever occurs at a later date (see the OHA Standing Orders on Contact Information for addresses);

(2) The application shall include an affidavit stating that notice has been given to the field office of OSM serving the state in which the minesite subject to the order is located. The notice shall identify the mine, the mine operator, the date and number of the order from which relief is requested, the name of the OSM inspector involved, and the name and contact information of the applicant. OSMRE's' field offices' contact information is provided in the OHA Standing Orders on Contact Information field offices and their numbers follow:

(3) Prior to or at the hearing, the applicant shall file with the Hearings Division an affidavit stating the date upon which the copy of the application was delivered to the office of the field solicitor or the applicant may make an oral statement at the hearing setting forth that information. For purposes of the affidavit or statement the applicant may rely upon telephone confirmation by the office of the field solicitor that the application was received.

(4) In addition to the service requirements of § 4.1266(b) (1) and (2), the applicant shall serve any other parties with a copy of the application simultaneously with the filing of the application. If service is accomplished by mail, the applicant shall inform such other parties by telephone at the time of mailing that an application is being filed, the contents of the application, and with whom the application was filed.

(5) The field solicitor and all other parties may indicate their objection to the application by communicating such objection to the administrative law judge and the applicant by telephone. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge. The field solicitor and all other parties shall simultaneously reduce their objections to writing. The written objections must be immediately filed with the administrative law judge and immediately served upon the applicant.

(6) Upon receipt of communication that there is an objection to the request, the administrative law judge shall immediately order a location, time, and date for the hearing by communicating such information to the field solicitor, all other parties, and the applicant by telephone. The administrative law judge shall reduce such communications to writing in the form of a memorandum to the file.

(7) If a hearing is held—

(i) The administrative law judge may require the parties to submit proposed findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or where written proposed findings of fact and conclusions of law have not been submitted at the hearing, they may be orally presented for the record at the hearing.

(ii) The administrative law judge shall either rule from the bench on the application, orally stating the reasons for his decision or he shall within 24 hours of completion of the hearing issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision.

(8) The order or decision of the administrative law judge shall be issued within 5 working days of the receipt of the application for temporary relief.

(9) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to supply the information required by

§ 4.1263 such action shall constitute a waiver of the 5-day requirement of section 525(c) of the act.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1489, Jan. 11, 1994; 67 FR 61510, Oct. 1, 2002; 88 FR 5795, Jan. 30, 2023]

§ 4.1267 Appeals.

(a) Any party desiring to appeal a decision of an administrative law judge granting temporary relief may appeal to the Board.

(b) Any party desiring to appeal a decision of an administrative law judge denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a) of the act.

(c) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980]

APPEALS TO THE BOARD FROM DECISIONS OR ORDERS OF ADMINISTRATIVE LAW JUDGES

§ 4.1270 Petition for discretionary review of a proposed civil penalty.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of a civil penalty proceeding under § 4.1150.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition is granted, the rules in §§ 4.1273 through 4.1275 are applicable, and the Board must use the point system and conversion table contained in 30 CFR part 723 or 845 in recalculating assessments. However, the Board has the same authority to waive the civil penalty formula as that granted to administrative law judges in § 4.1157(b)(1). If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61511, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010]

§ 4.1271 Notice of appeal.

(a) Any aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under §§ 4.1160 through 4.1171, 4.1200 through 4.1205, 4.1260 through 4.1267, 4.1290 through 4.1296, and 4.1350 through 4.1356.

(b) Except in an expedited review proceeding under § 4.1180, or in a suspension or revocation proceeding under § 4.1190, a notice of appeal shall be filed with the Board on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1489, Jan. 11, 1994]

§ 4.1272 Interlocutory appeals.

(a) If a party has sought certification under § 4.1124, that party may petition the Board for permission to appeal from an interlocutory ruling by an administrative law judge.

(b) A petition under this section shall be in writing and not exceed 10 pages in length.

(c) If the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case, the Board may grant the petition.

(d) Upon granting a petition under this section, the Board may dispense with briefing or issue a briefing schedule.

(e) Unless the Board or the administrative law judge orders otherwise, an interlocutory appeal shall not operate as a stay of further proceedings before the judge.

(f) In deciding an interlocutory appeal, the Board shall confine itself to the issue presented on appeal.

(g) The Board shall promptly decide appeals under this section.

(h) Upon affirmance, reversal or modification of the administrative law judge's interlocutory ruling or order, the jurisdiction of the Board shall terminate, and the case shall be remanded promptly to the administrative law judge for further proceedings.

§ 4.1273 Briefs.

(a) Unless the Board orders otherwise, an appellant's brief is due on or before 30 days from the date of receipt of notice by the appellant that the Board has agreed to exercise discretionary review authority pursuant to § 4.1270 or a notice of appeal is filed.

(b) If any appellant fails to file a timely brief, an appeal under this part may be subject to summary dismissal.

(c) An appellant shall state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested. The failure to specify a ruling as objectionable may be deemed by the Board as a waiver of objection.

(d) Unless the Board orders otherwise, within 20 days after service of appellant's brief, any other party to the proceeding may file a brief.

(e) If any argument is based upon the evidence of record and there is a failure to include specific record citations, when available, the Board need not consider the arguments.

(f) Further briefing may take place by permission of the Board.

(g) Unless the Board provides otherwise, appellant's brief shall not exceed 50 typed pages and an appellee's brief shall not exceed 25 typed pages.

§ 4.1274 Remand.

The Board may remand cases if further proceedings are required.

§ 4.1275 Final decisions.

The Board may adopt, affirm, modify, set aside, or reverse any finding of fact, conclusion of law, or order of the administrative law judge.

Appeals to the Board From Decisions of the Office of Surface Mining

§ 4.1280 Scope.

This section is applicable to appeals from decisions of the Director of OSM concerning small operator exemptions under 30 CFR 710.12(h) and to other appeals which are not required by the Act to be determined by formal adjudication under the procedures set forth in 5 U.S.C. 554.

§ 4.1281 Who may appeal.

Any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal.

§ 4.1282 Appeals; how taken.

(a) A person appealing under this section shall file a written notice of appeal with the office of the OSM official whose decision is being appealed and at the same time shall send a copy of the notice to the Board of Land Appeals.

(b) The notice of appeal shall be filed within 20 days from the date of receipt of the decision. If the person appealing has not been served with a copy of the decision, such appeal must be filed within 30 days of the date of the decision.

(c) The notice of appeal shall indicate that an appeal is intended and must identify the decision being appealed. The notice should include the serial number or other identification of the case and the date of the decision. The notice of appeal may include a statement of reasons for the appeal and any arguments the appellant desires to make.

(d) If the notice of appeal did not include a statement of reasons for the appeal, such a statement shall be filed with the Board within 20 days after the notice of appeal was filed. In any case, the appellant shall be permitted to file with the Board additional statements of reasons and written arguments or briefs within the 20-day period after filing the notice of appeal.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1283 Service.

(a) The appellant shall serve personally or by certified mail, return receipt requested, a copy of the notice of appeal and a copy of any statement of reasons, written arguments, or other documents on each party within 15 days after filing the document. Proof of service shall be filed with the Board within 15 days after service.

(b) Failure to serve may subject the appeal to summary dismissal pursuant to § 4.1285.

§ 4.1284 Answer.

(a) Any party served with a notice of appeal who wishes to participate in the proceedings on appeal shall file an answer with the Board within 20 days after service of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal.

(b) If additional reasons, written arguments or other documents are filed by the appellant, a party shall have 20 days after service thereof within which to answer. The answer shall state the reasons the party opposes or supports the appeal.

§ 4.1285 Summary dismissal.

An appeal shall be subject to summary dismissal, in the discretion of the Board, for failure to file or serve, upon all persons required to be served, a notice of appeal or a statement of reasons for appeal.

§ 4.1286 Motion for a hearing on an appeal involving issues of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.1100, 4.1102 through 4.1115, 4.1121 through 4.1127, and 4.1130 through 4.1141. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

[75 FR 64669, Oct. 20, 2010]

§ 4.1287 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of the recommended decision to file exceptions with the Board.

[75 FR 64669, Oct. 20, 2010]

PETITIONS FOR AWARD OF COSTS AND EXPENSES UNDER SECTION 525(e) OF THE ACT

§ 4.1290 Who may file.

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in—

(1) A final order being issued by an administrative law judge; or

(2) A final order being issued by the Board.

(b) [Reserved]

§ 4.1291 Where to file; time for filing.

The petition for an award of costs and expenses including attorneys' fees must be filed with the administrative law judge who issued the final order, or if the final order was issued by the Board, with the Board, within 45 days of receipt of such order. Failure to make a timely filing of the petition may constitute a waiver of the right to such an award.

§ 4.1292 Contents of petition.

(a) A petition filed under this section shall include the name of the person from whom costs and expenses are sought and the following shall be submitted in support of the petition—

(1) An affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding;

(2) Receipts or other evidence of such costs and expenses; and

(3) Where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.

(b) [Reserved]

§ 4.1293 Answer.

Any person served with a copy of the petition shall have 30 days from service of the petition within which to file an answer to such petition.

§ 4.1294 Who may receive an award.

Appropriate costs and expenses including attorneys' fees may be awarded—

(a) To any person from the permittee, if—

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding; or

(2) The person initiates an application for review of alleged discriminatory acts, pursuant to 30 CFR part 830, upon a finding of discriminatory discharge or other acts of discrimination.

(b) From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; or

(d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 525 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(e) To OSM where it demonstrates that any person applied for review pursuant to section 525 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the Government.

[43 FR 34386, Aug. 3, 1978, as amended at 50 FR 47224, Nov. 15, 1985]

§ 4.1295 Awards.

An award under these sections may include—

(a) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act; and

(b) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award in OHA.

§ 4.1296 Appeals.

Any person aggrieved by a decision concerning the award of costs and expenses in an administrative proceeding under this Act may appeal such award to the Board under procedures set forth in § 4.1271 *et seq.*, unless the Board has made the initial decision concerning such an award.

PETITIONS FOR REVIEW OF PROPOSED INDIVIDUAL CIVIL PENALTY ASSESSMENTS UNDER SECTION 518(f) OF THE ACT

SOURCE: 53 FR 8754, Mar. 17, 1988, unless otherwise noted.

§ 4.1300 Scope.

These regulations govern administrative review of proposed individual civil penalty assessments under section 518(f) of the Act against a director, officer, or agent of a corporation.

§ 4.1301 Who may file.

Any individual served a notice of proposed individual civil penalty assessment may file a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1302 Time for filing.

(a) A petition for review of a notice of proposed individual civil penalty assessment must be filed within 30 days of its service on the individual.

(b) No extension of time will be granted for filing a petition for review of a notice of proposed individual civil penalty assessment. Failure to file a petition for review within the time period provided in paragraph (a) shall be deemed an admission of liability by the individual, whereupon the notice of proposed assessment shall become a final order of the Secretary and any tardy petition shall be dismissed.

§ 4.1303 Contents and service of petition.

(a) An individual filing a petition for review of a notice of proposed individual civil penalty assessment shall provide—

(1) A concise statement of the facts entitling the individual to relief;

(2) A copy of the notice of proposed assessment;

(3) A copy of the notice(s) of violation, order(s) or final decision(s) the corporate permittee is charged with failing or refusing to comply with that have been served on the individual by OSM; and

(4) A statement whether the individual requests or waives the opportunity for an evidentiary hearing.

(b) Copies of the petition shall be served in accordance with § 4.1109 (a) and (b) of this part.

[53 FR 8754, Mar. 17, 1988; 53 FR 10036, Mar. 28, 1988]

§ 4.1304 Answer, motion, or statement of OSM.

Within 30 days from receipt of a copy of a petition, OSM shall file with the Hearings Division an answer or motion, or a statement that it will not file an answer or motion, in response to the petition.

§ 4.1305 Amendment of petition.

(a) An individual filing a petition may amend it once as a matter of right before receipt by the individual of an answer, motion, or statement of OSM made in accordance with § 4.1304 of this part. Thereafter, a motion for leave to amend the petition shall be filed with the administrative law judge.

(b) OSM shall have 30 days from receipt of a petition amended as a matter of right to file an answer, motion, or statement in accordance with § 4.1304 of this part. If the administrative law judge grants a motion to amend a petition, the time for OSM to file an answer, motion, or statement shall be set forth in the order granting the motion to amend.

§ 4.1306 Notice of hearing.

The administrative law judge shall give notice of the time and place of the hearing to all interested parties. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1307 Elements; burdens of proof.

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case that:

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under sections 518(b) or 703 of the Act or implementing regulations), unless the fact of violation or failure or refusal to comply with an order has been upheld in a final decision in a proceeding under § 4.1150 through 4.1158, § 4.1160 through 4.1171, or § 4.1180 through 4.1187, and § 4.1270 or § 4.1271 of this part, and the individual is one against whom the doctrine of collateral estoppel may be applied to preclude relitigation of fact issues;

(2) The individual, at the time of the violation, failure or refusal, was a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraph (a)(1) of this section.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraphs (a)(2) and (a)(3) of this section and as to the amount of the individual civil penalty.

[53 FR 8754, Mar. 17, 1988, as amended at 68 FR 66728, Nov. 28, 2003]

§ 4.1308 Decision by administrative law judge.

(a) The administrative law judge shall issue a written decision containing findings of fact and conclusions of law on each of the elements set forth in § 4.1307 of this part.

(b) If the administrative law judge concludes that the individual is liable for an individual civil penalty, he shall order that it be paid in accordance with 30 CFR 724.18 or 846.18, absent the filing of a petition for discretionary review in accordance with § 4.1309 of this part.

§ 4.1309 Petition for discretionary review.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of an individual civil penalty proceeding under § 4.1308 of this part.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed, and the time for filing shall not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition for review under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition for review is granted the rules in §§ 4.1273–4.1276 of this part are applicable. If the petition is

denied, the decision of the administrative law judge is final for the Department, subject to § 4.5 of this part.

(g) Payment of a penalty is due in accordance with 30 CFR 724.18 or 846.18.

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39526, Oct. 22, 1987, unless otherwise noted.

§ 4.1350 Scope.

These rules set forth the procedures for obtaining review of a preliminary finding by OSM under section 510(c) of the Act and 30 CFR 774.11(c) of an applicant's or operator's permanent permit ineligibility.

[67 FR 61511, Oct. 1, 2002]

§ 4.1351 Preliminary finding by OSM.

(a) If OSM determines that an applicant or operator controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations and the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit, OSM must serve a preliminary finding of permanent permit ineligibility on the applicant or operator.

(b) OSM must serve the preliminary finding by certified mail, or by overnight delivery service if the applicant or operator has agreed to bear the expense for this service. The preliminary finding must specifically state the violations upon which it is based.

[67 FR 61511, Oct. 1, 2002]

§ 4.1352 Who may file; where to file; when to file.

(a) The applicant or operator may file a request for hearing on OSM's preliminary finding of permanent permit ineligibility.

(b) The request for hearing must be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, within 30 days of receipt of the preliminary finding by the applicant or operator.

(c) Failure to file a timely request constitutes a waiver of the opportunity for a hearing before OSM makes its final finding concerning permanent permit ineligibility. Any untimely request will be denied.

[67 FR 61511, Oct. 1, 2002, as amended at 88 FR 5796, Jan. 30, 2023]

§ 4.1353 Contents of request.

The request for hearing shall include—

(a) A clear statement of the facts entitling the one requesting the hearing to administrative relief;

(b) An explanation of the alleged errors in OSM's preliminary finding; and

(c) Any other relevant information.

§ 4.1354 Determination by the administrative law judge.

The administrative law judge shall promptly set a time and place for and give notice of the hearing to the applicant or operator and shall issue a decision within 60 days of the filing of a request for hearing. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1355 Burden of proof.

OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit.

[67 FR 61511, Oct. 1, 2002]

§ 4.1356 Appeals.

(a) Any party aggrieved by the decision of the administrative law judge may appeal to the Board under procedures set forth in § 4.1271 *et seq.* of this subpart, except that the notice of appeal must be filed within 20 days of receipt of the administrative law judge's decision.

(b) The Board shall order an expedited briefing schedule and shall issue a decision within 45 days of the filing of the appeal.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS, PERMIT REVISIONS, PERMIT RENEWALS, THE TRANSFER, ASSIGNMENT OR SALE OF RIGHTS GRANTED UNDER PERMIT (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS) AND FOR COAL EXPLORATION PERMITS (FEDERAL PROGRAM)

SOURCE: 56 FR 2143, Jan. 22, 1991, unless otherwise noted.

§ 4.1360 Scope.

These rules set forth the exclusive procedures for administrative review of decisions by OSMRE concerning—

(a) Applications for new permits, including applications under 30 CFR part 785, and the terms and conditions imposed or not imposed in permits by those decisions. They do not apply to decisions on applications to mine on Federal lands in states where the terms of a cooperative agreement provide for the applicability of alternative administrative procedures (see 30 CFR 775.11(c)), but they do apply to OSMRE decisions on applications for Federal lands in states with cooperative agreements where OSMRE as well as the state issue Federal lands permits;

(b) Applications for permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permit;

(c) Permit revisions ordered by OSMRE;

(d) Applications for coal exploration permits; and

(e) Ineligibility for a permit under section 510(c) of the Act and 30 CFR 773.12.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1361 Who may file.

The applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSMRE set forth in § 4.1360 may file a request for review of that decision.

§ 4.1362 Where to file; when to file.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, within 30 days after the applicant or permittee is notified by OSMRE of the written decision by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense for this service.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1363 Contents of request; amendment of request; responses.

(a) The request for review shall include—

(1) A clear statement of the facts entitling the one requesting review to administrative relief;

(2) An explanation of each specific alleged error in OSMRE's decision, including reference to the statutory and regulatory provisions allegedly violated;

(3) A request for specific relief;

(4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and

(5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review, or a statement that no answer or motion will be filed, within 15 days of receipt of the request specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Administrative Law Judge. An Administrative Law Judge may not grant a motion for leave to amend unless all parties agree to an extension of the date of commencement of the hearing under § 4.1364. A request for review may not

be amended after a hearing commences.

(d) An interested party shall have 10 days from filing of a request for review that is amended as a matter of right or the time remaining for response to the original request, whichever is longer, to file an answer, motion, or statement in accordance with paragraph (b) of this section. If the Administrative Law Judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting it.

(e) Failure of any party to comply with the requirements of paragraph (a) or (b) of this section may be regarded by an Administrative Law Judge as a waiver by that party of the right to commencement of a hearing within 30 days of the filing of a request for review if the Administrative Law Judge concludes that the failure was substantial and that another party was prejudiced as a result.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991]

§ 4.1364 Time for hearing; notice of hearing; extension of time for hearing.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the date of the filing of the request for review or amended request for review and shall simultaneously notify the applicant or permittee and all interested parties of the time and place of such hearing before the hearing commences. The hearing shall be of record and governed by 5 U.S.C. 554. An agreement to waive the time limit for commencement of a hearing may specify the length of the extension agreed to.

§ 4.1365 Status of decision pending administrative review.

The filing of a request for review shall not stay the effectiveness of the OSMRE decision pending completion of administrative review.

§ 4.1366 Burdens of proof.

(a) In a proceeding to review a decision on an application for a new permit—

(1) If the permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the permit application fails in some manner to comply with the applicable requirements of the Act or the regulations, or that OSMRE should have imposed certain terms and conditions that were not imposed.

(b) In a proceeding to review a permit revision ordered by OSMRE, OSMRE shall have the burden of going forward to establish a prima facie case that the permit should be revised and the permittee shall have the ultimate burden of persuasion.

(c) In a proceeding to review the approval or disapproval of an application for a permit renewal, those parties opposing renewal shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the renewal application should be disapproved.

(d) In a proceeding to review the approval or disapproval of an application for a permit revision or an application for the transfer, assignment, or sale of rights granted under a permit—

(1) If the applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application; and

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

(e) In a proceeding to review a decision on an application for a coal exploration permit—

(1) If the coal exploration permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the approval.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act or the regulations.

§ 4.1367 Request for temporary relief.

(a) Where review is requested pursuant to § 4.1362, any party may file a request for temporary relief at any time prior to a decision by an Administrative Law Judge, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part.

(b) The request shall be filed with the Administrative Law Judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior.

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A statement of the specific relief requested;

(3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and

(4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The Administrative Law Judge may hold a hearing on any issue raised by the application.

(e) The Administrative Law Judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if—

(1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and

(3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the Administrative Law Judge granting or denying temporary relief may appeal to the Board, or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1368 Determination by the Administrative Law Judge.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall issue a written decision in accordance with § 4.1127 within 30 days of the date the hearing record is closed by the Administrative Law Judge. An agreement to waive the time limit for issuing a decision may specify the length of the extension agreed to.

§ 4.1369 Petition for discretionary review; judicial review.

(a) Any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt of the decision or, in the alternative, may seek judicial review in accordance with 30 U.S.C. 1276(a)(2) (1982). A copy of the petition shall be served simultaneously on the Administrative Law Judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding.

(b) The petition shall set forth specifically the alleged errors in the decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OSM DECISIONS PROPOSING TO SUSPEND OR RESCIND OR SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS

SOURCE: 59 FR 54326, Oct. 28, 1994, unless otherwise noted.

§ 4.1370 Scope.

Sections 4.1370 through 4.1377 govern the procedures for review of a written notice of proposed suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.22 and of a written notice of suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.23.

[67 FR 61511, Oct. 1, 2002]

§ 4.1371 Who may file, where to file, when to file.

(a) A permittee that is served with a notice of proposed suspension or rescission under 30 CFR 773.22 or a notice of suspension or rescission under 30 CFR 773.23 may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior within 30 days of service of the notice.

(b) Failure to file a request for review within 30 days of service of the notice shall constitute a waiver of review of the notice. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583, the Hearings Division may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§ 4.1373 through 4.1377.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61511, Oct. 1, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1372 Contents of request for review, response to request, amendment of request.

(a) The request for review shall include:

(1) A copy of the notice of proposed suspension or rescission or the notice of suspension or rescission;

(2) Documentary proof, or, where appropriate, offers of proof, concerning the matters in 30 CFR 773.21(a) and (b) or 30 CFR 773.14(c) for a notice of proposed suspension or rescission, or 30 CFR 773.23(a)(1) through (a)(6) for a notice of suspension or rescission, showing that the person requesting review is entitled to administrative relief;

(3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;

(4) A request for specific relief; and

(5) Any other relevant information.

(b) Within 20 days of service of the request for review by the permittee in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for such a hearing.

(c) The permittee may amend the request for review once as a matter of right before a response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the permittee may file a motion for leave to amend the request for review with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1373 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of the responses under § 4.1372(b). The 90-day deadline for convening the hearing

may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least 10 days in advance of the date of the hearing.

[59 FR 54362, Oct. 28, 1994; 59 FR 56573, Nov. 14, 1994]

§ 4.1374 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the notice of proposed suspension or rescission or the notice of suspension or rescission.

(b) The permittee shall have the ultimate burden of persuasion by a preponderance of the evidence that the notice is invalid.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61512, Oct. 1, 2002]

§ 4.1375 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1372(b).

§ 4.1376 Petition for temporary relief from notice of proposed suspension or rescission or notice of suspension or rescission; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the notice of proposed suspension or rescission or the notice of suspension or rescission in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior.

(c) The petition for temporary relief shall include:

(1) A statement of the specific relief requested;

(2) A detailed statement of why temporary relief should be granted, including—

(i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

(ii) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule

and shall decide the appeal expeditiously.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1377 Petition for discretionary review of initial decision.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under § 4.1375 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP OR CONTROL CHALLENGES

SOURCE: 59 FR 54363, Oct. 28, 1994, unless otherwise noted.

§ 4.1380 Scope.

Sections 4.1380 through 4.1387 govern the procedures for review of a written decision issued by OSM under 30 CFR 773.28 on a challenge to a listing or finding of ownership or control.

[67 FR 61512, Oct. 1, 2002]

§ 4.1381 Who may file; when to file; where to file.

(a) Any person who receives a written decision issued by OSM under 30 CFR 773.28 on a challenge to an ownership or control listing or finding may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior within 30 days of service of the decision.

(b) Failure to file a request for review within 30 days of service of the decision constitutes a waiver of review of the decision. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583, the Hearings Division may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§ 4.1383 through 4.1387.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1382 Contents of request for review; response to request; amendment of request.

(a) The request for review shall include:

(1) A copy of the decision of OSM;

(2) A statement of the alleged errors in the decision and the facts that entitle the person requesting review to administrative relief;

(3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;

(4) A request for specific relief; and

(5) Any other relevant information.

(b) Within 20 days of service of the request for review in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for a hearing.

(c) The person filing the request for review may amend it once as a matter of right before the response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the person may file a motion for leave to amend the request with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

§ 4.1383 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of responses under § 4.1382(b). The 90-day

deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least 10 days in advance of the date of the hearing.

§ 4.1384 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the decision.

(b) The person filing the request for review shall have the ultimate burden of persuasion by a preponderance of the evidence that the decision is in error.

§ 4.1385 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1382(b).

§ 4.1386 Petition for temporary relief from decision; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the decision of OSM in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior.

(c) The petition for temporary relief shall include:

(1) A statement of the specific relief requested:

(2) A detailed statement of why temporary relief should be granted, including:

(i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

(ii) A showing that granting the relief requested will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1387 Petition for discretionary review of initial decisions.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under § 4.1385 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39530, Oct. 22, 1987, unless otherwise noted.

§ 4.1390 Scope.

Sections 4.1391 through 4.1394 set forth the procedures for obtaining review of an OSM determination under 30 CFR 761.16 that a person does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

§ 4.1391 Who may file; where to file; when to file; filing of administrative record.

(a) The person who requested a determination under 30 CFR 761.16 or any person with an interest that is or may be adversely affected by a determination that a person does or does not have valid existing rights may file a request for review of the determination with the office of the OSM official whose determination is being reviewed and at the same time shall send a copy of the request to the Interior Board of Land Appeals, U.S. Department of the Interior. OSM shall file the complete administrative record of the determination under review with the Board as soon as practicable.

(b) OSM must provide notice of the valid existing rights determination to the person who requested that determination by certified mail, or by overnight delivery service if the person has agreed to bear the expense of this service.

(1) When the determination is made independently of a decision on an application for a permit or for a permit boundary revision, a request for review shall be filed within 30 days of receipt of the determination by a person who has received a copy of it by certified mail or overnight delivery service. The request for review shall be filed within 30 days of the date of publication of the determination in a newspaper of general circulation or in the FEDERAL REGISTER, whichever is later, by any person who has not received a copy of it by certified mail or overnight delivery service.

(2) When the determination is made in conjunction with a decision on an application for a permit or for a permit boundary revision, the request for review must be filed in accordance with § 4.1362.

(c) Failure to file a request for review within the time specified in paragraph (b) of this section shall constitute a waiver of the right to review and the request shall be dismissed.

[56 FR 2145, Jan. 22, 1991, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1392 Contents of request; amendment of request; responses.

(a) The request for review:

(1) Must include:

(i) A clear statement of the reasons for appeal;

(ii) A request for specific relief;

(iii) A copy of the decision appealed from; and

(iv) Any other relevant information; and

(2) May not exceed 30 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown.

(b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed within 15 days of receipt specifically admitting

or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Board.

(d) An interested party may file an answer, motion, or statement as described in paragraph (b) of this section in response to an amended request for review as follows:

(1) If the request for review is amended as a matter of right, the answer, motion, or statement must be filed within the longer of the following periods:

(i) The time remaining for response to the original request for review; or

(ii) Ten days after receipt of the amended request for review; and

(2) If the Board grants a motion to amend a request for review, the answer, motion, or statement must be filed within the time set by the Board in its order granting the motion.

(e) The filing of a reply is discouraged. However, a person who filed a request for review may file a reply that:

(1) Is limited to the issues raised in an answer or motion;

(2) Does not exceed 20 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown; and

(3) Is filed within:

(i) Fifteen days after service of the answer or motion under paragraph (b) or (d)(1) of this section; or

(ii) The time set by the Board in its order under paragraph (d)(2) of this section.

[52 FR 39530, Oct. 22, 1987, as amended at 75 FR 64670, Oct. 20, 2010]

§ 4.1393 Status of decision pending administrative review.

43 CFR 4.21(a) applies to determinations of the Office of Surface Mining under 30 U.S.C. 1272(e).

§ 4.1394 Burden of proof.

(a) If the person who requested the determination is seeking review, OSM shall have the burden of going forward to establish a prima facie case and the person who requested the determination shall have the ultimate burden of persuasion.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the person who requested the determination does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

Subpart M—Special Procedural Rules Applicable to Appeals of Decisions Made Under OMB Circular A–76

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 75213, Nov. 14, 1980, unless otherwise noted. Redesignated at 52 FR 39525, Oct. 22, 1987.

§ 4.1600 Purpose and nature of the appeal process.

(a) This appeals procedure embodies an informal administrative review of agency decisions made under OMB Circular A–76, and is intended to assure that such decisions are fair, equitable, and in compliance with the provisions of the Circular. This procedure provides affected parties an opportunity to request that such decisions be objectively reviewed by a party independent of the A–76 decision process.

(b) This appeals procedure is administrative rather than judicial in nature, and does not provide for a judicial review or for further levels of appeal. The decisions of the appeals official are final.

(c) This procedure is intended to protect the rights of all affected parties and, therefore, neither the procedure nor agency determinations may be subject to negotiation, arbitration, or agreements with any one of the parties.

§ 4.1601 Basis for appeal.

(a) An appeal may be based only on a specific alleged material deviation (or deviations) by the agency from the provisions of OMB Circular A–76 or Supplement No. 1 thereto, the ''Cost Comparison Handbook.'' Appeals may not

be based on other factors, such as the economic impact of the agency's decision on a community, or other socio-economic issues.

(b) This appeals procedure shall be used only to resolve questions of the determination between contract and in-house performance of a commercial or industrial type requirement, and shall not apply to questions concerning award to one contractor in preference to another.

§ 4.1602 Who may appeal under this procedure.

An appeal may be filed by any affected party, viz, employees of the Federal activity under review, authorized employee representative organizations, contractors, and potential contractors.

§ 4.1603 Appeal period.

An appeal may be submitted at any time within 45 calendar days after announcement of an agency decision regarding the method of performance of a commercial or industrial type requirement.

§ 4.1604 Method of filing an appeal.

An appeal must be in writing, and must be submitted to: Director, Office of Hearings and Appeals, U.S. Department of the Interior.

[45 FR 75213, Nov. 14, 1980. Redesignated at 52 FR 39525, Oct. 22, 1987 as amended at 67 FR 4368, Jan. 30, 2002; 88 FR 5796, Jan. 30, 2023]

§ 4.1605 Action by the Office of Hearings and Appeals.

(a) Upon receipt of an appeal, the Director, Office of Hearings and Appeals shall designate an appeals official, who shall process the appeal.

(b) The appeals official shall promptly docket the appeal and send copies of the docketing notice to the appellant, the director or other appropriate official of the bureau or office involved, and the Solicitor of the Department.

§ 4.1606 Department representation.

(a) Upon receipt of the docketing notice, the Solicitor shall appoint counsel to represent the Department in the appeal action, and so notify the appellant and the appeals official.

(b) Within seven calendar days of his designation the Department Counsel shall assemble and transmit to the appeals official a file containing the appealed agency decision and all documents relevant thereto, including the detailed analysis upon which the agency decision was based. At the same time, the Department Counsel shall send to the appellant a copy of the transmittal document, containing a table of contents of the file.

§ 4.1607 Processing the appeal.

(a) The appeals official shall arrange such conferences with the concerned parties as are necessary, including (if requested by the appellant) an oral presentation.

(b) The appeals official may require either party to submit any additional documents, oral or written testimony, or other items of evidence which he considers necessary for a complete review of the agency decision.

(c) All documentary evidence submitted by one party to the appeal action shall be made available to the other party (or parties), except that availability of proprietary information may be restricted by the party holding the proprietary interest in such information.

§ 4.1608 Oral presentations.

(a) Upon request of the appellant, an opportunity for an oral presentation to the appeals official shall be granted. The purpose of an oral presentation shall be to permit the appellant to discuss or explain factual evidence supporting his allegations, and/or to obtain oral explanations of pertinent evidence. The time and place of each oral presentation shall be determined by the appeals official, after consultation with the appropriate parties.

(b) The appellant may, but is not required to, be represented by legal counsel at an oral presentation.

(c) The Department Counsel and the bureau/office involved shall be invited to attend any oral presentation. The appeals official may require the attendance and participation of an official or employee of the Department, whether or not requested by the appellant, if, in the appeals official's judgment, such official or employee may

possess knowledge or information pertinent to the agency decision being appealed, and if this knowledge or information is unobtainable elsewhere.

(d) An oral presentation shall not constitute a judicial proceeding, and no such judicial proceeding or hearing shall be provided for in this appeals process. There shall be no requirement for legal briefs, sworn statements, interrogation under oath, official transcripts of testimony, etc., unless the appeals official determines such are necessary for effective disposition of the appeal.

§ 4.1609 Multiple appeals.

If two or more appellants submit appeals of the same agency decision, which are based on the same or similar allegations, the appeals official may, at his discretion, consider all such appeals concurrently and issue a single written decision resolving all of the several appeals.

§ 4.1610 Decision of the appeals official.

(a) Within 30 calendar days after receipt of an appeal by the Office of Hearings and Appeals, the appeals official shall issue a written decision, either affirming or denying the appeal. This decision shall be final, with no judicial review or further avenue of appeal.

(b) If the appeals official affirms the appeal, his decision regarding further action by the agency shall be binding upon the agency.

(c) If it proves impracticable to issue a decision within the prescribed 30 calendar days, the appeals official may extend this period, notifying all concerned parties of the anticipated decision date.

PART 5—COMMERCIAL FILMING AND SIMILAR PROJECTS AND STILL PHOTOGRAPHY ON CERTAIN AREAS UNDER DEPARTMENT JURISDICTION

Subpart A—Areas Administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service

Sec.

Subpart B—Areas Administered by the Bureau of Indian Affairs

AUTHORITY: 5 U.S.C. 301; 16 U.S.C. 1–3, 3a, 668dd–ee, 715i, 460*l*–6d; 25 U.S.C. 2; 31 U.S.C. 9701; 43 U.S.C. 1701, 1732–1734, 1740.

SOURCE: 78 FR 52095, Aug. 22, 2013, unless otherwise noted.

Subpart A—Areas Administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service

§ 5.1 What does this subpart cover?

This subpart covers commercial filming and still photography activities on lands and waters administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service.