



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Office of the Director  
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May 15, 2024

Dear Tribal Leader:

The Office of Hearings and Appeals (OHA) is revising its procedural regulations located in Title 43 of the Code of Federal Regulations, Part 4. These regulations govern hearings and appeals proceedings before the Department of the Interior's administrative tribunals—the Departmental Cases and Hearings Division (DCHD), the Probate Hearings Division (PHD), the Interior Board of Indian Appeals (IBIA), the Interior Board of Lands Appeals (IBLA), and the OHA Director's Office.

Your input is requested on these revisions, through which OHA seeks to:

- Promote expeditious and impartial review of administrative decisions;
- Reflect changes in the law;
- Reorganize and retitle subparts to improve clarity;
- Eliminate redundant language and outdated procedures; and
- Keep pace with technological and other advancements, including the establishment of a regulatory framework for an E-filing and case docket management system.

The revisions and subpart-by-subpart analysis are enclosed with this letter. The revisions improve OHA procedures by:

- Expanding options for parties to file and serve documents electronically in proceedings before the IBIA, IBLA, DCHD, and the Director's Office;
- Retaining non-electronic filing options for tribal governments and pro se parties and clarifying non-electronic procedures;
- Requiring attorneys and federal, state, and local governments to file documents electronically, except for good cause;
- Retaining regular mail as the method for parties to file and receive documents in cases before PHD;
- Updating subpoena procedures by specifying applicability to the production of documents, providing for service by registered or certified mail, and specifying that geographic limits do not apply when in-person attendance at a hearing is not required;
- Where not already provided, making the filing date the date of mailing by the party, instead of the date of receipt by the OHA office, for the purpose of determining compliance with filing deadlines;
- Further delineating procedures for hearings and appeals before the OHA Director;
- Affirming OHA's commitment to alternative dispute resolution in appropriate cases, which can avoid the necessity for further litigation or a hearing;
- Streamlining the resolution of IBIA appeals by providing an option for the IBIA to affirm the result of the decision under review without a written opinion in certain circumstances;

- Providing an option for IBIA appellants who have not received a final decision after 36 months to proceed to federal court without further exhaustion of administrative remedies;
- Making revisions due to recent amendments to the probate regulations at 43 C.F.R. part 30 (2022) and BIA’s administrative appeal regulations at 25 C.F.R. part 2 (2023);
- Updating and relocating the White Earth Reservation Land Settlement Act regulations to a separate subpart;
- Making IBLA appeals processes easier to navigate by reordering regulations to track the chronological progression of an appeal;
- Requiring the bureau or office that issued the decision on appeal before the IBLA to provide a copy of the record for the decision to the appellant no later than 60 days after service of the notice of appeal;
- Streamlining the resolution of IBLA appeals by providing an option for the IBLA to affirm the result of the decision under review without a written opinion in certain circumstances;
- Enhancing the efficient resolution of IBLA appeals by requiring appellants to demonstrate standing and timeliness when they file an appeal and to file any petition for stay at the same time they file an appeal;
- Improving case processing before DCHD by establishing uniform, consistent procedures for all aspects of prehearing, hearing, and post-hearing adjudication that are modeled after the Federal Rules of Civil Procedure but tailored to administrative proceedings; and
- Codifying procedures for conducting DCHD hearings remotely using video technology.

The Department will hold two virtual consultations with the Indian Tribes on these regulatory changes on the following dates:

<b>Date</b>	<b>Time</b>	<b>Location</b>
June 25, 2024	11:00 a.m. Central time	Join ZoomGov Meeting <a href="https://www.zoomgov.com/j/1616037373?pwd=YWN6Mjk2UEEx4anpHMHVlODY4eUZGdz09">https://www.zoomgov.com/j/1616037373?pwd=YWN6Mjk2UEEx4anpHMHVlODY4eUZGdz09</a>  Meeting ID: 161 603 7373 Passcode: 970990  Find your local number: <a href="https://www.zoomgov.com/u/adgGFlnJsp">https://www.zoomgov.com/u/adgGFlnJsp</a>
July 1, 2024	3:00 p.m. Central time	Join ZoomGov Meeting <a href="https://www.zoomgov.com/j/1615585067?pwd=OUhJeHZTOGtKODM2VEhrRmN3bDU3dz09">https://www.zoomgov.com/j/1615585067?pwd=OUhJeHZTOGtKODM2VEhrRmN3bDU3dz09</a>  Meeting ID: 161 558 5067 Passcode: 839880  Find your local number: <a href="https://www.zoomgov.com/u/aFsUb5cYt">https://www.zoomgov.com/u/aFsUb5cYt</a>

OHA is working to finalize and publish the procedural changes in coordination with deployment of OHA’s new E-filing system now in the final stages of development.

If you have any written input you would like to provide, please send it to [doiohacomments@oha.doi.gov](mailto:doiohacomments@oha.doi.gov) by **August 2, 2024**, to ensure timely consideration.

If you have any questions, please contact Rachel Lukens, Counsel to the Director, [dir@oha.doi.gov](mailto:dir@oha.doi.gov), (703) 235-3810.

Sincerely,

**SHAYLA  
SIMMONS**

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SIMMONS  
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Shayla Freeman Simmons  
Director

Enclosures

***TRIBAL CONSULTATION – PREAMBLE AND RULE TEXT FOR OHA’S RULE  
CHANGES TO 43 CFR PART 4***

**PREAMBLE - Subpart-by-Subpart Analysis**

**Acronyms Used in This Document**

For the convenience of the reader, we provide this list of some of the acronyms used in this rule:

ADR = Alternative Dispute Resolution

ALJ = Administrative Law Judge

APA = Administrative Procedure Act

BIA = Bureau of Indian Affairs

BIE = Bureau of Indian Education

BLM = Bureau of Land Management

BOEM = Bureau of Ocean Energy Management

BOR = Bureau of Reclamation

BSEE = Bureau of Safety and Environmental Enforcement

DCHD = Departmental Cases Hearings Division

E.O. = Executive Order

FOGRSFA = Federal Oil and Gas Royalty Simplification and Fairness Act

FRCP = Federal Rules of Civil Procedure

FRE = Federal Rules of Evidence

FWS = U.S. Fish and Wildlife Service

IBIA = Interior Board of Indian Appeals

IBLA = Interior Board of Lands Appeals

IPJ = Indian Probate Judge

ISDA = Indian Self-Determination and Education Assistance Act

LTRO = Land Titles and Records Office

NEPA = National Environmental Policy Act of 1969

OHA = Office of Hearings and Appeals

OIRA = Office of Information and Regulatory Affairs

OMB = Office of Management and Budget

ONRR = Office of Natural Resources Revenue

OSM or OSMRE = Office of Surface Mining Reclamation and Enforcement

PDF = Portable Document Format

PHD = Probate Hearings Division

WELSA = White Earth Reservation Land Settlement Act of 1985

## **Background**

OHA exercises the delegated authority of the Secretary of the Interior to conduct hearings and decide appeals from decisions of the bureaus and offices of the Department of the Interior.

OHA provides administrative process to outside litigants by providing an impartial forum and independent review of bureau and office decisions and notices. OHA's review ensures that the Department has an opportunity to correct its own administrative errors, final agency decisions are consistent with law, and, if Department decisions are challenged in federal court, those courts receive fully developed administrative records on which to base judicial review of agency actions.

Administrative adjudication can provide a more cost-efficient alternative to federal court litigation for federal and non-federal parties. Without that administrative avenue, persons challenging bureau decisions would have to go directly to the federal court system, which is costly and poses additional challenges for individuals who do not have access to legal counsel. The decisions rendered by the Director or by the Appeals Boards are generally final for the Department.

OHA is comprised of the Director's office and OHA Units that include the Interior Board of Lands Appeals (IBLA), the Interior Board of Indian Appeals (IBIA), the Departmental Cases Hearings Division (DCHD), and the Probate Hearings Division (PHD). OHA Judges include Administrative Law Judges (ALJs), Administrative Judges, and Indian Probate Judges (IPJs).

IBLA and IBIA are appellate review bodies that are separate and independent from the bureaus and offices whose decisions they review. IBLA has the authority to consider administrative appeals of decisions by:

- (1) The Bureau of Land Management, including but not limited to decisions regarding mining, grazing, energy development, timber harvesting, wildfire management,

recreation, wild horse and burro management, cadastral surveys, Alaska land conveyances, rights of way, land exchanges, and trespass actions;

(2) The Office of Natural Resources Revenue and the Deputy Assistant Secretary -

Natural Resources Revenue including decisions regarding royalty management;

(3) The Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement including decisions regarding resources and activities on the Outer Continental Shelf;

(4) The Bureau of Indian Affairs including decisions regarding royalty management on Indian lands;

(5) The Office of Surface Mining Reclamation and Enforcement including decisions regarding surface coal mining operations; and

(6) OHA's Departmental Cases Hearings Division, including decisions regarding grazing, surface coal mining, mining contests, and civil penalty assessments.

IBIA's Administrative Judges have the authority to consider administrative appeals from decisions by:

(1) Bureau of Indian Affairs officials, including but not limited to decisions regarding the use of Indian trust lands (e.g., lease approval, enforcement, cancellation, and rental rate adjustment); the use of mineral resources; conveyances of rights-of-way on Indian lands; land sales, exchanges, or other encumbrances; trespass; taking land into trust; and

disputes over the recognition of Tribal officials for government-to-government relations between the Department and a Tribe;

(2) OHA's Probate Hearings Division;

(3) Presiding officers in White Earth Reservation Land Settlement Act heirship determinations;

(4) Agency officials and ALJs in cases under the Indian Self-Determination and Education Assistance Act (ISDA); and

(5) Other agency officials as provided by regulation or in matters referred to IBIA by the Secretary, the Assistant Secretary - Indian Affairs, or the Director of OHA.

The OHA Hearings Divisions (DCHD and PHD) serve as administrative trial courts for the Department and provide an impartial forum for the resolution of disputes.

DCHD conducts formal hearings under the Administrative Procedure Act (APA) and other fact-finding hearings in accordance with statutes and regulations. DCHD adjudicates a wide range of matters related to the use and disposition of public lands and natural resources as well as select cases involving American Indians, Tribal Nations, and Alaska Natives. Case types include grazing appeals, civil penalties involving oil and gas resources, civil penalties under various wildlife and resource protection laws, surface coal mining cases, certain cases involving the ISDA, disputed issues of material fact involving conditions and prescriptions in hydropower licenses, and contest proceedings related to mining claims, Alaska Native allotment applications, and other interests in federal lands. DCHD also conducts hearings based on referrals from other



entities within the Department, including the OHA Appeals Boards and the Director. Examples of case types referred for hearing include adjudications relating to oil and gas leases, rights-of-way, and alleged trespasses on federal land and resources.

Through formal hearings conducted by IPJs and ALJs, PHD determines the rightful heirs and devisees of decedents who owned trust or restricted property. PHD determines the validity of wills, decides what claims against the estate will be allowed, and orders distribution of the trust property to those entitled to receive it.

In the Director's office, Ad Hoc Boards of Appeal decide various categories of appeals from bureau and office decisions that do not lie within the jurisdiction of standing appeals boards. These include certain debt collection matters, waivers of overpayments to Departmental employees, property board of survey determinations, government quarters rental rate adjustments, Uniform Relocation Assistance Act payments, and acreage limitation determinations under the Reclamation Reform Act. The Director also appoints appropriate hearings officials and establishes procedures for matters not covered by one of the OHA Units. In addition, the Director has the authority to review certain decisions in accordance with regulations.

### **Subpart-by-Subpart Analysis**

#### *Subpart A – General Information and Authorities - Office of Hearings and Appeals*

Subpart A provides general information and authorities about OHA. It identifies the authority of the Secretary and the Director, as well as the authority, membership, and jurisdiction of appeals boards and hearings divisions.

#### § 4.1 Scope of authority; applicable regulations

We will subdivide this section into paragraphs and subparagraphs to provide needed organization and structure to this section. The opening paragraph will now be labeled as paragraph (a) with no substantive changes.

Paragraph (b) will describe OHA Units and will add descriptions of the two hearings divisions in OHA, including the Departmental Cases Hearings Division and the Probate Hearings Division, both referenced in this part. Descriptions for Appeals Boards will be reorganized. To provide greater clarity, references to rules in other subparts or other regulations are provided for each OHA Unit. A new paragraph (c) will describe the authority of the Director to appoint an Ad Hoc Board of Appeals for appeals that are not within the jurisdiction of one of the Standing Boards. It will also clarify the Director's authority to designate or appoint presiding officers for hearings or appeals as needed for proceedings not specifically covered by an OHA Unit.

#### § 4.2 Membership and duties

We will add paragraphs and subparagraphs to better delineate membership of the Appeals Boards and Hearings Divisions and roles of the Chief Judges. Language indicating the duties of the Chief Judge, how panels are convened, and how decisions are issued will be carried forward with some clarifying edits.

We will add a new paragraph that describes Hearings Divisions as consisting of Administrative Law Judges (ALJs) and, where authorized, Indian Probate Judges. This recognizes the authority provided by 25 U.S.C. 372-2 to Indian Probate Judges to adjudicate Indian probate cases, fulfilling the hearing requirements in chapter 10 of Title 25. We will add language indicating the duties of the Chief Judges of the

Hearings Divisions, which are similar to those provided for the Chief Judges of the Appeals Boards. A new paragraph reiterates that the Director will designate or appoint OHA officials to conduct hearings and appeals that come before OHA and that are not within the jurisdiction of an OHA Unit.

#### § 4.3 Representation before OHA

Pursuant to 5 U.S.C. § 301, § 4.3(a) applies Part 1 to representation of parties, including Interior agencies. Paragraph (a) of this section will be revised to reference all OHA proceedings rather than just those before the Boards. OHA will continue its longstanding practice of enforcing the representation provisions of Part 1 by dismissing non-Governmental parties that are not properly represented by a qualified individual meeting the requirements of 43 C.F.R. § 1.3.

Paragraph (b) will be revised to clarify the applicable standard of conduct when the Department's Office of the Solicitor or other Government counsel represents an agency, bureau, or office of the Federal Government.

With regard to appearances as *amicus curiae*, OHA will clarify the "timely request" language in current regulations by adding a specific timeframe. Under this language, a request to appear as *amicus curiae* must be made within 30 days of the date the matter is docketed by OHA. It will further clarify that the granting or denying of the request is in the sole discretion of OHA.

#### § 4.4 Public records; contact information for offices

This section was recently changed in March 2023 to specify that contact information for offices referenced in part 4 are available in the OHA Standing Orders on Contact Information, and no other changes are being made. Final Rule, Practices

Before the Department of the Interior, 88 FR 5789 (Mar. 16, 2023).

#### § 4.5 Power of the Secretary and Director

In paragraph (a) of this section, we will specify that the Secretary has the authority to appoint judges to OHA. In *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), the U.S. Supreme Court held that the Securities and Exchange Commission ALJs are inferior officers for purposes of the Appointments Clause to the U.S. Constitution. The U.S. Constitution provides that Congress may vest the appointment of inferior officers “. . . in the President alone, in the courts of law, or in the heads of departments.” U.S. Const., Art. II, sec. 2, cl. 2. The Secretary has appointed or ratified the appointment of all ALJs, Administrative Judges, and Indian Probate Judges at OHA.

Paragraph (b)(1) will include language similar to that contained in current paragraph (b), indicating that the Director may assume jurisdiction of cases before Appeals Boards or direct Appeals Boards to reconsider. In addition, we will add new paragraphs (b)(2) and (b)(3) to clarify the authority of the Director to appoint an Ad Hoc Board or designate presiding officers and to provide for the internal management and administration of OHA, including managing case dockets. And finally, paragraph (b)(4) will carry forward regulatory changes to paragraph (b) that were finalized on March 16, 2023, and that specify the Director’s authority to issue OHA Standing Orders.

OHA has issued two Standing Orders that are currently posted on OHA’s Department of the Interior website. The OHA Standing Order on Electronic Transmission conveys procedures currently available for the electronic transmission of documents, and the OHA Standing Order on Contact Information provides a list of up-to-date office addresses referenced in part 4.

Throughout part 4, references to OHA Standing Order(s) on Electronic Transmission and OHA

Standing Orders on Contact Information will be added. These Standing Orders will be updated as needed, and other Standing Orders may be issued to convey current information to parties and the public. For example, OHA is developing an electronic filing system, and when it is deployed, the OHA Standing Order on Electronic Transmission will be updated to help parties navigate the system. Subpart H also will refer to an OHA Standing Order on the White Earth Reservation Land Settlement Act that will be issued when the regulatory changes go into effect.

Using Standing Orders rather than some other type of guidance aligns with how OHA communicates with interested individuals or parties in an administrative adjudicative setting. Standing Orders issued by the OHA Director apply to hearings and appeals at OHA. The Director has the authority to issue general notices pertaining to the functions assigned to OHA under 212 Departmental Manual 13.7.

#### § 4.6 Definitions and Acronyms

We will add a definitions and acronyms section. We will define Administrative Judge or AJ as a judge in OHA and Administrative Law Judge or ALJ as a judge appointed under the Administrative Procedure Act, 5 U.S.C. 3105. We will define Appeals Board as the Interior Board of Land Appeals (IBLA), the Interior Board of Indian Appeals (IBIA), or an Ad Hoc Board of Appeals in OHA. The definition of Standing Appeals Board, in contrast, will include IBIA and IBLA, but not an Ad Hoc Board of Appeals. We will identify acronyms for Department of the Interior bureaus and offices that are used throughout part 4, including the Bureau of Indian Affairs (BIA), Bureau of Indian Education (BIE), Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Reclamation (BOR), Bureau of Safety and Environmental Enforcement (BSEE), Office of Natural Resources Revenue (ONRR), and Office of Surface Mining and Reclamation (OSMRE). We provide a broad

definition of “bureau or office” to be used more generally in reference to a Department of the Interior bureau or office and specify those bureaus or offices that are included in the definition. We identify acronyms within OHA, including DCHD, IBIA, IBLA, OHA, and PHD. Department is defined as the Department of the Interior; Director means the Director of OHA; the Secretary means the Secretary of the Interior; and Solicitor’s Office means the Department of the Interior Office of the Solicitor.

Since OHA employs a number of Judges who are appointed under different authorities and pay bands, we will include a definition of “Judge” as an Administrative Judge, an Indian Probate Judge, or an Administrative Law Judge in OHA. Indian Probate Judges will be defined as an attorney in OHA authorized by 25 U.S.C. 372-2 to adjudicate Indian Probate cases. Indian Probate Judges and Administrative Law Judges in the PHD carry out identical duties within OHA. We also will change references to “presiding official” or “deciding official” in existing regulations to “presiding officer.” These terms have been used in subparts A and B to describe an official who is responsible for a hearing or an appeal or other proceeding before OHA. Presiding officer will mean a judge, attorney, or other official, depending on the type of matter before OHA, designated by the Director to adjudicate a matter pending before OHA.

### *Subpart B - General Rules Relating to Procedures and Practice*

#### § 4.20 Purpose and scope

Subpart B contains the general rules applicable to all proceedings, as well as rules that may apply to only some of the OHA Units depending on the type of proceedings. This subpart will clarify that, when there is a conflict between the more specific rules that are found in other subparts in this part and the more general rules in subparts A and B, the specific rules will

govern. In addition, the rule also indicates that other laws, regulations, and policies of the Department may be applicable to a particular type of proceeding. For example, for the Probate Hearings Division, the regulations in part 30 also apply to its proceedings.

#### § 4.21 Exhaustion and finality

Currently, § 4.21 is entitled “General Provisions,” and paragraphs (a) and (b) set out the general OHA procedures and criteria for seeking a stay of an agency decision pending administrative appeal to the Director or an Appeals Board. We will move these provisions from this subpart to § 4.405 in subpart E, governing appeals to the IBLA. Appeals filed with IBIA are generally automatically stayed pursuant to 43 CFR. 4.314 and stays of grazing decisions pending appeal to DCHD are governed by current §§ 4.471 and 4.472. With this change, OHA will eliminate any conflicts between § 4.21 and stay provisions specifically applicable to the appeals or proceedings it adjudicates. *See, e.g.*, §§ 4.171 (DCHD), 4.314(a) (IBIA). A number of regulations administered by bureaus and offices that appear before IBLA make reference to § 4.21(a) and (b). A subsequent final rule will make conforming changes to cross references that are needed as a result of the changes.

The existing § 4.21 ends with two paragraphs, (c) and (d), which address exhaustion of administrative remedies, finality, and the circumstances under which a party may seek reconsideration of a final decision issued by the Director or an Appeals Board. 43 CFR 4.21(c) and (d). Section 4.21 will continue to address exhaustion and finality with these provisions moved to paragraphs (a) and (b). Current paragraph (d) addressing reconsideration will be removed from this general subpart, and OHA Units will address reconsideration as applicable in specific subparts.

*Exhaustion of administrative remedies and finality of decision*

Current paragraph 4.21(c) addresses administrative remedies and finality for purposes of judicial review, providing that a decision is not final for purposes of judicial review unless either (a) a stay has been sought and denied or (b) the decision has been put into effect pending appeal by another pertinent regulation. We will move the exhaustion provisions from existing paragraph (c) to § 4.21(a).

After the current § 4.21 was promulgated in 1993, the Supreme Court decided *Darby v. Cisneros*, 509 U.S. 137, 152 (1993), and held that an otherwise final agency action is subject to judicial review unless a regulation requires an administrative appeal (exhaustion) and the decision on appeal is inoperative during that appeal. Relying on the exhaustion and finality requirements of the Administrative Procedure Act, 5 U.S.C. 704 (Section 10(c) of the APA), the Court concluded that courts and agencies could only require exhaustion when agencies, “first, . . . adopt[ed] a rule that an agency appeal be taken before judicial review is available, and, second, . . . provid[ed] that the initial decision would be ‘inoperative’ pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.” *Darby*, 509 U.S. at 152 (quoting sec. 704). Applying *Darby*, a number of courts have found that under § 4.21, when a decision becomes final, exhaustion is not required. See *Nat’l Parks & Conservation Ass’n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010).

We will make the provision consistent with *Darby* and also clarify that it addresses both exhaustion of administrative remedies and finality for purposes of judicial review by dividing these topics into separate paragraphs.



Paragraph (a) will address exhaustion and explicitly states that an appeal must be filed with the Director or applicable Appeals Board to exhaust administrative remedies unless (i) otherwise provided by applicable law or (ii) the decision is immediately effective.

The rule's two exceptions reflect existing regulatory and jurisprudential requirements. Under the first exception, regulations that specifically address exhaustion requirements for certain types of decisions will still govern over this general provision to the extent of any conflict. Many of the bureaus and offices whose decisions may be appealed to the IBLA, for example, have exhaustion requirements that clearly mandate an administrative appeal, and while those regulations do not conflict with paragraph (a), their specific requirements will still govern under the revised rule. *See*, *e.g.*, 30 CFR 1290.110 (requiring administrative appeals to exhaust administrative remedies of an order issued by the Office of Natural Resources Revenue); 30 CFR 590.8 (requiring appeals to the IBLA of orders and decisions of the Bureau of Ocean Energy Management); 30 CFR 290.8 (requiring appeals to the IBLA of orders and decisions of the Bureau of Safety and Environmental Enforcement). In addition, because the new paragraph (a) applies to the Director and Appeals Board, but not DCHD, the exhaustion provisions that apply to grazing appeals will govern instead of this provision. *See* § 4.174(b).

The second exception implements the *Darby* holding by providing that a decision is subject to judicial review if it is made effective pending appeal. By including these exceptions, parties adversely affected by an agency decision will be better positioned to understand when exhaustion is required and assess their options for further review of the decision.

Paragraph (b) will more specifically address finality for purposes of judicial review under 5 U.S.C. 704. Paragraphs (b)(1) and (b)(2) will distinguish between bureau or office decisions that are not in effect and those that are, deeming the latter category to be final agency action that is subject to judicial review regardless of how the decisions came into effect.

Paragraph (b) has three subparagraphs. Subparagraph (b)(1) will address decisions that are not in effect, stating that “[a] decision that is not in effect does not constitute final agency action for purposes of 5 U.S.C. 704 and may not be challenged in Federal court.” This provision will comply not only with *Darby* but also with the Supreme Court’s more general definition of APA finality set out in *Bennett v. Spear*, 520 U.S. 154 (1997). A bureau or office decision that is not in effect during the time it may be appealed, or during the pendency of the appeal, meets none of the *Bennett* indicia of finality: the decision under appeal does not yet mark the consummation of the agency’s decision-making process, does not finally determine rights or obligations, and does not yet impose legal consequences on any party. *Cf. Bennett*, 520 U.S. at 178. Thus, it is not final agency action under 5 U.S.C. 704.

The possibility that the decision may go into effect will be addressed by subparagraph (b)(2). It provides, again consistent with *Darby*, that “a decision that is in effect is final agency action for purposes of 5 U.S.C. 704 and may be challenged in Federal court.” Under this provision, an otherwise final bureau or office decision that goes into effect may be judicially reviewed regardless of whether an administrative appeal is pending. While an agency may require a party to complete an optional intra-agency appeal it has chosen to pursue, see *Stone v. INS*, 514 U.S. 386, 392 (1995)

(holding that a party who chose to file an optional rehearing request “cannot seek judicial review until the rehearing has concluded”), the rule will treat mandatory and optional appeals alike,

allowing a party to seek judicial review whenever a bureau or office decision is in effect. Doing so eliminates a needless disincentive to pursuing optional administrative appeals.

The final subparagraph (b)(3) will clarify the status of a bureau or office decision that has been appealed and for which the Director or an Appeals Board has issued a final decision on appeal. Once the Director or an Appeals Board issues a final decision, that decision becomes the final agency action of the Department, and the underlying decision is no longer the final agency action for the Department. Accordingly, even if a bureau or office decision has been effective pending appeal, and thus deemed final for purposes of 5 U.S.C. 704, it will no longer be the final agency action for purposes of 5 U.S.C. 704 once the Director or Appeals Board issues a final decision on appeal. This provision prevents the Department from simultaneously having two final agency actions on the same matter. Subparagraph (b)(3) also specifies that a final decision of

the Director or an Appeals Board is effective on the date it is issued unless otherwise specified in the decision.

#### Reconsideration

Existing paragraph (d) will be removed because other than the Director's Office, each OHA Unit has its own reconsideration regulation applicable to its proceedings. The Director's Office will add a reconsideration provision to subpart G, § 4.704, so it too will have a reconsideration provision that is substantively identical to the provision in existing § 4.21(d).

§ 4.22 Retention of documents; record address; and extensions of time

We will move the filing and service provisions from § 4.22 to § 4.407 for appeals before the IBLA and to a new § 4.32 for proceedings before the Director’s Office and PHD. IBIA and DCHD also will use the filing and service provisions provided in other subparts in part 4.

The current § 4.22(c) will become § 4.22(a), entitled, Retention of documents. The current language refers to “withdrawal” of original documents, but we will clarify that OHA will permit the “substitution” of original documents for true copies during the time a case is pending. We also will provide that an appeals board may require such substitution upon a request for withdrawal in order to ensure an accurate record of the proceeding.

The current § 4.22(d) will become paragraph (b), entitled Record address information. We will require every person or entity filing a document in a proceeding before OHA to provide their mailing address and those filing electronically to provide both a mailing address and an electronic mailing address. Address changes will need to be promptly filed, and any person or entity who fails to provide or update their address will not be entitled to notice or service in the proceeding until they do so.

The current § 4.22(e) will become § 4.22(c), entitled, Computation of time for filing and service. We propose revising this section to be consistent with Federal Rule of Civil Procedure 6(a)(1). Specifically, we will divide the current computation of time paragraph into three subparagraphs, which will provide three rules for computing time periods specified in the regulations, unless otherwise provided by law: (1) Exclude the day of the event that triggers the time period; (2) Count every day, including intermediate Saturdays, Sundays, and federal holidays; and (3) Include the last day of the period, but if the last day is a Saturday, Sunday, federal holiday, or other nonbusiness day, the period continues to run until the end of the next

day that is not a Saturday, Sunday, federal holiday, or other nonbusiness day. The only substantive change from the content of current § 4.22(e) is that time periods of seven days or less will no longer exclude any Saturday, Sunday, federal holiday, and other nonbusiness day. As explained in the Committee Notes for Federal Rule of Civil Procedure 6(a)(1), the instruction to “count every day” (so that “day” means “calendar day”) enables parties to calculate time periods less than 7 days and greater than 7 days in the same way. Some time periods provided by the regulations in part 4 will be extended to account for this change.

The current § 4.22(f) will become § 4.22(d), entitled Extensions of time, without any substantive changes.

#### § 4.23 Hearings or related proceedings

We will modify this section based on changes in technology and increased availability of recordings and because OHA employees typically do not prepare transcriptions. The current provision indicates that hearings will be recorded, and transcripts will be made when requested by the parties. It also specifies the rate to cover the cost of OHA employees preparing the transcripts for requesting parties. The new language will provide that hearings are recorded or transcribed or both and allows parties to have the option to request recordings. It carries forward the responsibility of the parties to pay for requested copies of the transcript or recording. For transcripts that are prepared by a contractor, the language will require the parties to obtain and pay for them. Paragraph (b) is new and will specifically provide that hearings may be conducted using video, teleconference, or other suitable technology. OHA has already begun using video hearings for the convenience of OHA and the parties.

#### § 4.24 Basis of decision

In § 4.24, we will carry forward paragraphs (a)(1), (a)(3), (a)(4), and (b) with minor edits to modernize the language. Paragraph (a)(2) will be revised to provide greater clarity without changing the requirements.

#### § 4.25 Oral argument and status conferences

We will revise this section to add “presiding officer” to the list along with the Director and Appeals Boards who have the authority in current regulations to grant an opportunity for oral argument. We also will specify that the Director, presiding officer, or Appeals Board may order status conferences. We also will expressly state that oral arguments or status conferences may be conducted by video, teleconference, or other suitable technology.

#### § 4.26 Subpoena power and witness provisions for probate proceedings

In paragraph (a), which currently references only ALJs, we will add that Indian probate judges or presiding officers in WELSA proceedings under subpart H also have subpoena power when carrying out their statutory duties to adjudicate Indian probate cases. We also specify that the subpoena power will apply not only to the attendance of witnesses at hearings or depositions, but also to the production of documents or other relevant materials.

Expanding this provision will help address a current need. For example, adoption or medical records may be relevant to issues arising in a probate case, but custodians of these records may provide them to OHA or a party only in response to a subpoena.

PHD has made greater use of video, teleconference, or other suitable technology to hold hearings, and paragraph (b) reflects this change by including language that specifies the contents of a subpoena requiring attendance by one of these methods.

Current regulations provide for personal service of subpoenas, but not service by other methods. Because witnesses may now appear by video, teleconference, or other suitable technology from a distant location, we will allow the use of registered or certified mail to complete service of a subpoena. Current regulations limit the distance a witness may be required to travel to attend a deposition or hearing to 100 miles from the place of service. Considering PHD's greater use of video, teleconference, or other suitable technology to hold hearings, we will specify in paragraph (d) that geographic limits do not apply when in-person attendance at a hearing is not required. We will add a new paragraph (e) on witness fees, which modernizes the language in current paragraph (c) without changing the substantive requirements. We continue to tie witness fees to those provided in the United States district courts.

#### § 4.27 Ex Parte communication and disqualification

We will reorganize and revise this existing provision, which has not been updated since 1971 (36 FR 7186; April 15, 1971), by adding a definition of ex parte communication, explicitly prohibiting ex parte communications, detailing the procedure that OHA will follow if it received an ex parte communication, and providing the sanctions for ex parte communications. We will specifically provide that the appropriate OHA Unit supervisor will notify OHA's Director in the event of a prohibited communication warranting discipline of an OHA employee, and to clarify that discipline will only be imposed on OHA employees who knowingly made ex parte communications or caused ex parte communications to be made. We will also require that a communication be knowingly made or caused by a party for sanctions on that party to be warranted. We further specify a list of allowable communications that will not be considered prohibited ex parte communications.

#### § 4.28 Interlocutory appeals

We will clarify and modernize the language but do not intend to make substantive changes except to again include Indian probate judges in recognition of the statutory authority of Indian probate judges to adjudicate Indian probate cases.

#### § 4.29 Disqualification of Presiding Officers and Board Members

We will delete current § 4.29, which addresses remands from federal courts. The current section applies only to IBIA and IBLA, but neither Appeals Board has found the procedures provided in the section necessary. Instead, IBIA and IBLA can effectively address remands from courts on a case-by-case basis.

We will move the provisions regarding Disqualification of Presiding Officers and Board Members to this section from their current location in § 4.27(c). We will use the term “presiding officer” for consistency with other changes to subparts A and B and also add language to qualify that the provision applies to members of Appeals Boards. No other substantive changes are made.

#### § 4.30 Alternative Dispute Resolution

We will remove the section entitled, “Information Required by forms” as the form required for subpoenas also has been removed. In its place, we will add a new section that codifies OHA’s authority to encourage the use of Alternative Dispute Resolution (ADR) among parties who have filed an appeal or requested a hearing. The Department of the Interior has greatly expanded its use of ADR and other informal tools to resolve disputes among internal



parties as well as with external groups. ADR can provide substantial benefits to parties, allowing for the flexibility to craft durable and creative solutions to disputes while also saving time and money associated with adjudication. OHA will seek opportunities to regularize and expand communications about ADR to parties with pending cases, while also allowing parties to inquire about the availability of ADR for their pending matter.

#### § 4.31 Limiting disclosure of confidential information

We will make significant clarifying amendments to this provision, which has been a source of challenge and confusion as currently drafted.

We will define the confidential information that is subject to this provision as information that is exempt from public disclosure by the Freedom of Information Act, Trade Secrets Act, or other laws that explicitly exempt the information from disclosure. This definition is intended to clarify that this provision will not address information protected by common law privilege.

We also will modernize and clarify the language describing the procedure by which a party may request a protective order for information submitted to OHA that the party asserts falls within the definition of confidential information, and the procedure by which OHA will rule on the motion for protective order. We will retain language to exempt hearings conducted pursuant to 5 U.S.C. 554 from this provision, as protective orders and disputes regarding confidential information are generally handled through the discovery process in those fact-finding hearings. We also will retain language stating that notwithstanding an OHA ruling on a protective order, information will be released if the Department determines that it is subject to release under the Freedom of Information Act.

#### § 4.32 Filing; service; issuance

We will move the filing and service provisions that apply to the Director's Office and PHD from § 4.22 to a new § 4.32 and specify that they do not apply to subparts C, D, E, H, J, K, and L.

OHA is working on an electronic filing system that is expected to be deployed to the parties and the public during FY 2024. The electronic filing system will be used for proceedings before the Director's office, IBLA, IBIA, and DCHD. However, while PHD will not be using this electronic filing system, any opportunities that become available for electronic transmission of documents will be provided for in the OHA Standing Orders on Electronic Transmission.

We will modify paragraph (a) to add subparagraphs that address electronic and non-electronic filing. Paragraph (a)(1) will add references to the OHA Standing Order on Contact Information and the OHA Standing Order on Electronic Transmission. Paragraphs (a)(2) and (a)(3) will provide for separate provisions on methods of filing and timeliness.

Paragraph (a)(2)(i) will add a requirement that any attorney representing a person or entity, and any Federal, State, or local agency must file documents electronically. This requirement will help maximize the efficiencies of an electronic system and provide benefits to OHA and the parties who appear before it.

Paragraph (a)(3)(i) will provide that the deadline for documents filed electronically will be 11:59 p.m. in the time zone of the office where the filing is required on the due date. For those who file electronically, we anticipate using the time stamp of the electronic process OHA is using at the time. For example, when the new electronic filing system is deployed, the date and time of filing will be determined by that system. For those who choose to file documents by

mail, paragraph (a)(3)(ii) will specify that a document will be deemed timely if it is mailed on or before the last day for filing or if it is dispatched to a commercial courier for delivery within 3 days. This provision is consistent with Federal Rule of Appellate Procedure 25, which similarly states that a brief not filed electronically is timely filed if it is mailed on or before the filing deadline, postage prepaid, by first-class mail or other equally expeditious class of mail or dispatched to a third-party commercial carrier for delivery to the clerk within 3 days of the dispatch. Paragraph (a)(3)(ii) will also require that the mailing or dispatch date be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgment from the company delivering the document for filing. The intent of this language is to put parties on notice that there must be proof of the date a document is mailed for filing. Without such proof, a document may be deemed untimely. To account for the possibility of an error by the post office or a commercial courier, paragraph (a)(3)(ii) specifies that a document not received within seven business days of the filing deadline is presumed to have not been filed, but that presumption may be rebutted by the date-of-mailing documentation.

The options we are providing for non-electronic filing do not include personal delivery that is not through the mail or by a third-party commercial courier. The current language in existing paragraph 4.22 (a) provides that “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.” This is no longer a viable option, given changes to the workplace, particularly since the COVID-19 pandemic.

OHA has a number of small offices, and a person who is authorized to receive a filing may not be available in the office every day during all business hours to receive such a personal delivery. In addition, due to security and other reasons, an OHA office suite may not be accessible to the

public. For these reasons, we are providing options that can offer documentation of delivery and verification of timeliness.

Paragraph (b) will update and clarify the requirements for serving documents in OHA proceedings and will continue to require that a person or entity filing a document must serve a copy concurrently on the appropriate official of the Office of the Solicitor and other government officials and all other parties.

We will modify paragraph (b)(1) to refer to the OHA Standing Order(s) on contact information for current office contacts of Government officials and offices. The modifications will also modernize OHA's practice by including electronic service and providing that service may be accomplished electronically on any person or entity that has consented. References to the OHA Standing Order(s) on Electronic Transmission will allow OHA to provide the most current information on the electronic filing system in place. OHA is anticipating that the electronic filing system will be continually updated and improved as technology changes and this framework will allow for such updates rather than fixing in regulation specific electronic procedures. We anticipate that parties will be able to provide for consent to be served electronically through the electronic filing system.

In paragraph (b)(3)(i), we will provide that service may be made electronically on any person or entity that has consented. We will also clarify that the Department of the Interior offices and bureaus, including the Office of the Solicitor, consent to electronic service. This will ensure that the Department's investment into an electronic filing system for OHA is fully used and the efficiencies of the system are maximized for the benefit of parties and the public. Requiring separate consent by the Office of the Solicitor or any of the Department's bureaus or

offices for each case filed and communicating such consent to all the parties will be cumbersome and inefficient.

Paragraph (b)(3)(i) will also give parties the opportunity to modernize their practice by providing that any person or entity may consent to electronic service.

We anticipate that such consent will be made through the electronic filing system. Because the system will be continually updated over time, specific procedures to provide consent to electronic service will be conveyed in the OHA Standing Orders.

Paragraph (b)(3)(ii) will address service by non-electronic means.

In paragraph (c)(1), we will specify that OHA may issue notices, orders, or decision electronically as specified in the OHA Standing Orders on Electronic Transmission, or by rules applicable to the OHA Unit or the type of proceeding. Paragraph (c)(2) will provide the methods of non-electronic issuance that OHA may use for parties who have not consented to electronic service or issuance.

*Subpart C – Rules Applicable to Proceedings Before the Departmental Cases Hearings Division*

The Departmental Cases Hearings Division (DCHD) serves as the administrative trial court for the Department of the Interior and provides an impartial forum for the resolution of disputes under the Department's jurisdiction. Administrative Law Judges (ALJs) appointed to DCHD conduct formal hearings under the Administrative Procedure Act (APA), 5 U.S.C. 551-59, and other fact-finding hearings in accordance with applicable statutes and regulations. DCHD adjudicates a wide range of matters relating to the use and disposition of public lands and natural resources as well as select cases involving American Indians, Tribal

Nations, and Alaska Natives. For instance, DCHD adjudicates cases involving rangeland and grazing resources; surface coal mining resources; oil, gas, and mineral resources; wildlife and cultural resources; mining contests; hydropower licenses; Alaska Native allotment applications, Tribal acknowledgment proceedings, and certain Indian Self-Determination and Education Assistance Act (ISDA) cases. DCHD also conducts hearings and adjudicates matters referred by other entities within the Department, including the Director of OHA and the Appeals Boards.

As part of this regulatory update, DCHD will establish a new subpart C within 43 CFR part 4, which is currently “Reserved” and does not contain any regulatory provisions. This new subpart will include uniform and consistent “General Procedural Rules for Practice Before the Departmental Cases Hearings Division” that will apply to all phases of prehearing, hearing, and post-hearing adjudication. The General Procedural Rules for Practice will serve as a procedural overlay for proceedings before DCHD similar in function and operation to the Federal Rules of Civil Procedure (FRCP) used in federal district court proceedings but will be streamlined for administrative proceedings. The new General Procedural Rules for Practice will also address current and anticipated technological advancements within DCHD such as the electronic filing and service of documents as well as the use of video technology for hearings and other prehearing processes.

DCHD will also relocate, modify, and update provisions currently in subpart E of 43 CFR part 4 that contain the rules applicable to certain types of proceedings before DCHD. At present, subpart E contains procedures that apply to both the IBLA and DCHD. This organizational structure has, at times, created confusion for litigants trying to ascertain which procedures apply to DCHD as opposed to the IBLA. To eliminate the confusion, this regulatory update will consolidate the rules applicable to DCHD into subpart C so that subpart E will only

contain the rules applicable to practice before the IBLA. Once relocated, subpart C will contain the “Specific Rules Applicable to Certain Types of Proceedings Before the Departmental Cases Hearings Division” and will include the following: (1) Specific Rules Applicable to Referrals for Fact-Finding Hearings; (2) Specific Rules Applicable to Contest Proceedings; and (3) Specific Rules Applicable to Grazing Proceedings (Inside and Outside of Grazing Districts).

*General Procedural Rules for Practice before the Departmental Cases Hearings Division*

For ease of reference, the General Procedural Rules for Practice before DCHD will be further separated into seven distinct topic areas: (1) Purpose, Scope, and Definitions; (2) Filing, Service, and Formatting of Documents; (3) Prehearing Procedures; (4) Discovery; (5) Other Procedures; (6) Hearing Process and Procedure; and (7) Reconsideration, Appeal, and Review.

Purpose, Scope, and Definitions

*§ 4.100 Purpose and scope*

DCHD will add a new subpart C to establish, for the first time, a set of uniform and comprehensive procedures for practice before DCHD intended to promote the efficient and timely resolution of proceedings. Subpart C will also contain the rules applicable to specific types of proceedings adjudicated by DCHD that are currently contained in subpart E. As explained in paragraph (a), subpart C will consist of both: (1) the “General Procedural Rules for Practice Before the Departmental Cases Hearings Division;” and (2) the “Specific Rules Applicable to Certain Types of Proceedings Before the Departmental Cases Hearings Division.”

The General Procedural Rules for Practice set forth in subpart C will broadly apply to all types of proceedings adjudicated by DCHD unless specifically exempted by this section.

Proceedings specifically exempted are listed in paragraph (b) and will include: (1) hydropower proceedings governed by 43 CFR part 45; (2) Tribal acknowledgement proceedings governed by 43 CFR part 4, subpart K; (3) Indian Self-Determination and Education Assistance Act proceedings governed by 25 CFR part 900 and 42 CFR part 137, subpart P; (4) administrative remedies for fraudulent claims and statements governed by 43 CFR part 35; and (5) debt collection proceedings governed by the Departmental Manual. For some types of proceedings, a comprehensive set of regulatory provisions already exist. *See, e.g., Hannahville Indian Cmty. v. Minneapolis*

*Area Educ. Officer and Area Supervisory Contract Specialist, Bureau of Indian Affairs*, 34 IBIA 252 (2000) (discussing the comprehensive negotiated rulemaking for cases dealing with the ISDA). Other proceedings, such as debt collection matters, are conducted using informal procedures that fall outside the scope of subpart C.

As explained in paragraphs (c) and (d), other regulations may also apply to proceedings before DCHD. As explained in paragraph (c), subparts A and B are generally applicable to DCHD unless they are inconsistent with subpart C. Other rules applicable to specific types of proceedings are contained throughout title 43 and in other portions of the Code of Federal Regulations as described in paragraph (d). Where possible, those regulations should be interpreted as consistent with the rules in subpart C. However, to the extent that a rule applicable to a specific type of proceeding directly conflicts with the General Procedural Rules for Practice before DCHD in subpart C, the specific rule will apply. To the extent that a specific rule references an outdated or inapplicable procedure, the ALJ may direct the parties, in writing, to



follow some, or all, of the procedures contained in the General Procedural Rules for Practice before DCHD contained in this subpart. For example, the regulations governing civil penalties promulgated by the Office of Natural Resources Revenue (ONRR) at 30 CFR 1241.8 currently cross-reference hearing procedures contained in 43 CFR 4.420-4.428; however, those hearing procedures will be eliminated as part of this regulatory update. Paragraph (c) of this section, will enable ALJs to guide the parties, in writing, to the applicable procedures in subpart C until ONRR has an opportunity to update its regulatory provisions and establish new cross-references. While Departmental bureaus and offices will be encouraged to update and correct existing cross-references, the potential for delay associated with those rulemaking efforts necessitates the inclusion of interim guidance.

Paragraph (d) discusses the applicability of OHA Standing Orders issued by the Director to proceedings before DCHD. The OHA Standing Orders on Electronic Transmission convey current information about the electronic filing and service of documents, and the OHA Standing Orders on Contact Information convey current electronic and mailing address information. The OHA Standing Orders will be made available on the Department of the Interior's OHA website at <https://www.doi.gov/oha>.

#### *§ 4.101 Definitions*

This section will include a definition for the term “Administrative Law Judge” and the acronym “DCHD.” All other definitions generally applicable to proceedings under 43 CFR part 4 will be defined in subpart A.

#### Filing, Service, and Formatting of Documents

#### *§ 4.102 Filing and service requirements*

This section combines the filing and service requirements of several existing regulations, deletes unnecessary provisions, and adds new provisions to modernize practice by allowing documents to be filed and served electronically. This section will also clarify how DCHD issues notices, orders, and decisions. Paragraph (a) will set forth the filing requirements, paragraph (b) will contain the service requirements, and paragraph (c) will discuss the issuance of notices, orders, and decisions.

In response to the exigent circumstances presented by the COVID-19 pandemic, DCHD began allowing parties to file and serve documents electronically by email. Since email filing began, DCHD's experience with electronic filing has been positive and has allowed DCHD to successfully accommodate electronic filings from parties as well as the electronic issuance of notices, orders, and decisions. OHA is currently working to develop an electronic filing system that will ultimately replace the use of email. DCHD will formally codify the procedures for the electronic filing, service, and issuance of documents as part of these General Procedural Rules for Practice before DCHD. In addition, DCHD will continue to rely on Standing Orders, which are issued to update filing and service procedures, provide current contact information, and notify parties of technological developments such as the anticipated implementation of a new electronic filing system.

Paragraph (a)(1) will require that documents be filed in proceedings pending before DCHD in accordance with the rules in this section and the OHA Standing Orders on Electronic Transmission and Contact Information. The available methods for filing either electronically or non-electronically will be discussed in paragraph (a)(2). For a federal, state, or local agency and for any attorney representing a person or entity in a proceeding before DCHD, paragraph

(a)(2)(i) will require electronic filing unless otherwise specified in the OHA Standing Orders on Electronic Transmission or when the ALJ has allowed non-electronic filing for good cause.

For electronic filing, paragraph (a)(3)(i) will adopt 11:59 p.m. Mountain Time as the deadline for filing documents with DCHD. The date and time of filing will be determined by DCHD using the time stamp of the electronic process DCHD is using at the time of filing. So, for as long as the OHA Standing Orders on Electronic Transmission provide that DCHD is accepting filings by email, the date and time of filing will be the date and time that appears on the email received by DCHD. When the new electronic filing system is deployed, the date and time of filing will be the date and time established by that system.

For those who choose to file documents non-electronically by mail or commercial courier, paragraph (a)(3)(ii) will explain that a document is deemed timely if, on or before the last day for filing, it is sent using first-class mail or other class of mail that is at least as expeditious, postage prepaid, or it is dispatched to a third-party commercial courier for delivery within three days. This modification to the existing filing rules is consistent with the approach taken in §§ 4.32 and 4.407 as well as the Federal Rules of Appellate Procedure (FRAP) at Rule 25. While DCHD has historically accepted filings transmitted by facsimile, that procedure will be eliminated going forward and replaced by electronic filing.

Because these regulatory changes will simplify and streamline the filing deadlines, DCHD will no longer need the “grace period” currently found in 43 CFR 4.422(a). Paragraph (a)(3)(ii) will require proof of mailing or dispatch documented by “a postmark date, acceptance scan, receipt, or other similar written acknowledgement.” A document not received within seven

business days of the filing deadline will be presumed untimely, but the presumption could be overcome by appropriate documentation establishing the date of mailing or dispatch.

Paragraph (b)(1) will provide notice of the general requirement to serve documents in accordance with the rules in this section and the OHA Standing Orders on Electronic Transmission and Contact Information. Copies of documents filed with DCHD will be required to be served concurrently on all parties to the proceeding under paragraph (b)(2). Service on a party known to be represented will be governed by paragraph (b)(3), which requires service on the representative. A person or entity will be required to serve the appropriate office of the Office of the Solicitor as provided in the OHA Standing Orders on Contact Information until a particular attorney in the Office of the Solicitor files and serves a notice of appearance or other document in the proceeding, after which that attorney must be served. To ensure timely and accurate service, paragraphs (b)(4) and (b)(5) will set forth the method for determining the service address and will require parties to promptly file and serve written notice of any address changes.

To streamline the service requirements, paragraph (b)(6) will allow service to occur electronically or non-electronically. Electronic service will be allowed under paragraph (b)(6)(i) on persons or entities who consent to electronic service under the terms specified in the OHA Standing Orders on Electronic Transmission. Paragraph (b)(6)(i) will also allow electronic service on the Office of the Solicitor and bureaus or offices of the Department of the Interior under the terms specified in the OHA Standing Orders on Electronic Transmission. Non-electronic service will be authorized by mail or third-party commercial courier, except that in contest cases, service could also be made by publication under § 4.163. The tables currently set forth in 43 CFR 4.422 will not be carried over into subpart C. Addresses for serving the Office of

the Solicitor and the bureaus and offices of the Department of the Interior will be set forth in the OHA Standing Orders on Contact Information. Proof of service will be required as specified under paragraph (b)(7).

Paragraph (b)(8) of the regulations will specify when service is complete. Electronic service of a document will be deemed complete when the document is sent or as otherwise specified under the terms of the OHA Standing Orders on Electronic Transmission, unless the party making service is notified that the document was not received. For a document served by mail or commercial courier, service will be complete upon mailing or dispatch to the carrier subject to documentation showing the date of mailing or dispatch such as a postmark, acceptance scan, receipt, or other similar written acknowledgement. Service by publication will be complete as set forth in § 4.163.

Notices, orders, and decisions issued by the ALJ will generally be served electronically as indicated in paragraph (c), and service will be complete on sending or as otherwise specified by the OHA Standing Orders on Electronic Transmission. If an electronic service address has not been provided, then a non-appealable notice, order, or decision will be issued by first-class United States mail or third-party commercial courier to the mailing address provided or, if not provided, to the last known address, and service will be complete on mailing or dispatch. If an electronic service address has not been provided, an appealable order or decision will be sent by certified United States mail to the mailing address provided or, if not provided, to the last known mailing address, and service will be complete when received. If a notice, order, or decision sent by certified mail is not claimed by the recipient or is returned as undeliverable, then service will be achieved by first-class United States mail, and service will be deemed complete on mailing.

#### *§ 4.103 Document formatting*

The document formatting requirements will standardize and clarify the requirements for documents filed with DCHD. Paragraph (a) will specify that the formatting requirements apply to any notice, motion, brief or other document filed with DCHD either electronically or in paper form. The formatting requirements will not apply to exhibits, attachments, and other appended documents. Paragraph (b) contains similar requirements to those found in the existing regulations at 43 CFR 4.410(d) but also includes new provisions to accommodate electronically filed documents. For instance, paragraph (b)(10) will specifically require that documents filed electronically “be in an electronic text-searchable portable document format (PDF).”

Paragraph (c) will explain the method for calculating page numbers and will specifically exclude from page numbering computations: any cover page, table of contents, table of citations, signature blocks, certificates of service, indices, attachments, and exhibits. To encourage compliance with these formatting requirements, paragraph (d) will allow an ALJ to strike and not consider a document or pleading that fails to comply with the applicable formatting requirements.

## Prehearing Procedures

### *§ 4.104 Prehearing conferences*

DCHD will include a new section discussing prehearing conferences. Like pretrial conferences conducted in federal district court under FRCP 16, prehearing conferences provide a critical first step in scheduling, managing, and planning the prehearing and hearing process. Although the current regulations only require prehearing conferences for some matters, DCHD’s ALJs routinely conduct prehearing conferences with the parties during the early stages of most proceedings. The timing and scheduling of prehearing conferences can vary depending on the

type of case and the procedural posture. For instance, prehearing conferences may be delayed if the matter is subject to a pending motion to dismiss, the regulations require the expeditious resolution of a stay petition, or the parties request time to engage in settlement discussions.

Paragraph (a) will broadly explain the purpose of prehearing conferences for parties that may be unfamiliar with the process. Paragraph (b) will address the timing, scheduling, and method for conducting a prehearing conference.

Paragraph (c) will contain a non-exhaustive list of the issues and topics that may be discussed, addressed, and resolved during the prehearing conference, including: simplification of the issues, consolidation, options for Alternative Dispute Resolution (ADR), discovery, the timing and appropriateness of prehearing motions, scheduling deadlines, hearing preparation, witness and exhibit disclosures, and other matters that may facilitate the timely, efficient, and fair resolution of the proceeding. While a few regulations applicable to specific types of proceedings currently include prehearing conference provisions, see, e.g., 43 CFR 4.430, 4.452-1, this section will replace those provisions and establish a more uniform and consistent process.

Paragraph (d) mirrors FRCP 16(e) and notifies the parties that the ALJ may also conduct a final prehearing conference prior to the commencement of any hearing to formulate a hearing plan and to facilitate the admission of evidence and the presentation of witnesses. As necessary, parties will be permitted to request the scheduling of a prehearing conference by filing a written motion under paragraph (e) that demonstrates a reasonable justification for the scheduling request. As explained in paragraph (f), an ALJ will issue an order after any prehearing conference documenting the actions agreed on and the rulings made by the ALJ during the conference. Post-conference orders will control the subsequent course of the proceeding unless

modified by the ALJ in a written order. The consequences of noncompliance will be described in paragraph (g), which explains the potential for sanctions under § 4.121 for the failure to appear at a prehearing conference, participate in good faith, or comply with the terms of a post-conference order.

#### *§ 4.105 Prehearing motions*

Parties appearing before DCHD file a significant number of prehearing motions that encompass many of the same types of issues that typically arise in federal district court proceedings. The motions can be wide-ranging and complex depending on the type of proceeding. Parties frequently file motions related to standing, jurisdiction, timeliness, and mootness early in the proceeding. As the proceeding progresses, parties often file motions related to discovery disputes and evidentiary issues. The lack of standard regulatory procedures governing motions practice has led to inefficiencies in case processing and inconsistent requirements. This provision will provide a framework to guide parties through the briefing process for most types of motions.

Paragraph (a) provides a general overview and will require that motions filed prior to a hearing be presented in writing unless otherwise authorized by the ALJ. This requirement is consistent with the practice of federal districts courts at FRCP 7(b)(1)(A). Procedures applicable to specific types of motions appear in separate sections of subpart C, and summary judgment motions will be governed by § 4.111.

Paragraph (b) describes the timing, page limits, and content of motions. It also requires that motions comply with the filing, service, and document formatting requirements set forth in §§ 4.102 and 4.103. A party will be authorized to file a motion any time after the commencement



of the proceeding unless a different deadline has been prescribed in subpart C or in an order issued by the ALJ. Motions will be limited to 15 pages, unless the ALJ orders otherwise. In terms of content, motions will be required to contain a clear and concise statement indicating: (1) the purpose of the motion and the relief sought; (2) the factual basis for the relief sought; and (3) the legal arguments and reasons supporting the motion, including citations to any applicable legal authority.

Responses under paragraph (c) will also be subject to the filing and service requirements of § 4.102 and the document formatting requirements of § 4.103. A response will be due 14 days after the filing of the motion and will be limited to 15 pages unless the ALJ orders otherwise. In terms of content, a response brief will be required to contain a clear and concise statement indicating: (1) whether the party supports or opposes the motion; (2) the factual basis for the response; and (3) the legal arguments and reasons supporting the response, including citations to legal authority.

To aid in calculating due dates, this section, and most of the regulatory provisions in subpart C, will calculate deadlines in 7-day increments. To allow for the more efficient resolution of motions, paragraph (d) does not allow replies or further briefing unless authorized by the ALJ.

In addition, this proposal will require in paragraph (e) that supporting documentary materials be submitted along with the motion or response unless the supporting materials have already been filed with DCHD. Any documentary materials will need to be directly referenced in the motion or response using pinpoint citations that specify the page(s) or paragraph number(s) where the supporting text is located. Pinpoint citations enable the ALJ to more quickly and efficiently review the briefing and materials submitted by the parties.

To expedite the resolution of purely procedural motions, paragraph (f) will allow an ALJ to rule on a motion for procedural relief without waiting for a response. Examples of purely procedural motions include requests to modify a deadline, reschedule an action, allow additional briefing, or permit the filing of an overlength brief. An ALJ will also be authorized under paragraph (g) to summarily deny a motion without waiting for a response when the motion is frivolous, repetitive, or would cause undue delay.

*§ 4.106 Extension of time*

Requests for extensions of time occur with some frequency in proceedings before DCHD and warrant a separate section. In general, as explained in paragraph (a), a party may request an extension of time for filing a document, other than a notice of appeal or a document initiating a proceeding, by filing a written motion. Under this rule, ALJs will retain the discretion to grant or deny extensions of time depending on the individual circumstances. Paragraph (b) will require that a motion requesting an extension be filed no later than the day before the document is due, absent a showing of compelling circumstances. To obtain an extension, paragraph (c) will require the movant to demonstrate good cause. To enable the ALJ to more expeditiously adjudicate motions for extensions of time, paragraph (d) will require the moving party to make a reasonable effort to contact each party to determine whether an agreement can be reached regarding an extension.

Occasionally, an ALJ may be at hearing or otherwise unavailable to rule on a requested extension prior to the deadline, especially when the request for an extension is made only a day or two before the deadline. To ensure consistency and certainty in the event of inaction by the ALJ, the regulation contains a default provision in paragraph (e) that allows for any document to be filed

within 7 calendar days after the original due date if the ALJ does not rule on the motion before the document is due, unless the ALJ orders otherwise. This 7-day default extension period is consistent with the IBLA's approach under § 4.409(b).

*§ 4.107 Consolidation and severance*

This regulation codifies current practices within DCHD. Paragraph (a) will allow for consolidation of two or more proceedings when they involve common factual or legal issues. Proceedings may be consolidated on the motion of a party or at the initiative of the ALJ. While relatively uncommon, consolidated cases occasionally need to be severed as the proceeding progresses and new information develops. Paragraph (b) will specifically allow a proceeding to be severed on the motion of a party or the initiative of the ALJ.

*§ 4.108 Intervention and amicus curiae*

DCHD does not have a uniform set of regulations governing the standards and processes for requesting intervention. But see 43 CFR 4.473 (grazing). In 2010, the IBLA developed a comprehensive intervention regulation, which it codified in the existing rules at 43 CFR 4.406 (see 75 FR 64655; October 20, 2010, and 72 FR 10454; March 8, 2007). In the absence of specific regulatory guidance, DCHD has relied on published decisions issued by the IBLA to determine when intervention may be appropriate in a particular proceeding. By adopting this regulation, DCHD intends to create certainty and consistency for persons and entities who seek intervention or amicus curiae status in proceedings pending before DCHD.

In accordance with existing practice, paragraph (a)(1) will allow intervention by written motion. Paragraph (a)(2) will authorize intervention consistent with existing case law if: (1) the person or entity had a legal right to initiate the proceeding, or (2) the person or entity has an

interest that could be adversely affected by the outcome of the proceeding. See, e.g., *Las Vegas Valley Action Comm.*, 156 IBLA 110, 112 (2001); *Nev. Div. of Wildlife v. BLM & Tuleadad Grazing Assoc.*, 138 IBLA 382, 390-391 (1997); *Bear River Land & Grazing v. BLM*, 132 IBLA 110, 113 (1995); *San Juan Citizens Alliance*, 129 IBLA 1, 2 n.1 (1994). Paragraph (a)(3) will discuss the required contents of a motion to intervene. Paragraph (a)(4) will enable an ALJ to grant intervention but limit participation. It will also allow an ALJ to deny a motion to intervene if the requirements of this section are not met or if the ALJ determines that granting the motion to intervene will materially prejudice existing parties or unduly delay adjudication of the proceeding. A party who is granted full or limited intervenor status will be a party to the proceeding as explained in paragraph (a)(5).

Under paragraph (b), a person or entity may also seek amicus curiae status. While requests for amicus curiae status occur infrequently, additional briefing submitted by interested persons and entities can provide a useful analysis of the issues. To request amicus curiae status, a person or entity will be required to file a written motion under paragraph (b)(1) that explains how the amicus brief will contribute to a resolution of the issues. The ALJ will have the discretion to grant or deny the motion under paragraph (b)(2). A person or entity granted amicus curiae status will not be a party to the proceeding under paragraph (b)(3) but will be allowed to file a written amicus brief that must be served on all other parties to the proceeding in accordance with paragraph (b)(4).

#### *§ 4.109 Notice of appearance, substitution of attorneys, and attorney withdrawal*

DCHD does not currently have a regulation governing notices of appearance, the substitution of attorneys, or the withdrawal of an attorney from the proceeding. This regulation will ensure that all parties and the ALJ have a clear understanding about which parties are

represented and who is providing that representation. It will also ensure proper service of pleadings, notices, orders, and decisions.

Paragraph (a) will require that an attorney or other representative file and serve a notice of appearance and provide prompt notice of any changes in legal representation. Paragraph (b) will allow parties to substitute attorneys by filing a notice of substitution that contains the contact information for the new attorney. The substitution will be effective upon filing.

Paragraph (c) will allow an attorney to withdraw from a proceeding by filing a written motion. The attorney filing the motion will be required to serve the motion on all parties to the proceeding and the attorney's client(s). To ensure that a withdrawing attorney's client(s) will not be unfairly prejudiced by the withdrawal, the motion will be required to contain: (1) pertinent contact information for the attorney's client(s); (2) a statement explaining why the withdrawal will not unfairly prejudice the attorney's client(s); and (3) a statement that the attorney has taken appropriate steps to protect the interests of the client(s) such as providing reasonable notice, allowing adequate time for the employment of another attorney, and surrendering files related to the proceeding. Under paragraph (c)(2), a motion to withdraw will not be effective until the ALJ rules on the motion, which could be conditioned or denied by the ALJ to avoid prejudice to the attorney's client(s) and other parties.

#### *§ 4.110 Voluntary withdrawal and stipulated dismissal*

It is not uncommon for individual parties to seek a voluntary withdrawal and dismissal of a proceeding or for all parties to jointly stipulate to a dismissal of a proceeding. This provision explains the procedures for requesting a voluntary withdrawal or stipulated dismissal and states when a dismissal becomes effective. For a voluntary withdrawal, paragraph (a) will require that

the party initiating the proceeding file and serve a motion to dismiss that confirms the party's intention to voluntarily withdraw from the proceeding. The voluntary withdrawal will become effective when the ALJ issues the order of dismissal. When all parties to a proceeding agree and stipulate to the dismissal of a proceeding, paragraph (b) will allow the parties to file and serve a joint motion to dismiss that becomes effective when the ALJ issues an order dismissing the proceeding.

#### *§ 4.111 Summary judgment*

This summary judgment provision codifies DCHD's current practices for resolving proceedings when there is no genuine dispute as to any material fact. At present, ALJs in DCHD generally allow litigants to file motions for summary judgment seeking full or partial relief, and the IBLA has long recognized this procedure as an appropriate means of resolving issues without a hearing. See, e.g., *06 Livestock Company*, 192 IBLA 323, 33435 (2018); *Larson v. BLM (On Reconsideration)*, 129 IBLA 250, 252 (1994). Although ALJs are not bound by the FRCP, this rule roughly parallels the procedures and standards set forth in FRCP 56. However, this rule has been tailored for administrative proceedings before DCHD and modified to provide additional instructions about formatting, deadlines, and content requirements for motions and responses.

Paragraph (a) provides a brief overview of the summary judgment process and standards to better serve pro se litigants and others who may be less familiar with the process. It also explains an ALJ's authority to resolve a proceeding through summary judgment when no genuine dispute exists as to any material fact and the movant is entitled to a decision as a matter of law. When an ALJ grants a summary judgment motion that completely resolves a matter, an evidentiary

hearing is unnecessary and will not be conducted. See, e.g., *Wroten Land & Cattle Co.*, 197 IBLA 13, 29-31 (2021) (grazing case).

Consistent with IBLA case law, paragraph (b) expressly acknowledges that while FRCP 56 does not apply to proceedings before DCHD, corresponding provisions in the federal summary judgment rule at FRCP 56—and federal case law interpreting FRCP 56—may serve as useful guidance in administrative proceedings. See *Dannelle and Chad Hensley*, 195 IBLA 345, 354-55 (2020). Thus, litigants and ALJs may continue to cite and rely on the extensive body of existing federal case law interpreting and analyzing the relevant standards applicable to summary judgments so long as that federal law does not conflict with the provisions of § 4.111. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Under paragraph (c), parties will receive explicit instructions regarding the formatting and required content for summary judgment motions filed before DCHD. This includes compliance with the filing, service, and document formatting provisions at §§ 4.102 and 4.103. As explained in paragraph (c)(1), the timing of the summary judgment process must comply with any deadlines or scheduling orders established by the ALJ. This allows the ALJ to manage the process to ensure fair scheduling for all parties while also preventing unexpected or last-minute filings that disrupt discovery or hearing preparations. Under paragraph (c)(2), standard page limits will apply to summary judgment motions unless the ALJ orders otherwise. To aid in the efficient and timely resolution of motions, paragraph (c)(4) expressly identifies the summary judgment standard, and paragraph (c)(5) lists the expected contents of a summary judgment motion.

Paragraph (d) addresses the requirements for responses, which includes compliance with the filing, service, and document formatting provisions at §§ 4.102 and 4.103. Paragraphs (d)(1), (d)(2), and (d)(3) specify the deadlines for filing responses and the applicable page limits. This rule also recognizes and authorizes the filing of cross-motions for summary judgment. Parties before DCHD frequently file cross-motions for summary judgment, and the process has proven to be an effective method for resolving proceedings. See 2 Moore’s Manual—Federal Practice and Procedure sec. 17 (noting that cross-motions for summary judgment have been recognized by the courts). When a party files a cross-motion, paragraph (d)(3) allows the cross-motion and any response to the original motion for summary judgment to be combined into a single document with a single page limitation. Paragraph (d)(4) lists the expected contents of a response.

To avoid lengthy and potentially unnecessary briefing, no replies or further briefing will be allowed unless authorized by the ALJ under paragraph (e). Declarations and affidavits will be addressed in paragraph (f), which is modeled after FRCP 56(c)(4). Under paragraph (g), assertions of fact must be supported by documentary evidence. In addition, all attachments, affidavits, declarations, or other supporting materials must be directly referenced in the motion or response using pinpoint citations that identify the page(s) or paragraph number(s) where the supporting text is located. Pinpoint citations enable the ALJ to undertake a more efficient review of the briefing and materials submitted by the parties.

Paragraph (h) discusses the key elements of an ALJ’s consideration of summary judgment motions. Paragraph (h)(1) specifically acknowledge an ALJ’s authority to direct the parties to confer and agree on stipulated facts, which helps to focus the briefing and simplify the review process. Paragraph (h)(2) mirrors FRCP 56(c)(3) and explains that an ALJ need only



consider the materials cited by the parties but will allow the ALJ to also consider other materials that are part of the record of the proceeding. Paragraph (h)(3) recognizes that an ALJ may take official notice of a factual matter in the same manner as a federal district court may take judicial notice. Official notice is described in subpart B of 43 CFR part 4 at rule § 4.24(b) (describing types of records and matters subject to official notice), in the Federal Rules of Evidence (FRE) at Rule 201 (describing the procedure for judicial notice), and in the APA at 5 U.S.C. 556(e) (stating that “[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary”). Paragraphs (h)(4) and (h)(5) roughly parallel FRCP 56(d) and (e) and will address the options available to an ALJ when facts are unavailable to a nonmoving party and when a party fails to properly support or address a fact.

Paragraph (i) explains that the ALJ will issue a written order as part of the summary judgment process that grants or denies the motion for summary judgment in whole or in part. It also states that a summary judgment will only be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. See *06 Livestock Company*, 192 IBLA at 334; see also FRCP 56(a) (federal summary judgment rule).

## Discovery

### *§ 4.112 Discovery generally*

Although a few existing regulatory schemes applicable to the proceedings before DCHD include express procedures for discovery, see, e.g., 43 CFR part 4, subpart L (surface coal mining) and 43 CFR part 45 (hydropower), most regulations offer little guidance regarding the scope of discovery in administrative proceedings. Even so, the IBLA has recognized the

authority of ALJs to authorize discovery and has determined that the FRCP supply useful guidance. See *United States v. Pittsburgh Pac. Co.*, 68 IBLA 342, 352-53 (1982). The discovery rules will generally track the discovery options and procedures available under the FRCP, but the discovery procedures will be streamlined and tailored for use in administrative proceedings to increase efficiency and to better serve pro se litigants.

Paragraph (a) provides parties with a general overview that defines the nature of the discovery process for the benefit of pro se litigants and others less familiar with the process. Although the FRCP do not apply to administrative proceedings before DCHD, paragraph (b) expressly acknowledges that corresponding provisions contained in the federal discovery rules set forth in portions of FRCP 26 through 37—and Federal case law interpreting FRCP 26 through 37—may serve as guidance in administrative proceedings when not in conflict with the discovery provisions in subpart C. The general discovery provisions in § 4.112 roughly parallel the provisions of FRCP 26(b), (c), and (g).

Paragraph (c) provides a broad description of the scope of discovery patterned after FRCP 26(b). Consistent with the standards used by federal courts, parties will be able to obtain discovery of any nonprivileged matter that is relevant to the issues in the proceeding and proportional to the needs of the case. Relevant information will not need to be admissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. See, e.g., FRCP 26(b)(1).

Under these discovery provisions, the ALJ will maintain the discretion to determine the methods of discovery, the scope of discovery, and whether any limitations should apply so that the process is fair and equitable to all parties. Discovery needs in administrative proceedings

before DCHD can vary widely. While some cases may require extensive discovery, other may require little or no discovery prior to adjudication by motion or at hearing. The discovery process in DCHD’s rules is structured so that the ALJ can manage the process to ensure the timely completion of discovery, to explain any confusing processes to pro se litigants, and to avoid problems associated with a purely “party-driven” process that can sometimes result in unnecessary or overly broad discovery requests. Under paragraph (d), ALJs will have the authority to allow discovery using one or more of the standard mechanisms recognized by the FRCP, including: interrogatories (§ 4.113), requests for production (§ 4.114), requests for admission (§ 4.115), and depositions (§ 4.116).

Paragraph (e) will address the requirement that the parties and their representatives sign discovery requests, answers, responses, and objections. The signature requirement is consistent with the requirements imposed by federal district courts. See, e.g., FRCP 26(g), 33(b)(5). Paragraph (f) addresses the authority to limit discovery either at the discretion of the ALJ or on the motion of a party. See, e.g., FRCP 26(b). Paragraph (g) of this section establishes a procedure for the issuance of protective orders to protect confidential, privileged, or sensitive information so that the information either will not be revealed or only disclosed in a specified manner. The requirements in paragraph (g) are patterned after FRCP 26(c).

Finally, in accordance with the general practice before DCHD, paragraph (h) will encourage the parties to cooperate in good faith and reach agreements, where possible, regarding the discovery process, the exchange of information, and the resolution of any disputes.

#### *§ 4.113 Interrogatories*

Paragraph (a) allows parties to serve written interrogatories on any other party, as authorized by the ALJ. Unless otherwise agreed to by the parties or ordered by the ALJ, interrogatories will be limited to 20 in number and responses will be due within 28 days of service. Written interrogatories serve as an effective discovery tool in appropriate proceedings pending before DCHD, and this rule will use interrogatories in administrative proceedings in a manner analogous to the federal district courts under FRCP 33 (interrogatories).

*§ 4.114 Requests for production*

Paragraph (a) allows parties to propound requests for production as authorized by the ALJ. Types of requests for production generally include: (1) requests to produce documents, (2) requests to produce tangible things, and (3) requests to enter onto designated land or property. Paragraph (b) will identify the contents of each request, which requires a party to indicate with particularity: (1) the item or category of items to be produced, copied, or inspected; (2) a reasonable time, place, and manner for any inspection and related acts; and (3) the form in which electronically stored information is to be produced.

Paragraph (c) establishes a default response period of 28 days unless otherwise agreed by the parties or ordered by the ALJ. Written requests for production serve as an effective discovery tool in appropriate proceedings pending before DCHD and this rule will use requests for production in administrative proceedings in a manner analogous to the federal district courts at FRCP 34 (requests for production).

*§ 4.115 Requests for admission*

Paragraph (a) allows a party to serve another party with requests for admission as authorized by the ALJ. To avoid overly burdensome and unnecessary requests, this rule will limit

the number of requests for admission to 20, unless otherwise authorized by the ALJ. Paragraph (b) requires parties to set forth each request separately, and any request to admit the authenticity of a document must be accompanied by a copy of the document unless the document has otherwise been furnished or made available.

A party must answer or object to each request for admission within 28 days of service under paragraph (c) unless another deadline is agreed to by the parties or ordered by the ALJ. Answers must be signed by the person providing the answer, and objections must be signed by the party's representative or the party, if unrepresented. Paragraph (c) also specifies appropriate types of answers and objections.

Paragraph (d) will inform parties that a matter is deemed admitted unless a written answer or objection is timely served. Paragraph (e) will explain that a matter admitted is conclusively established unless the ALJ permits the admission to be withdrawn or finds the admission is contrary to law. Paragraph (f) makes clear that an admission made under this section cannot be used against a party in another proceeding.

This process tends to be used less frequently in proceedings before DCHD but may serve as an effective discovery tool in appropriate proceedings in the same manner as requests for admission under FRCP 36 (requests for admission).

#### *§ 4.116 Depositions*

This section sets forth the procedures for scheduling and taking depositions by oral examination. Except for a few regulations applicable to specific types of proceedings before DCHD, see, e.g., 43 CFR 4.1138 (surface mining) and 43 CFR 45.44 (hydropower), no generally applicable regulation currently exists that describes the deposition process. This rule will fill that

gap by establishing consistent, uniform deposition procedures for administrative proceedings before DCHD.

In most cases, DCHD’s ALJs currently exercise their inherent authority to allow discovery and rely on the FRCP as guidance. See *United States v. Pittsburgh Pac. Co.*, 68 IBLA 342, 349-53 (1982); see also 5 U.S.C. 556(c)(4) (providing ALJs with the authority to take depositions or have depositions taken “when the ends of justice would be served”). The contours of this authority vary, however, depending upon whether the written discovery request or deposition request is directed at a party or a nonparty. Like federal district court judges, an ALJ may compel a party to provide written discovery responses and deposition testimony without the necessity for a subpoena. However, the deposition of a nonparty can only be compelled by subpoena, which may be subject to limitations. The different processes applicable to discovery directed at a party versus a nonparty is reflected in practice under the FRCP. See 14 Bender’s Forms of Discovery Treatise sec. 10.03[2][a]-[b] (2021) (explaining that a subpoena is only required for nonparties under FRCP 45).

Under paragraph (a), a party will be allowed to take the deposition of any person by oral examination when authorized by the ALJ. Parties will be encouraged to schedule and conduct depositions by agreement whenever possible. If a party seeks to take the deposition of a nonparty, and that deposition cannot be scheduled by agreement, then the requesting party will be required to apply for the issuance of a subpoena under the procedures set forth at § 4.120.

Paragraphs (b) through (d) of this section establish the requirements for noticing depositions as well as the procedures for conducting depositions before an officer authorized to administer oaths. These procedures will generally follow the deposition procedures used in

federal district courts but have been tailored and streamlined to meet the needs of administrative proceedings before DCHD. See, e.g., FRCP 28 (persons before whom depositions may be taken), 30 (oral depositions). Paragraph (b) lists the contents of a deposition notice. Paragraph (c) explains the requirements associated with a deposition notice directed to an organization, business entity, government agency, or other entity, which will be modeled after FRCP 30(b)(6). Paragraph (d) details the procedures associated with the deposition, including: (1) administering oaths; (2) the noticing party's responsibility to arrange for deposition facilities and pay the costs of transcription; (3) the ability to conduct cross-examination; (4) the requirement to mark documents and tangible evidence; and (5) the requirement to transcribe the oral examination and prepare a certified transcript.

These rules will not contain procedures for depositions on written questions, because that process is rarely used and unlikely to be used in the future given the advances in technology that allow depositions to be conducted remotely using video technology. But see FRCP 31 (depositions by written questions). This rule does specifically address preservation depositions, however, because litigants before DCHD request permission to conduct preservation depositions with more frequency. Procedures for preservation depositions will be set forth in paragraph (e). Parties will be required to request permission to conduct a preservation deposition by filing a written motion or by making an oral request during a prehearing conference. The requesting party must show either: (1) that the witness will be unable to attend the deposition because of age, illness, or other incapacity; or (2) that the witness is unlikely to attend the hearing and the party will be unable to compel the attendance of the witness by subpoena. These procedures for preservation depositions roughly mirror 43 CFR 4.1033(b) (Tribal acknowledgement procedures).

*§ 4.117 Supplementation or correction*

This section will provide for the supplementation of discovery responses in a manner consistent with the requirements used in federal district courts under FRCP 26(e). Paragraph (a) will substantially incorporate the supplementation requirement contained in the federal discovery rules at FRCP 26(e)(1)(a) when a party learns that the answer or response previously provided is materially incomplete or incorrect. Paragraph (b) will also notify parties that the ALJ may issue an order at any time directing the supplementation of an answer or response.

*§ 4.118 Motion to compel*

This rule allows a party to request an order compelling discovery and will set forth the processes and procedures for making that request. The procedures in this section roughly track FRCP 37(a). Under paragraph (a), a party will be required to file a motion requesting an order to compel that includes: (1) a copy of the discovery request; (2) a copy or description of the response or objection; (3) a concise statement of the facts and law supporting the motion; and (4) a statement that the moving party has, prior to filing the motion, in good faith conferred or attempted to confer with the person, entity, or representative failing to make a disclosure or allow discovery.

Paragraph (b) authorizes responses to be filed within 14 days and will also require a concise statement of the facts and law supporting the response. Under paragraph (c), the ALJ may issue an order granting or denying a motion to compel, in whole or in part, and may issue any other appropriate order, including a protective order or an order imposing curative measures. Curative measures encompass a variety of actions, including but not limited to, orders extending



the discovery period, authorizing additional discovery, or directing a party to make an additional search of its records.

*§ 4.119 Sanctions for failure to comply with a discovery order*

This rule describes the procedures and types of sanctions an ALJ may impose for a failure to comply with a discovery order. As recognized by the IBLA, an ALJ’s authority to sanction a party for failing to obey an order compelling discovery may be guided by FRCP 37(b)(2)(A)-(C). See *United States v. Pittsburgh Pac. Co.*, 68 IBLA at 353.

Paragraph (a) will explain that a party failing to comply with an ALJ order compelling discovery may be subject to appropriate sanctions. The requirement for notice and an opportunity to respond prior to the imposition of sanctions will be discussed in paragraph (b). Consistent with FRCP 37(b), paragraph (c) will list the potential range of sanctions for the violation of a discovery order based on the relevant circumstances and the nature of the violation. The list of sanctions has been tailored to administrative proceedings and does not include sanctions more appropriately exercised by federal district court judges.

Other Procedures

*§ 4.120 Subpoenas*

This subpoena section will establish uniform procedures for requesting and issuing subpoenas in DCHD proceedings. Under the APA, ALJs may “issue subpoenas authorized by law.” 5 U.S.C. 556(c)(2); see also 5 U.S.C. 555(d). Currently, various statutes and regulations applicable to proceedings before DCHD contain different authority, standards, and procedures for the issuance of subpoenas. This provision will establish standardized procedures for the issuance of subpoenas to the extent authorized by law. As a

matter of general practice, parties to administrative proceedings, and their employees, generally understand their legal obligation to appear and testify at DCHD hearings without the need for a subpoena. In addition, discovery directed at a party to the proceeding falls within the purview of the discovery provisions and does not require the issuance of a subpoena. See 14 Bender's Forms of Discovery Treatise sec. 10.03[2][a]-[b] (2021) (explaining that a subpoena is only required for nonparties under FRCP 45). Consequently, hearing subpoenas, depositions subpoenas, and subpoenas for document production (subpoenas duces tecum) will generally only be required to compel testimony and document production by nonparties.

Paragraph (a) describes the purpose of this subpoena section for those less familiar with the process. Unlike FRCP 45, subpoenas will not be issued by parties or their attorneys under this section. Instead, any party seeking to obtain a subpoena will be required to file a written application with the ALJ under paragraph (b) that demonstrates the requested subpoena is reasonable in scope and relevant to the proceeding. The ALJ will then be responsible for reviewing the applicable legal authority and determining whether to issue the requested subpoena in accordance with paragraph (c).

Under paragraph (c), if the ALJ determines that it would be appropriate to issue a subpoena, it would be issued on a form that contains the caption for the proceeding along with the name and address of the person or entity being subpoenaed. If the subpoena orders a person to testify at a hearing or deposition, then the subpoena would also contain the specified date, time, and place. If the subpoena requires testimony using video, teleconference, or other technology, the information necessary to testify remotely will also be included in the subpoena. If the subpoena requires the production of documents, the production date and method of production will be included in the subpoena.

A party will be required to serve the subpoena in person or by certified or registered mail as set forth in paragraph (d). The existing regulation at 43 CFR 4.26(a) only authorizes personal service, so this will expand the methods of service. Under paragraph (e), the person serving the subpoena will be required to prepare a certificate of service swearing or affirming that the subpoena was properly served in the manner specified.

Under paragraph (f), a witness who is not a party will be entitled to witness fees and mileage fees equivalent to that paid to witnesses in federal district court under 28 U.S.C. 1821. Consistent with 43 CFR 4.26 and FRCP 45(c), a witness who is not a party may not be compelled to travel to attend a hearing or deposition at place more than 100 miles from where the person resides, is employed, or regularly transacts business unless another geographic limit applies by statute to the proceeding. No geographic limit will apply to testimony conducted using video, teleconference, or other suitable technology that allows a person to testify remotely.

Recipients of a subpoena may file a motion to quash or modify the subpoena within 10 days of service under paragraph (h). Filing a motion to quash or modify the subpoena will stay the effect of the subpoena pending the ALJ's decision. Enforcement for the failure to comply with a subpoena occurs in federal court. *See* 5 U.S.C. 555(d). According to the APA, an agency's subpoena may be sustained "to the extent that it is found to be in accordance with law," and "the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." *Id.* Paragraph (i) will alert parties and practitioners to the necessity for judicial enforcement.

#### *§ 4.121 Sanctions*

Under the APA, the ALJ is vested with the general authority to regulate the course of the proceeding. 5 U.S.C. 556(c)(5). At present, only a few regulations expressly discuss the authority to impose sanctions. See, e.g., 43 CFR 4.27 (ex parte communication provision); 43 CFR 4.1156 (surface mining civil penalty provision). This rule will establish a procedure for imposing appropriate sanction, so ALJs will have the ability to enforce their own rulings and orders, while also encouraging compliance with regulatory procedures governing the proceeding. This section provides consistent, well-defined procedures for ALJs to use when imposing sanctions so parties will better understand their responsibilities and the potential consequences of failing to comply with an ALJ order, violating a regulatory provision in this subpart, or engaging in other prejudicial conduct.

As acknowledged by the IBLA, “an ALJ can and indeed must regulate the course of a hearing and appropriately impose necessary sanctions,” so long as parties receive notice of the possible range of sanctions either as part of a regulatory provision or ALJ order. See *Burke Ranches, Inc. v. Bureau of Land Management (BLM)*, 173 IBLA 45, 4748 (2007). Paragraph (a) will explicitly authorize an ALJ to impose appropriate sanctions for noncompliance with an ALJ order, violation of the regulations in this subpart, a failure to prosecute or defend in a timely manner, or other misconduct that prejudices another party or interferes with the efficient, orderly, and fair conduct of the proceeding. The requirement to provide notice and an opportunity to respond before imposing sanctions will be contained in paragraph (b). And paragraph (c) will list the nature and types of sanctions available depending on the circumstances and the nature of the violation.

#### *§ 4.122 Interlocutory appeal*

The interlocutory appeal provision will better describe the process for obtaining permission to file an interlocutory appeal and builds on the general rule contained in subpart B at 43 CFR 4.28. As noted by the IBLA, “interlocutory appeals are generally viewed with disfavor.” *Yates Petroleum*, 136 IBLA 249, 250 (1996). There are three key reasons. First, when proceedings are stayed during an interlocutory appeal, an interlocutory appeal may delay the proceedings rather than advance decision making. Second, appeals of non-final orders tend to disrupt case processing and docket management at the Appeals Board, which must put aside older appeals to expedite an interlocutory appeal. And third, frequent intervention in ongoing proceedings disrupts an ALJ’s proper administration of the proceeding and may lead to increased requests for interlocutory appeals. Consequently, parties seeking to obtain review of a non-final ALJ order before the conclusion of the proceeding will be required to obtain permission through the two-step process described in this section.

For parties unfamiliar with the interlocutory appeal process, paragraph (a) provides a brief overview. The two-step process applicable to interlocutory appeals is described in paragraph (b). First, the party will be required to file an application with the ALJ to certify the order, in whole or in part, for interlocutory appeal. Second, the party will be required to obtain permission from the Appeals Board to file an interlocutory appeal.

At present, the general interlocutory appeal rule in subpart B, 43 CFR 4.28, does not provide a specific standard for ALJs to use when determining whether to certify an order for interlocutory review, so the IBLA has held that ALJs should be limited to the same standard applicable to the Appeals Board. *Western Watersheds Project v. BLM*, 164 IBLA 300, 303-04

(2005). As part of this rule, DCHD will adopt a standard equivalent to that used by the federal courts at 28 U.S.C. 1292. Under paragraph (c), an ALJ will be authorized to certify an order if:

- (1) the order involves a controlling question of law about which there are substantial grounds for difference of opinion; and
- (2) an immediate appeal will materially advance the completion of the proceeding.

Paragraph (d) will require a party to file an application requesting certification by the ALJ within 14 days of the ALJ's order and will specify the contents of the application. Any response by a party opposing the application for certification must be filed within 14 days of the filing of the application under paragraph (e). The ALJ will then reach a decision on certification based on the application and response as specified under paragraph (f).

A party will have 14 days after the ALJ's ruling on the application for certification to petition the Appeals Board for permission to file an interlocutory appeal under paragraph (g). The contents of the petition will be set forth in paragraphs (g)(1) through (g)(4). The Appeals Board may then grant or deny permission in accordance with § 4.28 (for the IBIA or the Ad Hoc Board) or § 4.414 (for the IBLA).

As explained in paragraph (i), neither the certification nor the interlocutory appeal will operate to suspend the proceeding, unless so ordered by the ALJ or the Appeals Board.

#### *§ 4.123 Alternative Dispute Resolution*

Alternative Dispute Resolution (ADR) refers to the various processes and techniques used for resolving disputes without litigation or a hearing. DCHD offers ADR procedures consistent with the Administrative Dispute Resolution Act, 5 U.S.C. 571-84. Parties are encouraged to consider ADR as an option for dispute resolution in proceedings before DCHD, because ADR affords parties the opportunity to engage in collaborative problem solving, which could avoid the time and expense associated with adjudication.

Paragraph (a) describes the purpose of ADR in administrative proceedings. Paragraph (b) will explain that ADR is a voluntary process and parties cannot be forced to agree to a resolution by participating in ADR. If ADR is unsuccessful in reaching an agreement, the proceeding will be adjudicated by the ALJ. In accordance with paragraph (c), parties will be able to file a request to use ADR at any time during the proceeding. The ALJ will also have the option of notifying the parties that the matter has been identified as a candidate for ADR. Often, the ALJ discusses ADR options during a prehearing conference if the pending matter appears appropriate for resolution without a hearing. DCHD currently has an ADR program that emphasizes mediation, and written procedures describing that process can be made available to the parties on request.

## Hearing Process and Procedure

### *§ 4.124 Hearing scheduling*

Hearings before DCHD are generally scheduled by the ALJ in coordination with the parties. Paragraph (a) codifies this practice and identifies relevant considerations for scheduling, including applicable statutory requirements, the convenience of the parties and witnesses, the availability of suitable hearing space, and the need for any special accommodations.

During the COVID-19 pandemic, DCHD also developed a process for conducting hearings using remote video technology. In doing so, DCHD considered the procedures of other federal agencies using video technology. See, e.g., Lederer, *Report for ACUS: Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings* (June 3, 2021); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication* (86 FR 36075; July 8, 2021). While DCHD expects to conduct in-person hearings going forward, DCHD also anticipates that hearings will continue to be conducted using video technology, in whole or in part, as warranted by the individual circumstances of each case.

Paragraph (b) will expressly authorize the use of video, teleconference, and other suitable technology for hearings. Given that technology can change rapidly over time, this provision does not attempt to identify the precise technology that will be used for conducting the hearing. Instead, paragraph (c) explains that parties will receive advance written notice of the hearing location and dates, and to the extent that a hearing will be conducted, in whole or in part, using video, teleconference, or other suitable technology, the parties will also be provided with instructions and guidance for participating in the hearing using those technologies.

#### *§ 4.125 Hearing postponements*

Hearing postponements are generally disfavored. Once a hearing has been scheduled, the parties and the ALJ will have begun preparing for the hearing by arranging for the attendance of witnesses and securing the services of a reporter to transcribe the proceeding. Consequently, paragraph (a) requires a party requesting a postponement to show good cause and reasonable diligence in preparing for the hearing. This standard mirrors the existing requirement for postponements found at 43 CFR 4.432 (hearings involving questions of fact) and 43 CFR 4.452-3 (contest proceedings).



Paragraph (b) will generally require a motion for postponement be filed at least 21 days before the hearing, absent compelling circumstances. Parties will also be put on notice that ALJs generally will not grant a postponement request made less than 10 days in advance of the hearing date, unless all parties agree to postpone the hearing, or the requesting party demonstrates that an emergency occurred that could not be anticipated. ALJs are generally more receptive to postponement requests when all parties agree to the delay or when the parties have committed to engage in settlement discussions that could resolve the matter without the need for a hearing.

Paragraph (c) describes the contents of any motion as well as the requirement to contact the other parties to ascertain their willingness to agree to a postponement. DCHD's ALJs generally disfavor repeated requests for postponement made by the same party and will require a showing of compelling circumstances under paragraph (d) to avoid prejudice to other parties and to ensure that the interests of justice are met.

#### *§ 4.126 Hearing procedures generally*

As provided in the APA at 5 U.S.C. 556(d): "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Paragraph (a) provides a broad overview of the hearing procedures applicable to administrative proceedings before DCHD consistent with the language of the APA. It also emphasizes the presentation of evidence, preparation of a verbatim transcript under § 4.128, and the use of the hearing record to inform the ALJ's decision.

See also 5 U.S.C. 556(e) (describing hearing record).

Paragraph (b) sets forth the authority of the ALJ to conduct hearings in an orderly and judicial manner. See, e.g., 43 CFR 4.474(a) (grazing). As the administrative trial court for the

Department of the Interior, ALJs use similar procedures to those used in federal district courts to conduct civil trials. The broad powers of ALJs have been summarized in the APA at 5 U.S.C. 556(c) and include the authority to “regulate the course of the hearing.” At present, a variety of regulatory provisions list the authority and powers of ALJs applicable to specific types of proceedings. See, e.g., 43 CFR 4.433 (hearings involving questions of fact), 43 CFR 4.474 (grazing), 43 CFR 4.1121 (surface mining), 43 CFR 45.31 (hydropower). Paragraph (b) will establish a uniform description of the authority and powers of the ALJ when conducting hearings. This authority will include the power to: subpoena witnesses, administer oaths, call and examine witnesses, provide for the sequestration of witnesses, rule on the admission of evidence, take official notice of a factual matter, issue protective orders, recess or continue a hearing, rule on motions, direct the filing of written briefs, and impose sanctions.

Paragraph (c) will address the order and presentation of witnesses and evidence at hearing. The ALJ determines the order of presentation based on the applicable legal standards as well as considerations of fairness and judicial efficiency. Applicable legal standards may include the burden of proof. Fairness and judicial efficiency considerations may include agreements made by the parties and witness availability. Each party will remain responsible for presenting its case and defenses to ensure the adequacy of the hearing record, subject to any limitations imposed by law, regulation, or order.

In accordance with paragraph (d), the ALJ will prescribe the format, timing, and content of any post-hearing briefs either at the conclusion of the hearing or in a subsequent written order. Once a hearing concludes, no additional evidence will be received unless the ALJ finds good cause to reopen a hearing under paragraph (e). Under paragraph (f), an ALJ will be able to find

that a party waived its right to a hearing if the party failed to appear at the hearing without good cause.

*§ 4.127 Evidence*

As explained in the APA at 5 U.S.C. 556(c)(3), the ALJ has the authority to “rule on offers of proof and receive relevant evidence.” In addition, “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” See 5 U.S.C. 556(d). Paragraph (a) expressly recognizes the ALJ’s authority to admit or exclude evidence. The Federal Rules of Evidence (FRE), while not directly applicable to administrative hearings conducted under subpart C, would be available for use by the ALJ as guidance.

Paragraph (b) will specify that oral testimony must be under oath or affirmation. It will also explain that witnesses are subject to cross-examination, see 5 U.S.C. 556(d), and may be questioned at hearing by the ALJ. Paragraph (c) will explain that objections to the admission of evidence during hearing must be made on the record, and if the ALJ sustains an objection to the admission of evidence, the affected party will be able to preserve the issue by making an offer of proof.

Parties are encouraged to stipulate to relevant factual matters, whenever possible, to streamline the hearing under paragraph (d). As explained in paragraph (d), stipulations will be binding on the parties with respect to the matters stipulated. Oral stipulations will be made on the record at hearing and written stipulations will be received into evidence as exhibits.

Paragraph (e) sets forth the requirements for using depositions at hearing and will be roughly modeled after 43 CFR 45.53 (hydropower). This paragraph will inform parties that

depositions do not become part of the hearing record unless received into evidence, in whole or in part, as an exhibit by the ALJ. The requirements for using a deposition will be explained in paragraph (e)(1). Paragraph (e)(2) explains when an ALJ will exclude a question and response from evidence. For purposes of ensuring completeness, paragraph (e)(3) will permit another party to request the inclusion of additional portions of a deposition based on considerations of fairness. Paragraph (e)(4) will address the process for admitting both written and video depositions.

#### *§ 4.128 Transcripts and reporting*

In accordance with DCHD's historic practice, hearings conducted under subpart C will be transcribed verbatim. The procedures for obtaining a transcript and paying the associated fees will be set forth in paragraph (a). At present, some regulations applicable to specific types of proceedings within DCHD's jurisdiction provide for the payment of reporting costs by the bureau or office. See, e.g., 43 CFR 4.476(d) (grazing), 43 CFR 4.452-7(a) (Government mining contest), 43 CFR 4.436 (hearings involving fact finding). Other regulatory provisions are silent on the allocation of costs. Paragraph (a) will establish a standardized procedure for allocating costs when hearings are conducted before DCHD. Allocating these costs to the bureau or office involved in the proceeding will serve the adjudicatory function of those programs and will address DCHD's limited budget to cover such costs.

Paragraph (b) will explain that the official transcript, along with any exhibits, must be duly certified by the reporter and submitted to the ALJ for filing. Any corrections to the transcript must be made in accordance with the procedures in paragraph (c).

#### *§ 4.129 Decision*

As explained in paragraph (a), an ALJ will issue a written decision following hearing, unless a statute or regulation allows for the issuance of an oral decision. See, e.g., 43 CFR 4.1187(e) (surfacing mining). Paragraph (b) recognizes that decisions issued by the ALJ are final for the Department unless a notice of appeal, petition for review, or petition for reconsideration is filed or the applicable statute, regulation, or order of referral requires the ALJ to issue: (1) proposed findings of fact on issues presented at hearing; or (2) a recommended decision that includes findings of fact and conclusions of law. See, e.g., 43 CFR 4.338(a) (referral from the IBIA); 43 CFR 4.409(g) (referral from the IBLA).

#### Reconsideration, Appeal, and Review

##### *§ 4.130 Reconsideration*

At present, DCHD does not have a general regulation governing reconsideration, and the lack of a regulatory standard and procedure has created uncertainty. See *Idaho Cattle Ass'n*, 190 IBLA 99 (2017), *reconsideration denied*, 195 IBLA 283 (2020). This section will create a reconsideration rule for DCHD and will provide for the expedited review of petitions for reconsideration before the expiration of the normal 30-day appeal period.

To ensure a quick review, paragraph (a) requires that a petition for reconsideration from a dispositive order or decision be filed within 14 days after issuance of the order or decision. DCHD will adopt an “extraordinary circumstances” standard in paragraph (b) that generally mirrors the IBLA’s regulatory approach as well as the standards used by federal courts when reviewing motions to amend or alter a judgment under FRCP 59(e). See, e.g., *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9<sup>th</sup> Cir. 2000); *Mouzon v. Radiancy, Inc.*, 309 F.R.D. 60, 63 (D.D.C. 2015); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam).

Because strict deadlines exist for filing appeals and requesting review, paragraph (c) will not allow responses to petitions for reconsideration unless authorized by the ALJ. Paragraph (d) will require the ALJ to expeditiously review the petition for reconsideration within 10 days of filing and determine whether to accept the petition for reconsideration for further analysis. If the ALJ fails to act on the petition for reconsideration within 10 days, then the petition for reconsideration will be deemed denied.

As explained in paragraph (e), filing a petition for reconsideration will not stay the effectiveness of the dispositive order or decision unless the ALJ accepts the petition for reconsideration for further analysis. However, if the ALJ accepts the petition for reconsideration for further analysis, the effectiveness of the dispositive order or decision will be automatically stayed, and all applicable deadlines will be tolled until the ALJ issues a decision on reconsideration.

As explained in paragraph (f), a decision on reconsideration issued by the ALJ will be final for purposes of appeal and review. A notice issued by the ALJ declining to accept the petition for reconsideration for further analysis or a failure by the ALJ to act on the petition within 10 days will not be subject to appeal or review. If a party files a notice of appeal or requests review of the dispositive order or decision before the ALJ resolves the petition for reconsideration, the ALJ will no longer have jurisdiction, and the matter will be forwarded to the appropriate appellate or reviewing authority.

Paragraph (g) makes clear that a party will not be required to file a petition for reconsideration to exhaust administrative remedies.

#### *§ 4.131 Appeal and review*

Given the wide range of different matters subject to DCHD’s jurisdiction, the process for appealing or seeking review is governed by the statutory or regulatory provisions applicable to the specific type of proceeding involved. This section will advise parties to review and follow the requirements set forth in the pertinent statutes and regulations that govern their proceeding.

*Specific Rules Applicable to Certain Types of Proceedings Before the Departmental Cases Hearings Division*

The rules applicable to certain types of proceedings before DCHD are divided into three broad categories: (1) Specific Rules Applicable to Referrals for Fact-Finding Hearings; (2) Specific Rules Applicable to Contest Proceedings; and (3) Specific Rules Applicable to Grazing Proceedings (Inside and Outside of Grazing Districts).

Specific Rules Applicable to Referrals for Fact-Finding Hearings

*§ 4.150 Procedures for hearing referrals*

At present, the procedures for adjudicating matters referred to an ALJ for factfinding are set forth in the existing regulations at 43 CFR 4.430–4.438. As part of this regulatory update, DCHD will relocate the provisions governing fact-finding hearings from subpart E to subpart C. DCHD will also modify and revise the existing provisions governing fact-finding hearings to specifically incorporate and apply the General Procedural Rules for Practice before DCHD as set forth in subpart C at §§ 4.100 through 4.131.

Paragraph (a) provides a general overview and explains that a proceeding may be referred to an ALJ for an evidentiary hearing by an Appeals Board or other Departmental entity when it appears that specific issues of material fact require a hearing for resolution. While

referrals typically originate from one of the Appeals Boards, other Departmental entities, including the Secretary and the Director of OHA, may also make referrals.

Under paragraph (b), DCHD will specifically adopt and apply the General Procedural Rules for Practice before DCHD in addition to the rules set forth at §§ 4.150 through 4.151. By incorporating and applying the General Procedural Rules for Practice before DCHD, it will no longer be necessary to include separate provisions related to prehearing conferences, hearing notices, postponements, evidence, hearing conduct, court reporting, and transcription, such as those contained in the existing regulations at 43 CFR 4.430–4.437. Therefore, the existing provisions will be removed as part of this regulatory update and fact-finding hearings will be governed by the more comprehensive General Procedural Rules for Practice before DCHD contained in subpart

C.

Paragraph (c) will specifically acknowledge the ALJ’s authority to conduct the proceedings and any hearing involving questions of fact in an orderly and judicial manner, subject to any limitations prescribed in the referral. Typical limitations contained in a referral could include a deadline for completing the hearing or a restriction on the scope of the issues to be adjudicated. Unless otherwise directed by the referring entity, however, paragraph (d) will authorize the ALJ to “consider other relevant issues or evidence identified after referral of the matter to DCHD.” This provision in paragraph (d) reflects current practice and is consistent with the IBLA’s rule at § 4.409(g)(4).

*§ 4.151 Resolution of hearing referrals*



Currently, 43 CFR 4.438 describes the types of action to be taken by an ALJ upon completion of a fact-finding hearing. This section will roughly mirror the existing regulatory provision and will also comply with the requirements of the IBLA's rule at § 4.409(g)(3). Subject to the instructions contained in the referral, the ALJ will be required to issue one of the following at the conclusion of the proceeding: (1) proposed findings of fact on the issues presented at 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.

If an ALJ issues proposed findings of fact or a recommended decision, then paragraph (b) will require the ALJ to transmit the entire record of the proceeding to the entity making the referral. Under paragraph (c), parties will have 30 days from service of any proposed findings of fact or a recommended decision to file exceptions or comments with the entity making the referral. If the ALJ issues a final decision that may be appealed to an Appeals Board or other Departmental entity, then paragraph (d) will require the ALJ to advise the parties of their appeal rights at the conclusion of the decision.

#### Specific Rules Applicable to Contest Proceedings

The rules governing contest proceedings are currently codified at 43 CFR 4.450– 4.452-9 in subpart E. As part of this rulemaking, DCHD proposes that the contest proceeding provisions be relocated to subpart C and renumbered as §§ 4.160 through 4.169. For the most part, the rules governing private and government contest will not be substantively modified, except that the General Procedural Rules for Practice before DCHD contained in subpart C will be substituted for the existing provisions governing the hearing process. Most changes will be directed at fixing

cross-references, adopting gender-neutral terminology, using plain language, combining similar topics, and making formatting more consistent with other provisions in subpart C.

*§ 4.160 Private contests; initiation of a private contest*

This section will carry forward the text from the existing regulation at 43 CFR 4.450-1 with minor modifications, including a reference to the “person or entity” and a cross-reference to indicate that the proceedings will be governed by the regulations at §§ 4.160 through 4.169 of this subpart.

*§ 4.161 Private contests; protests*

This section will carry forward the text from the existing regulation at 43 CFR 4.450-2 with minor modifications, including a reference to the “person or entity” and other edits to modernize the language.

*§ 4.162 Private contests; complaint*

This section will combine the text from the existing regulations at 43 CFR 4.450-3 and 4.450-4 into one section and will renumber the paragraphs accordingly. Additional minor edits will be made to modernize the language and to include a cross-reference to the OHA Standing Orders on Contact Information in paragraph (b)(8). In addition, paragraph (e) will be updated to increase the filing fee to \$20 and the deposit towards the reporter’s fee to \$200.

*§ 4.163 Private contests; service*

This section will carry forward the text from the existing regulation at 43 CFR 4.450-5 with some modifications. The modifications will include changes to formatting, cross-references to subpart C, and modernization of the regulatory language.

Paragraph (a) will include the information currently contained in the first unnumbered paragraph of the existing regulation at 43 CFR 4.450-5 as well as the 30-day service deadline contained in the existing regulation at 43 CFR 4.450-3. To update the service provisions, the existing cross references to 43 CFR 4.422 will be removed and replaced with a cross-reference to the service provisions in subpart C set forth at § 4.102, except that non-electronic service will still be allowed by personal delivery, registered mail, or certified mail. The paragraph will also be modified to modernize the language related to service on minors and persons adjudged legally incompetent.

Paragraph (b) will include the information contained in paragraph (a) of the existing regulation at 43 CFR 4.450-5 but will make modifications to correct the cross-references and to replace “manager” with the “BLM State Office.”

Paragraph (c) will address service by publication and will include the information contained in paragraphs (b)(1) and (b)(2) of the existing regulation at 43 CFR 4.450-5 with modifications to modernize the language and to replace “manager” with the “BLM State Office.” Paragraph (d) will address publication, mailing, and posting of notice and will include the information contained in paragraph (b)(3) of the existing regulation at 43 CFR 4.450-5 with modifications to modernize the language and to specifically reference the “BLM State Office.” Given recent trends that have reduced the availability of newspapers of general circulation, DCHD is seeking comments on the possibility of “publishing” notice on the web site of the BLM State Office when a newspaper of general circulation is not available or the possibility of providing notice through other means.

Proof of service will be discussed in paragraph (e) and will carry forward the information contained in the existing regulation at 43 CFR 4.450-5 with modifications to modernize the language and to specifically reference the “BLM State Office.”

*§ 4.164 Private contests; answer to complaint*

The rule will combine the existing regulations at 43 CFR 4.450-6 and 43 CFR 4.450-7 into one section and will modify the formatting to be consistent with this regulatory update.

*§ 4.165 Government contests; initiation of Government contest*

The rule will carry forward the text from the existing regulation at 43 CFR 4.451-1 without modification.

*§ 4.166 Government contests; complaint and service*

The rule will carry forward the text from the existing regulation at 43 CFR 4.451-2 with some modifications. The modifications will include changes to formatting, adjustments to the paragraph numbering, updates to the cross-references, and modernization of the regulatory language.

This section will be organized into two paragraphs. Paragraph (a) will explain that Government contest proceedings will be governed by the rules relating to private contests, subject to the listed exceptions. Paragraph (b) will contain the exceptions specifically related to service.

*§ 4.167 Government contest; answer to complaint*

This new section will mirror the procedures applicable to private contest proceedings. The inclusion of an answer provision will ensure that contestees understand their obligation to file an answer to the complaint in a Government contest proceeding. This section will replicate the provisions of § 4.160-5 but will include specific references to the Government contest complaint.

*§ 4.168 Proceedings before Administrative Law Judge*

DCHD will modify and revise the existing provisions governing proceedings before the ALJ to specifically incorporate and apply the General Procedural Rules for Practice before DCHD as provided in this subpart at §§ 4.100 through 4.131. At present, the regulatory provisions governing proceedings before the ALJ are set forth at 43 CFR 4.452-1 to 4.452-9. Those existing provisions will be removed as part of this regulatory update and replaced by two new sections: (1) § 4.168 will describe proceedings before the ALJ; and (2) § 4.169 will describe the appeal procedures.

Paragraph (a) will specifically incorporate and apply the General Procedural Rules for Practice before DCHD set forth in subpart C to contest proceedings in addition to the rules applicable to contest proceedings. By incorporating and applying the General Procedural Rules for Practice before DCHD, it will no longer be necessary to include separate provisions related to prehearing conferences, hearing notices, postponements, evidence, hearing conduct, or evidence such as those contained in the existing regulations at 43 CFR 4.452-1 to 4.452-8. Therefore, the existing provisions will be removed, and contest proceedings will be governed by the more comprehensive General Procedural Rules for Practice before DCHD contained in subpart C.

Paragraph (b) will recognize the authority of the ALJ to conduct a contest proceeding in an orderly and judicial manner and to issue a decision that will be final for the Department unless appealed. Paragraph (c) will address the allocation of the reporter's fees consistent with the existing regulation at 43 CFR 4.452-7. The government agency initiating the proceeding will continue to be responsible for the reporter's fees regardless of which party is successful. In a private contest, each party will continue to be responsible for reimbursing DCHD for the reporter's fees covering that portion of the party's direct evidence and cross-examination, but if the ultimate decision is adverse to the contestant, then the contestant will be required to pay all costs otherwise payable by the contestee.

#### *§ 4.169 Appeal*

This section will carry forward the text from the existing regulation at 43 CFR 4.452-9 with some modifications to correct the cross-references and to identify the "Board" as the "IBLA."

#### *Specific Rules Applicable to Grazing Proceedings (Inside and Outside of Grazing Districts)*

The rules governing grazing proceedings are currently codified at 43 CFR 4.470–480 in subpart E. As part of this rulemaking, DCHD proposes that the existing grazing procedures be removed from subpart E and relocated to subpart C. The provisions governing grazing procedures will be renumbered as §§ 4.170 through 4.175 and will be revised, updated, and modified as set forth below. DCHD also will incorporate and apply the General Procedural Rules for Practice before DCHD in subpart C to grazing proceedings.

#### *§ 4.170 Appealing a grazing decision*

This section will explain the process for appealing a grazing decision to DCHD. At present, the appeal process is discussed in 43 CFR 4.470. DCHD will revise and update the existing regulation by requiring that appeals be filed directly with DCHD, requiring appeals to be served in accordance with the filing and service rules in subpart C, and describing the contents of a grazing appeal with more specificity.

Under paragraph (a), an appellant will be required to file an appeal from a grazing decision with DCHD in accordance with § 4.102 (filing and service) and § 4.103 (document formatting). To be timely, paragraph (b) will require an appellant to file a notice of appeal within 30 days after receipt of the grazing decision or within 30 days after the grazing decision becomes final as provided in 43 CFR 4160.3(a). Paragraph (c) will require service of the notice of appeal in accordance with the filing and service provisions contained in § 4.102 on: (1) each person or entity named in the BLM grazing decision; (2) the appropriate official of the Office of the Solicitor; and (3) the BLM office that issued the decision.

Paragraph (d) will specify the contents of a grazing appeal, which will include: (1) a copy of the decision or proposed decision being appeal; (2) a statement showing that the person or entity filing the notice of appeal is adversely affected by the decision; (3) a statement of timeliness providing the date when the person or entity filing the notice of appeal received a copy of the decision and showing that the appeal is timely; and (4) a statement that clearly and concisely states the reasons why the appellant believes the BLM grazing decision is incorrect, which contains specific factual allegations related to the BLM grazing decision being appealed and a summary of the applicable legal arguments. DCHD frequently receives notices of appeal that fail to adequately address standing, timeliness, and the grounds for appeal. These shortcomings can lead to inefficiencies in case processing and delays in adjudication. Given that

a significant percentage of grazing appeals are initiated by pro se litigants, the increased specificity contained in this rule should lead to more complete initial filings and allow for more expeditious case processing.

This rule also addresses waiver and amendments in paragraph (e). It informs those who practice before DCHD that any ground for appeal not included in the notice of appeal is waived unless the ALJ grants permission to amend the notice of appeal based on a motion demonstrating good cause. The current regulation at 43 CFR 4.470(c) does not expressly inform appellants that a motion to amend is necessary or that the good cause standard will be applied when evaluating a request to amend.

Paragraph (f) will explain that a person or entity who receives proper notice of a grazing decision and then fails to file a timely notice of appeal may not later challenge the matters decided in the grazing decision.

For those who timely file a notice of appeal, paragraph (g) will explain that the grazing decision will not be automatically stayed. To request a stay, a person or entity will be required to comply with the procedures in § 4.171.

#### *§ 4.171 Petitions for stay*

This section will describe the standards and procedures for obtaining a stay. At present, the stay petition procedures and criteria are contained in the existing regulations at 43 CFR 4.471–4.472. DCHD will clarify the process for obtaining a stay and update the criteria used by the ALJ when determining whether a stay is warranted. The updated stay criteria will be consistent with the criteria adopted by the IBLA as part of this regulatory update in § 4.405(b).



Under paragraph (a), appellants will be able to seek a stay by filing a petition for a stay concurrently with the notice of appeal. While the current regulation at 43 CFR 4.471(c) requires an appellant to satisfy four specific criteria, paragraph (a)(1) will contain only three criteria—and all three reflect criteria presently considered under the existing rule. These criteria will include: (1) irreparable harm, (2) the balance of harms, and (3) the likelihood of success.

The rule will not include the existing “public interest” criterion. Instead, DCHD will adopt an approach consistent with federal court opinions holding that when the Federal Government is the party opposing the stay, the balance of harms and public interest “merge.” See *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that, in the context of a stay, assessing the harm to the opposing party and weighing the public interest “merge when the Government is the opposing party”); see also *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (applying *Nken* in denying preliminary injunction of a final rule issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (applying *Nken* in denying preliminary injunction concerning National Park Service special use permit for oyster farming); *Colo. Wild Horse & Burro Coalition, Inc. v. Jewell*, 130 F. Supp. 3d 205, 220-21 (D.D.C. 2015) (applying *Nken* in denying preliminary injunction of gather of wild horses). Under this principle, consideration of the “public interest” as a separate element becomes unnecessary because the public interest is deemed to align with the balance of harms. If the balance of harms weighs in favor of granting the stay, so does the public interest. If the balance of harms weighs in favor of denial, so does the public interest. The IBLA has favorably cited this reasoning in a published decision, see *Western Watersheds Project v. BLM*, 195 IBLA 115, 137 n.135 (2020), and adopted this approach in several unpublished stay orders.

The irreparable harm criterion under subparagraph (a)(1)(i) requires appellants to show they “will likely be irreparably harmed by implementation of the grazing decision pending the appeal, and that harm will be avoided by granting the stay.” This criterion corresponds with the current regulatory factor at 43 CFR 4.471(c)(3), but the rule will eliminate the “immediate” terminology and instead will require a showing that the irreparable harm will likely occur “pending resolution of the appeal.” This modification promotes the purpose of a stay, which is to prevent or minimize irreparable harm while an appeal is being considered. Elimination of the term “immediate” will not allow stays to be granted when the harm is speculative or is likely to occur at some indefinite time in the future, because the appellant must still show that irreparable harm will likely occur as a result of the decision at some definite time while the grazing appeal is pending. In addition, the appellant must demonstrate that the harm “will be avoided by granting the stay.”

The balance of harms criterion under subparagraph (a)(1)(ii) will remain substantially the same as the relative harm factor in the current regulation at 43 CFR 4.471(c)(1). The additional explanatory language requires a showing that the “irreparable harm to the appellant absent a stay exceeds the harm to the United States or other parties from a stay being granted” and is intended to better describe the standard. The third criterion set forth in subparagraph (a)(1)(iii) addresses the likelihood of success on the merits and remains the same as the standard contained in the existing regulation at 43 CFR 4.471(c)(2).

Paragraph (a)(2) will retain the requirement that the appellant seeking a stay bears the burden of proof to demonstrate that a stay should be granted under all three criteria. Paragraph (a)(3) will better describe and explain the filing and service requirements by expressly citing to

proposed rules §§ 4.102 and 4.103 as well as the applicable Standing Orders. It also lists the individuals entitled to receive service.

Under paragraph (b), BLM and other persons or entities wishing to file a response will have 14 days after service of the stay petition to file any response with DCHD. The existing regulations allow responses to be filed within 10 days, see 43 CFR 4.472(a), but that time frame has led to frequent requests for extensions of time. With the expanded use of electronic filing, DCHD believes the additional response period will still provide ALJs with adequate time to adjudicate stay petitions by the 45-day deadline. This rule also notifies litigants that the failure to file a response will not be construed as an admission that the stay petition should be granted.

Under paragraph (c) no replies or further briefing will be allowed unless authorized by the ALJ. If all parties consent to a stay or if the parties file responses affirmatively stating no opposition to a stay, paragraph (d) would allow the ALJ to summarily grant the stay petition without considering the stay criteria.

Finally, under paragraph (e), DCHD will retain the 45-day time frame for adjudicating a stay petition that currently exists in 43 CFR 4.472(d).

#### *§ 4.172 BLM document filing requirements*

At present, 43 CFR 4.472 contains a list of documents that BLM must transmit within 10 days after receipt of a grazing appeal and stay petition. However, the current regulation does not adequately identify the documents typically necessary for an adjudication of a stay petition. To ensure that ALJs have the requisite documentation to meet the deadline for resolving a stay

petition, paragraph (a) contains a more complete list of documents that BLM will be required to transmitted within 14 days of receiving the notice of appeal.

Paragraph (b) will allow the ALJ to direct BLM to serve a copy of its record for the grazing decision on all parties to the proceeding in addition to, or in lieu of, the discovery procedures set forth in the General Procedural Rules for Practice before DCHD contained in this subpart at §§ 4.112 through 4.119. This initial disclosure option is intended to expedite adjudications on the merits and potentially eliminate the need for additional discovery. This approach is conceptually analogous to the initial document disclosure requirements contained in FRCP 26 and will be included to accelerate the exchange of relevant, discoverable information.

*§ 4.173 Adjudication of grazing appeal*

Paragraph (a) will incorporate and apply the General Procedural Rules for Practice before DCHD as provided in this subpart at §§ 4.100 through 4.131 in addition to the rules applicable to grazing proceedings at §§ 4.170 through 4.175. Doing so will eliminate the need for several existing provisions related to hearing notices, intervention, ALJ authority, service, the conduct of the hearing, court reporting, and transcripts contained in the current grazing regulations at 43 CFR 4.473–4.477. By removing those existing provisions and substituting the more comprehensive General Procedural Rules for Practice before DCHD set forth in subpart C, parties will benefit from a more detailed procedural roadmap for the adjudication of grazing appeals.

Paragraph (b) will recognize the authority of the ALJ to conduct grazing proceedings in an orderly and judicial manner. Paragraph (c) will recognize the authority of the ALJ to issue written decisions that are final for the Department unless appealed under § 4.175. It will also

require ALJs to identify and describe the basis for the decision and apply the substantial compliance standard contained in the existing regulations at 43 CFR 4.480(b).

*§ 4.174 Effect of decision pending appeal; exhaustion and finality*

This section will clarify when a BLM grazing decision becomes effective and will explicitly state the requirements for exhaustion. These concepts are currently discussed in the existing regulations at 43 CFR 4.479, and these proposed revisions do not make significant substantive changes. Paragraph (a) will explain when a BLM grazing decision becomes effective pending an appeal before an ALJ. Paragraph (b) will explicitly state the requirement to exhaust administrative remedies. The exhaustion provision is consistent with the current regulatory requirements but will be stated more plainly to avoid confusion.

*§ 4.175 Appeal and review*

This section will explain a party's right to appeal to the IBLA or seek judicial review. At present, a party's right to appeal and or seek review is described in the existing regulations at 43 CFR 4.478, and this rule does not modify the existing standards. Instead, this provision has been re-organized for clarity. Paragraph (a) will contain the requirements for an appeal to the IBLA from a stay petition order or a decision on the merits, and paragraph (b) will contain the requirements for judicial review.

*Subpart D – Rules Applicable to Appeals Before the Interior Board of Indian Appeals*

The Interior Board of Indian Appeals (Board) hears appeals from decisions rendered by Department of the Interior officials involving Indian matters and decides those appeals finally for the Department. The subjects of these appeals include the use of Indian trust lands and mineral resources; conveyances of rights-of-way on Indian lands; land sales, exchanges, and other

encumbrances; trespass; acquisitions of land in trust; disputes over the recognition of tribal officials for government-to-government relations; probates of trust or restricted property; heirship under the White Earth Reservation Land Settlement Act (WELSA); and pre-award disputes under the Indian Self-Determination and Education Assistance Act. The Board also decides other matters referred to it by the Secretary of the Interior, the Director of OHA, or the Assistant Secretary—Indian Affairs. The Board’s mission is to provide an impartial forum within the Department of the Interior for the fair resolution of disputes involving Indian matters under the Department’s jurisdiction.

Subpart D provides rules applicable to appeals to the Board. We will modernize, clarify, reorganize, and otherwise revise these rules to reflect current practice, take advantage of technological advances, and make the rules more user friendly.

#### Scope of Subpart; Definitions

##### *§ 4.200 How to use this subpart*

We will revise the table in § 4.200(a) that serves as a guide to the contents of subpart D by subject matter, by changing the following cross-references: In (a)(1) add §§ 4.200 through 4.201 for clarity and in (a)(5) replace “§§ 4.350 through 4.357” with “subpart H of this part” because we also will revise and relocate to subpart H the provisions regarding WELSA appeals, currently in §§ 4.350 through 4.357. In addition, in (a)(2) and various other places in subpart D, we will replace the term “decisions” with “orders” for consistency with the existing probate regulations in 43 CFR part 30 that describe the probate “orders” that are appealable to the Board.

#### § 4.201 Definitions

We will include in § 4.201 only those terms used exclusively in subpart D or that have a specialized meaning in subpart D. Specifically, this section will include definitions of “Adversely affected,” “Agency,” “Appellant,” “Board,” “Day,” “Decedent,” “Devise,” “Devisee,” “Estate,” “Formal probate proceeding,” “Heir,” “Individual Indian Money (IIM) account,” “Interested party,” “Intestate,” “Probate Judge,” “LTRO,” “Probate,” “Restricted property,” “Trust personalty,” “Trust property,” and “Will.” Other terms common to all subparts in part 4 will be defined in subpart A.

We will add a definition of “Adversely affected.” The term appears in §§ 4.320 and 4.331 to describe who may appeal to the Board. The definition is consistent with other Departmental regulations and well-established Board precedent that, to have standing to appeal to the Board, an appellant must have suffered or be likely to suffer an injury to a legally protected interest because of the action, order, or decision on appeal. See, e.g., *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296-97 (2014).

We will revise the definition of “Agency” to update the statutory citation contained in it.

We will add a definition of “Appellant” for clarity.

We will revise the definition of “Formal probate proceeding” to replace the word “judge” with “probate judge” for clarity.

We will revise the definition of “Interested party,” which is used to describe persons or entities who may file an appeal or are entitled to receive service of pleadings and orders. The current definition is limited to probate appeals and mirrors the definition in 43 CFR § 30.101.

Without changing the scope of the term as applied to probate appeals, we add language addressing administrative appeals from actions or decisions of BIA officials. The definition is consistent with well-established Board precedent that, to have standing to appeal to the Board, a person or entity must have a legally protected interest that was injured or is likely to be injured by the action, decision, or order on appeal.

We will add a definition of “Probate judge,” meaning an ALJ or IPJ in the Probate Hearings Division, for clarity.

We will delete the definitions of “Administrative law judge (ALJ),” “BIA,” “Indian probate judge (IPJ),” and “Secretary” as duplicative of the definitions in subpart A.

We will delete the definition of “Decision or order (or decision order),” which is used in reference to probate cases, because it is outdated. The existing probate regulations in 43 CFR part 30, which were amended effective January 19, 2022, identify the probate “orders” that are appealable to the Board.

We will remove the definition of “Judge,” because it is convoluted as it excludes administrative judge and means an ALJ or IPJ. Where the term “judge” is used in the existing subpart D regulations, the term “probate judge” will be used instead.

*§§ 4.202–4.309 [Reserved]*

We will renumber this subheading, from “§§ 4.202–4.308” to “§§ 4.202–4.309,” because it currently omits reference to reserved § 4.309.

General Rules for Practice Before the Interior Board of Indian Appeals

*§ 4.310 Documents; filing, service, computing time, and extensions*



We will revise and add new provisions to our existing regulation at § 4.310 to modernize Board practice by allowing for electronic filing and service of documents and clarifying filing and service requirements.

Existing paragraph (a) will be revised and moved to paragraph (c), and existing paragraph (b) will be revised and moved to paragraph (d). We will add new paragraphs (a) and (b), which will address how documents are filed with the Board. New paragraph (a) directs that documents must be delivered to the Board as specified in subpart D and in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information found on the Department of the Interior OHA website and provides the website address for the OHA Standing Orders. New paragraph (b) specifies that documents may be filed with the Board electronically and nonelectronically, also under the terms of the OHA Standing Orders. New paragraph (b) also specifies that federal, state, and local agencies and any attorney representing a person or entity before the Board must file electronically unless otherwise specified in the OHA Standing Orders on Electronic Transmission or when the Board has allowed nonelectronic filing for good cause.

Paragraph (c) will update and clarify the effective date for filing a notice of appeal or other document with the Board. Paragraph (c)(1) specifies that, for documents filed by electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission, the effective date for filing documents with the Board by electronic means is the date of transmission to the Board. Paragraph (c)(1) institutes a new filing deadline for documents filed electronically with the Board: 11:59 p.m. Eastern Time on the due date. We will determine the date and time of filing by using the date and time of filing reflected by the electronic process the Board is using at the time. For example, while the OHA Standing Orders on Electronic Transmission provide that the Board may accept certain filings by email, the date and time of

filing is the date and time that appears on the email received by the Board. When the OHA Standing Orders on Electronic Transmission indicate that the new electronic filing system is deployed, the date and time of filing will be determined by that system. A document filed electronically will be considered timely filed if it is transmitted to the Board, as reflected by the electronic filing system, by 11:59 Eastern Time on the last day of the period prescribed for filing.

Paragraphs (c)(2) and (c)(3) will provide, consistent with Board precedent, that the effective date of filing a document with the Board by non-electronic means is the date of “mailing” to the Board if sent by an official government mail system, such as U.S. mail, or the date of delivery to the Board if delivered by commercial courier or hand delivery. See *Confederated Tribes and Bands of the Yakama Nation v. Northwest Regional Director*, 56 IBIA 176, 181-83 (2013). Existing § 4.310 uses the term “personal delivery” to describe filings that are not sent by an official government mail system, and the term “personal delivery” is not defined but has been construed by the Board to mean commercial courier or hand delivery. See *id.* We will use the terms “commercial courier” and “hand delivery” instead of “personal delivery.” Paragraph (c)(2) specifies that a document filed using U.S. mail or a foreign government’s mail system will be considered timely or untimely based on the date of the postmark, regardless of when the document is received by the Board or placed in the mail, except that if the postmark is not legible then the person or entity who is required to file the document will bear the burden of proving when it was mailed. Paragraph (c)(3) specifies that the date of filing by commercial courier or hand delivery is the date of receipt in the Board’s office during its regular business hours by a person authorized to receive the filing. If a document is delivered to the Board by commercial courier or hand delivery and is received after the Board’s regular business hours, the document will be considered filed on the next business day.

Paragraph (d) will update and clarify requirements for serving documents that are filed with the Board. Paragraph (d) clarifies that service must be done concurrently with filing, and that complete copies of documents filed with the Board, including all attachments, must be served on all interested parties, either by electronic transmission, mailing, delivery by commercial courier, or hand delivery. We will no longer use the term “personal delivery” to describe service by commercial courier or hand delivery. We will also modernize our service requirements by allowing service to occur electronically on the Office of the Solicitor and the bureau or office whose decision is being appealed as specified in the OHA Standing Orders on Electronic Transmission. Paragraph (d) provides that service may be made electronically on other persons or entities through means that the person or entity to be served has consented to in writing under the terms specified in the OHA Standing Orders on Electronic Transmission. Paragraph (d) also specifies that all documents filed with the Board must include a certification that service was made as required by this section, which may help to reduce the frequency of the Board needing to issue orders to the parties to complete service.

We will re-number, without changes, existing paragraphs (c), (d), and (e) as paragraphs (e), (f), and (g), respectively.

Paragraph (f) that was added in a Direct Final Rule will be deleted as more specific information about electronic filing and service is provided for in paragraphs (a) through (d).

#### *§ 4.311 Briefs on appeal*

We will not change § 4.311.

#### *§ 4.312 Board decisions*

In any given year, the Board may have a significant backlog of pending appeals, some of which may have been filed three or more years earlier. In some instances, the delay may result from the parties' request to suspend consideration of the appeal for settlement discussions or other reasons, but in other situations the delay may simply result from the volume and complexity of the appeals that have been filed.

We are designating the existing text of § 4.312 as paragraph "(a)."

Paragraph (b) is new and will authorize the Board in its discretion to issue, through a panel of administrative judges, an order affirming without opinion. Since 1999, the Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, has authorized or required its appellate adjudicators to affirm the results reached below without opinion where (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) either (a) the issue on appeal is squarely controlled by precedent and does not involve the application of precedent to a novel factual situation; or (b) the factual and legal questions raised on appeal are not so substantial as to warrant issuance of a written opinion. See 84 FR 31463, July 2, 2019; 67 FR 54878; August 26, 2002;

64 FR 56135, October 18, 1999. For IBIA's efficient case management, paragraph (b) will allow the Board to issue orders affirming without opinion in similar circumstances. An affirmance without opinion under paragraph (b) does not reflect an abbreviated review of a case; it reflects the use of an abbreviated order to describe the Board's review where the regulatory requirements of paragraph (b) are met. Paragraph (b)'s use of the word "may" reflects that it is within the Board's discretion to affirm without opinion under this provision and that the Board is not required to do so.

Paragraph (b) will state what must be included in a Board order affirming an appealed decision or order without opinion. Specifically, the Board's order must cite the Board's delegated authority (§ 4.21) and this paragraph (§4.312(b)), and state, without further explanation or reasoning, that the result of the decision or order under review is affirmed without opinion. Paragraph (b) will also specify, similar to the Department of Justice's Board of Immigration Appeals affirmance without opinion provision, see 8 CFR 1003.1(e)(4) (2022), that the order will approve the result reached but will not necessarily imply approval of all the reasoning of the decision or order under review. Judicial review will occur as it occurs in review of affirmances without opinion by the Department of Justice's Board of Immigration Appeals, including the court's review of the reasoning contained in the decision or order that had been affirmed without opinion by the Board of Indian Appeals.

Paragraph (c) is new and will specify that nothing in paragraph (a) or paragraph (b) limits the Board's authority to summarily dismiss a case or to summarily adopt, modify, reverse, or set aside a decision or order under review. The Board has issued summary dispositions in various circumstances, for example based on an appellant's failure to allege error in the decision being appealed, and will continue to be able to use summary dispositions to efficiently manage its docket and dispose of cases.

Paragraph (d) is new and will give appellants the option to proceed to Federal court after 36 months without a decision by the Board if the decision being appealed is not in effect and all appellants wish to do so. When an appeal has been pending for an extended time, it presents potential problems for the parties and the Board. If the Department has required the appeal to be taken to exhaust administrative remedies and the decision being appealed has been stayed

pending appeal, the appellant is prevented from seeking judicial review and the affected bureau or office remains unable to implement or modify its decision. In addition, the facts and associated legal issues underlying the dispute may have changed during the pendency of the appeal so that a Board decision would in effect address a problem that no longer exists or has changed in material ways.

Under paragraph (d), the Board will assume that an appellant wishes to maintain the appeal with the Board unless the appellant moves for the Board to issue an order dismissing the case without an opinion by the Board on the merits and making the decision or order being appealed final for the Department. If all the appellants in a case submit or join such a motion, the Board will issue an order dismissing the case without an opinion by the Board, and the appealed decision will become final for the Department as of the date of the Board's order. Paragraph (d) does not address cases in which the appealed decision is in effect, because an appellant in such a case already could seek judicial review.

*§ 4.313 Amicus curiae; intervention; joinder motions*

We propose no changes to § 4.313.

*§ 4.314 Effect of decision pending appeal and exhaustion of administrative remedies*

We are adding a new paragraph (a) consistent with the revisions to § 4.21. Existing § 4.21 generally does not apply to decisions by the BIA, because as a general rule BIA decisions are automatically stayed during the appeal period and during the pendency of an appeal. See 25 CFR 2.6; 43 CFR 4.314. Because our revisions to § 4.21 will make it consistent with § 4.314, we will add a new paragraph (a) to specify that, except as otherwise provided by applicable statute or

regulation, §§ 4.21 and 4.314 govern the effect of a decision pending appeal and exhaustion of administrative remedies. Because § 4.21 will address exhaustion of administrative remedies and finality, we will revise the language of existing paragraph (a), which will become paragraph (b), to specifically address the effect of a decision pending appeal. The revised paragraph (b) will provide that, except as otherwise provided by applicable statute or regulation, a decision of an ALJ, IPJ, or BIA official will not be effective during the time in which an appeal may be filed with the Board, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the Board's decision on appeal, unless the Board issues an order making the decision or any part of it immediately effective.

Existing paragraphs (b) and (c) will become paragraphs (c) and (d), respectively.

*§ 4.315 Reconsideration of a Board decision*

We will not make changes to paragraphs (a), (b), or (c).

We will add a new paragraph (d), which will specify, similar to the Department of Justice's Board of Immigration Appeals regulations, see 8 CFR 1003.2(b)(3) (2022), that a petition for reconsideration based solely on an argument that the case should not have been affirmed without opinion under § 4.312(b) is not permitted.

*§ 4.316 Remands from courts*

We propose no changes to § 4.316.

*§ 4.317 Standards of conduct*

We are revising and clarifying paragraph (a). Existing paragraph (a) states that “[a]ll inquiries about any matter pending before the Board” must be made to the Chief Administrative

Judge or the administrative judge assigned to the matter. At the same time, however, § 4.27 prohibits ex parte communications concerning the merits of a proceeding, and a reader might be confused if they do not read both provisions together.

In addition, inquiries by parties regarding case status are routinely handled by the Board's staff. Section 4.317(a) specifies that, except for ex parte communications that are prohibited by § 4.27, all inquiries by a party to a matter pending before the Board should be directed to the Board's clerk, and all inquiries by a non-party (e.g., Congressional offices, media, etc.) to a matter pending before the Board should be directed to the Chief Administrative Judge of the Board or the administrative judge assigned to the matter. Under § 4.2, the Chief Administrative Judge of the Board acts on behalf of the Board in conducting correspondence and oversees responses to all types of inquiries.

We are not changing paragraph (b).

#### *§ 4.318 Scope of review*

We are revising and updating § 4.318 to make it consistent with the list in § 4.320 of the probate orders that are appealable to the Board and to reflect changes in the probate regulations in 43 CFR part 30 that became effective in 2022. See 86 FR 72086; December 20, 2021. Existing § 4.318 provides that an appeal to the Board in a probate matter will be limited to the issues that were before the ALJ or IPJ “upon the petition for rehearing, reopening, or regarding tribal purchase of interests . . . .” This list is incomplete compared to existing § 4.320(c), which is not limited to “tribal” purchase of interests, and compared to existing § 4.320(d), which includes “modification of the inventory of an estate.” Therefore, we are revising § 4.318 to provide that an appeal to the Board in a probate matter will be limited to those issues that were before the ALJ or



IPJ upon the petition for rehearing or reopening, or regarding added or omitted property or purchase of interests in an estate.

#### Specific Rules for Appeals in Probate Matters

##### *§ 4.320 Who may appeal a probate judge's order?*

In § 4.320, we are replacing the term “judge” with “probate judge” for clarity and to replace “decision” with “order” for consistency with the existing probate regulations in 43 CFR part 30, which identify the “orders” that are subject to appeal to the Board. The Board lacks jurisdiction to review directly an initial probate “decision” determining heirs or beneficiaries; a party must first exhaust remedies with the probate judge by seeking rehearing or reopening. See *Estate of Thomas Eugene Iron*, 58 IBIA 123, 123 n.2 (2013).

We are not changing paragraphs (a), (b), or (c).

We are revising paragraph (d), which currently refers to orders regarding “modification of the inventory of an estate,” to instead refer to orders regarding “added or omitted property.” Under the revised probate regulations, a probate judge’s final order on a request for reconsideration of a distribution order regarding added or omitted property is subject to appeal to the Board.

We will add paragraph (e) to clarify that an order determining that a person for whom a probate proceeding is sought is not deceased is subject to appeal to the Board. These determinations are referred to in existing § 4.324(f)(3).

##### *§ 4.321 How do I appeal a probate judge's order?*

We will revise paragraph (a) to replace the term “judge” with “probate judge” for clarity, to replace “decision” with “order” for consistency with the existing probate regulations, and to replace “mailed” with “sent” to describe the issuance of probate orders by electronic and non-electronic means.

Paragraph (b) will update the methods for filing a notice of appeal to include electronic means and non-electronic means (including mail, commercial courier, or hand delivery), in accordance with a cross-reference to revised § 4.310(b). We will omit the term “personal delivery” in favor of “commercial courier” and “hand delivery.”

*§ 4.322 What must an appeal contain?*

We propose no changes to § 4.322.

*§ 4.323 Who receives service of the notice of appeal?*

We will revise paragraph (a) to omit the language “deliver or mail” as unnecessary because the electronic and non-electronic methods of filing a notice of appeal are set forth in § 4.321(b). Revised paragraph (a) specifies that the appellant must file the original notice of appeal with the Board.

Paragraph (b) will update the methods for serving a notice of appeal to include electronic and non-electronic means, in accordance with a cross-reference to revised § 4.310(d). We also are revising paragraph (b) to replace “judge” with “probate judge” for clarity and to replace “decision” with “order” for consistency with the existing probate regulations.

We are not changing paragraph (c).

Paragraph (d) was added in a Direct Final Rule and will be deleted as more specific information about electronic filing and service is provided for in revised § 4.321(b) and § 4.323(b).

*§ 4.324 How is the record on appeal prepared?*

We are revising paragraph (a) to replace “judge” with “probate judge” for clarity and to replace “decision” with “order” for consistency with the existing probate regulations.

Paragraph (b) will be revised to replace “judge” with “probate judge” for clarity.

Paragraph (c)(4) will be revised to replace reference to § 4.310(f), which was added in a Direct Final Rule and will be deleted, with reference to revised § 4.310(b).

We are not changing paragraphs (d) or (e).

Paragraph (f) will be revised to replace “judge” with “probate judge” for clarity and will replace “decision” with “order” for consistency with the existing probate regulations.

Paragraph (f)(2) will be revised to replace “decision” with “order,” to replace “§§ 30.126 or 30.127” with “§ 30.235,” and to replace “modification of an inventory of an estate” with “added or omitted property” for consistency with the existing probate regulations.

Paragraph (f)(3) will be revised to replace “decision” with “order” for consistency with the existing probate regulations and to omit “to be opened” as unnecessary verbiage.

*§ 4.325 How will the appeal be docketed?*

Section 4.325 will be revised to replace “judge” with “probate judge” for clarity.

*§ 4.326 What happens to the record after disposition?*

We propose no changes to § 4.326.

Specific Rules for Appeals from Administrative Actions Not Relating to Probate Proceedings

*§ 4.330 Scope*

In paragraph (a), we are removing an outdated cross-reference and correcting a citation. In paragraph (b)(3), we will delete references to the Minerals Management Service and replace them with references to the Office of Natural Resources Revenue (ONRR) or successor organization since the Minerals Management Service was reorganized and its royalty and mineral revenue management functions were transferred to ONRR in 2010. See 75 FR 61051 (October 4, 2010) (discussing the creation and transfer of functions to ONRR under Secretarial Orders No. 3299 (May 19, 2010) and No. 3302 (June 18, 2010)). We will also, due to IBLA's revisions, delete reference to 43 CFR 4.410 and replace it with a reference to 43 CFR subpart E.

*§ 4.331 Who may appeal*

We are revising paragraph (a) to add the term “adversely” before “affected” to clarify that an interested party who is adversely affected by a final administrative action or decision may appeal to the Board. The Board has consistently held that, in order to have a right of appeal to the Board, an appellant must have a legally protected interest that is adversely affected by the decision that is being appealed. See *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296 (2014).

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

Paragraph (a) will update the methods for filing a notice of appeal to include electronic means and non-electronic means (including mail, commercial courier, or hand delivery), in accordance with a cross-reference to revised § 4.310(b). We will omit the term “personal delivery” in favor of “commercial courier” and “hand delivery.” In addition, existing paragraph (a) only requires service on the Assistant Secretary—Indian Affairs. Consistent with changes to 25 CFR part 2, we will add a requirement for the appellant to also serve and certify completion of service of the notice of appeal on the Associate Solicitor, Division of Indian Affairs.

Existing paragraph (b) provides that 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. We will revise paragraph (b) due to changes to BIA’s 25 CFR part 2 regulations. In paragraph (b), “25 CFR 2.20(c)” will be replaced with “25 CFR 2.508” and the Assistant Secretary— Indian Affairs will be given 40 days from the Board’s receipt of a notice of appeal, instead of 20 days from the Board’s receipt, to decide to review the appeal and notify the Board. If within 40 days from the Board’s receipt of the notice of appeal the Board receives notification from the Assistant Secretary—Indian Affairs that he or she has decided to review the appeal, the Board will transmit any documents concerning the case filed with the Board to the Assistant Secretary—Indian Affairs.

We will not change paragraphs (c) or (d).

#### *§ 4.333 Service of notice of appeal*

We are revising § 4.333 to remove the paragraph lettering and delete the text of paragraph (b) as unnecessary. Consistent with changes to 25 CFR part 2, and § 4.332(a), we will add a

requirement for the appellant to also serve the notice of appeal on the Associate Solicitor, Division of Indian Affairs.

*§ 4.334 Extensions of time*

We propose no changes to § 4.334.

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

We propose no changes to § 4.335.

*§ 4.336 Docketing and Objections to the Administrative Record*

We will separate § 4.336 into two paragraphs, (a) and (b). In paragraph (a), the “20 days” period in which the Board waits to assign a docket number to an appeal will be replaced with “40 days” consistent with § 4.332(b). Consistent with changes to 25 CFR part 2, paragraph (a) will also provide that if, before the date on which the Board will ordinarily assign a docket number to the appeal, the Board received notice that the Assistant Secretary—Indian Affairs had decided not to assume jurisdiction over the appeal, the Board will assign a docket number to the appeal upon receipt of that notice. Revised paragraph (a) will provide that the Board will include the Table of Contents for the administrative record with the notice of docketing unless the Table of Contents was previously sent to interested parties. To mitigate impacts of the new 40-day time period for the Assistant Secretary—Indian Affairs to notify the Board of an assumption of jurisdiction over an appeal, which is to occur only rarely, the Board may want to send the Table of Contents to interested parties upon receipt of the administrative record, before the Board will otherwise issue a notice of docketing containing the Table of Contents.

Paragraph (b) will include the existing requirement in § 4.336 that any objection to the administrative record as constituted must be filed with the Board within 15 days of the objecting party's receipt of the Table of Contents (which under the existing rule is included with the notice of docketing and under the rule may be sent before the notice of docketing or included with it).

*§ 4.337 Action by the Board*

We are not making changes to § 4.337.

*§ 4.338 Submission by Administrative Law Judge of proposed findings, conclusions and recommended decision*

We are not making changes to § 4.338.

*§ 4.339 Exceptions or comments regarding recommended decision by Administrative Law Judge*

We are not making changes to § 4.339.

*§ 4.340 Disposition of the record*

We are not making changes to § 4.340.

*White Earth Reservation Land Settlement Act of 1985; Authority of Administrative Judges; Determinations of the Heirs of Persons Who Died Entitled to Compensation*

We will revise and relocate to subpart H the provisions regarding WELSA appeals, currently in §§ 4.350 through 4.357.

*Subpart E - Rules Applicable to Appeals Before the Interior Board of Land Appeals*

The Interior Board of Land Appeals (Board) decides finally for the Department of the Interior appeals from decisions rendered by Departmental officials relating to the use and disposition of public lands and resources; the use and disposition of resources of the Outer Continental Shelf and the authorization of activities on the Outer Continental Shelf; the collection of energy and mineral revenue from the Outer Continental Shelf and onshore federal and Indian lands, subject to the restrictions in § 4.330 of this part; and the conduct of surface coal mining under the Surface Mining Control and Reclamation Act.

The Board's mission is to provide an impartial forum within the Department of the Interior for the fair resolution of disputes involving public lands and natural resources under the Department's jurisdiction.

#### § 4.400 Scope of rules

We will add this section to make clear that the rules in subpart E, proposed §§ 4.400 through 4.418, will govern practice before the Board only; this subpart will no longer include provisions that apply to proceedings in the Departmental Cases Hearings Division (DCHD). We will expressly state that the rules in subparts A and B of part 4 will apply to Board proceedings only when not inconsistent with rules set forth in subpart E. This section will also include a statement that OHA Standing Orders apply to proceedings before the Board.

#### § 4.401 Definitions

We will revise the definitions in § 4.400 and move them to § 4.401. We will include in § 4.401 only those terms used exclusively in subpart E or that have a specialized meaning in subpart E. Specifically, this section will include definitions of “Administrative Law Judge (ALJ),” “Adversely affected,” “Appealable decision,”



“Appellant,” “Board,” “Office or officer,” and “Party to the case.” Other terms common to all subparts in part 4 will be defined in subpart A.

We will revise the definition of “Administrative Law Judge” to specify that, in subpart E, the term refers only to an Administrative Law Judge appointed to DCHD.

We will add to § 4.401 the definitions of “Adversely affected” and “Party to the case,” which are currently defined in § 4.410(b) (“party to a case”) and (d) (“adversely affected”). Current § 4.410 is the regulation governing “Who may appeal.”

These terms will be used in the revised section by the same title, proposed § 4.402, “Who may appeal (standing).” We will revise the definition of “adversely affected” for clarity, which we explain in the discussion of § 4.402(a). We also will add a definition of “Appealable decision,” which is another term that will be used in proposed § 4.402(a).

We will add a definition of “Appellant,” which will mean “a person or entity appealing the decision to the Board.” Certain regulations within proposed subpart E apply only to an appellant and not to other persons or entities. For example, the proposed stay provisions in § 4.405 apply only to appellants, and only an appellant will be permitted to file a statement of reasons or reply brief under § 4.410. Since we refer explicitly to the appellant in those proposed regulations, we have defined the term.

We will retain the definitions of “Board” and “Office or officer” and deleting the remaining definitions in current § 4.400 as either duplicative of the definitions in subpart A or unnecessary.

§ 4.402 Who may appeal (standing)

We will revise our current regulation at 43 CFR 4.410 to clarify who may file an appeal from a bureau or office decision, that is, who has “standing.” The proposed revisions will codify but not substantively change the current standing requirements.

Clarifying the Board’s standing requirements will prevent confusion regarding what a person or entity must demonstrate at the time they file an appeal and will help the Board to better manage its docket by dismissing those appeals that do not meet the requirements set forth in our proposed standing rules.

First, in paragraph (a), we will retain the requirement that a person or entity who wishes to appeal must be a “party to the case” and “adversely affected” by an “appealable decision.” Each of these terms will be defined in the proposed definitions section, § 4.401. The definition of “party to the case” will retain the definition found in current § 4.410(b). The definition of “adversely affected” will retain the language found in current § 4.410(d), but it will also specify that legally cognizable interests may include a property or economic interest in the affected public lands or resources, or the cultural, recreational, or aesthetic use and enjoyment of the affected public lands or resources. This additional language will reflect our long-standing articulation of the types of legally cognizable interests that may establish a basis for standing. See, e.g., *Center for Biological Diversity*, 195 IBLA 298, 302 (2020). “Appealable decision” will be defined in § 4.401 as a decision that authorizes, denies, prohibits, or requires some action that affects a person or entity having or seeking some right, title, or interest in public lands or resources. This definition is used in Board precedent, and its inclusion in the rule is intended to assist potential appellants in understanding what types of bureau or office decisions they may properly appeal to the Board. See *Burning Man Project*, 197 IBLA 66, 73-74 (2021).

Paragraph (b) will address decisions over which the Board does not have jurisdiction, which is currently addressed in § 4.410(a)(1)-(3). The list in proposed paragraph (b) will encompass the same decisions listed in current § 4.410(a)(1)-(3) but will be more broadly worded. For example, instead of specifying that there is a right to appeal to the Board except as otherwise provided “in Group 2400 of chapter II of this title,” the rule will state that “[a]n appeal cannot be filed . . . [w]here a . . . regulation provides a different review process or makes a decision final for the Department.”

Paragraph (c) will contain the provision currently in § 4.410(e) regarding appeals relating to land selections under the Alaska Native Claims Settlement Act. In the phrase, “a regional corporation shall have a right to appeal to the Board,” we will add the word “appropriate” before “regional” for consistency with 43 U.S.C. 1613(h) (“Authorization for land conveyances,” where Congress used “appropriate Regional Corporation”) and the regulations in 43 CFR part 2650. See, e.g., 43 CFR 2650.7(d) (“appropriate regional corporation”). We will also change “shall have” in the same phrase to “has.”

#### § 4.403 How to appeal

We will revise the current regulation at 43 CFR 4.411 to explain the procedures for appealing a bureau or office decision.

In paragraph (b), we will change how an appeal is filed: Unless a statute or regulation requires otherwise, instead of filing a notice of appeal with the bureau or office that issued the decision, a person or entity who wants to appeal will file their notice of appeal with the Board

and concurrently serve the notice on the office of the officer who made the decision and the Office of the Solicitor. This new procedure will be consistent with how complaints are filed in federal court because it will require appeals to be filed in the forum that will decide the appeal. The rule will still ensure that all affected parties receive timely notice of the appeal by requiring at the time of filing with the Board that the notice of appeal be concurrently served on the bureau or office that made the decision, all persons or entities named in the decision, and the proper representative of the Office of the Solicitor (paragraph (b)(2)). This provision will not apply in the event a bureau or office has specific regulations requiring appeals to be filed directly with that bureau or office See, e.g., 30 CFR 290.4, 590.4 (requiring that appeals be filed directly with BSEE and BOEM).

We will also require appellants to file, with their notice of appeal, certain documents that will help the Board determine if it has jurisdiction over a matter.

More specifically, in paragraph (a) we will require an appellant to provide the Board with a copy of the decision being appealed; a statement of facts establishing that the appellant has standing; and a statement of timeliness and any corroborating documentation providing the date when the appellant received notice of the decision.

Corroborating documentation of an appellant's notification of the decision could include an email from the bureau or office transmitting the decision, a screenshot of when the bureau or office posted notice of the decision online, or a copy of the envelope in which the bureau or office mailed the decision. These new requirements will increase the efficiency of the appeals process by ensuring the Board receives timely notice of an appeal and minimizing the need for the Board to request additional jurisdictional briefing. For example, in some instances, it is unclear if an appellant has standing to file its appeal and the Board may require an appellant to

submit additional briefing before we can adjudicate an appeal or a petition for stay. By requiring the appellant to submit a statement of standing setting forth facts supporting their status as a party to the case that

is adversely affected by the decision being appealed, we will more easily be able to determine if an appellant is qualified to file its appeal and avoid unnecessary delays.

In proposed paragraph (c), we address when an appellant must file and serve the notice of appeal. Unless a statute or regulation provides otherwise, the notice of appeal must be filed no later than 30 days after the date of receiving notice of the decision (paragraph (c)(1)), which is the same requirement as in the current rule. This 30-day deadline applies “[e]xcept as otherwise provided by statute or regulation,” which accommodates the requirements that currently appear in 30 CF 290.3, 590.3, and 1290.105(a)(2), which specify that appeals of BSEE, BOEM, and certain ONRR decisions must be filed within 60 days of receiving the decision being appealed.

In paragraph (c)(2), we will add a provision specifying how to compute the 30-day appeal period. We will specify that a person or entity will be deemed to have received notice of the decision at the earliest of the following dates: when the decision is delivered by mail or delivery service as indicated on a U.S. Postal Service or delivery service tracking report or, if no tracking report exists, and absent contrary evidence, seven days after the date of the postmark on the envelope containing the decision as long as the envelope was properly addressed and had proper postage prepaid; when the bureau or office electronically transmits the decision or a notice that the decision is available on a public website to the person or entity; when the bureau or office notifies the public in an online news release that the decision is available on a public website; when the bureau or office publishes the decision in the Federal Register; or if the bureau or office

did not serve, email, or publish the decision, then when the person or entity receives actual notice of the decision. In paragraph (c)(3), we explain that filing is accomplished as provided in proposed § 4.407.

In paragraph (c)(4), we will retain the language in current § 4.411(c), which provides that no extension of time may be granted for filing a notice of appeal and that, if an appeal is untimely, the appeal will not be considered, and the Board will dismiss it for lack of jurisdiction. The documents listed in paragraph (a)(1)-(3) are separate from the notice of appeal, and therefore the time for filing those documents could be extended.

#### § 4.404 Effect of appeal

We will include a new section explaining the effect an appeal of a decision has on the bureau or office's ability to take action related to that decision. The section will codify Board precedent by specifying when an appeal of a decision is filed, the bureau or office that issued the decision loses jurisdiction to modify, rescind, or supersede it. See, e.g., *Century Offshore Management Corp. (On Reconsideration)*, 196 IBLA 250, 253 (2021); *Sojitz Energy Venture, Inc.*, 193 IBLA 1, 3-4 (2018). The appeal transfers jurisdiction from the bureau or office to the Board, and the bureau or office cannot modify or supersede its decision without first asking the Board to remand the decision to the bureau or office. Also, if the Board stays the decision on appeal, the bureau or office may only make new decisions related to the subject of the decision on appeal if the new decisions are functionally independent from the decision on appeal. For example, a decision to temporarily close grazing allotments after a fire is functionally independent from a decision to renew grazing permits on the same allotment. *Chipmunk Grazing Association, Inc.*, 188 IBLA 35, 44 (2016).

#### § 4.405 Effectiveness of decision pending appeal; petitions for stay

We will move the provisions addressing the effectiveness of decisions pending appeal and petitions for a stay from current § 4.21 to new § 4.405. The first two paragraphs of § 4.21 addressing these topics, paragraphs (a) and (b), currently apply almost exclusively to the Board and the Director's Office. Decisions pending appeal to IBIA are generally automatically stayed pursuant to 43 CFR 4.314 and stays of grazing decisions pending appeal to DCHD are governed by current §§ 4.471 and 4.472. With this move of § 4.21(a) and (b) to § 4.405, OHA will eliminate any conflicts between § 4.21 and individual unit procedures and ensure that each unit has stay provisions specifically applicable to the appeals it hears. See, e.g., §§ 4.171 (DCHD), 4.314(a) (IBIA).

The current version of § 4.21 was promulgated in 1993. Final Rule, Department Hearings and Appeals Procedures, 58 FR 4939 (Jan. 19, 1993) (a non-substantive, technical amendment was made in 2010). Paragraph (a) of § 4.21 currently specifies when and under what circumstances a decision goes into effect pending appeal. These provisions apply unless "otherwise provided by law or other pertinent regulation." 43 CFR 4.21(a). Under current § 4.21(a), bureau and office decisions are stayed during the period in which an appeal to the Board may be taken. But a bureau or office by separate regulation may put a decision into immediate effect to avoid this automatic stay, see, e.g., id. § 2931.8(b) (placing BLM decisions concerning special recreation permits into immediate effect pending appeal), or an Appeals Board may do so itself "when the public interest requires." Id. § 4.21(a)(1). Once the period for filing an appeal has passed, the decision goes into effect, even if an appeal has been filed, unless an appellant has filed a petition for a stay together with its notice of appeal. Id. § 4.21(a)(2). If an appellant has filed a petition for a stay, then the decision will remain automatically stayed for an additional 45

days from the expiration of the time for filing a notice of appeal, unless the Board denies the petition within that time. Id. §§ 4.21(a)(3), (b)(4). After the end of the 45-day period, the decision will go into effect unless the Board has granted the petition for stay.

The current regulation also specifies the procedures and standards for obtaining a stay pending appeal. Id. § 4.21(b). An appellant must establish that four criteria have been met. Id. These regulatory criteria are similar to those used by Federal courts when considering whether to issue preliminary injunctions. Compare id. § 4.21(b)(1), with *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”). Section 4.21(b) also specifies that the petitioner for a stay “bears the burden of proof to demonstrate that a stay should be granted,” and directs the Board to act on a stay petition “within 45 calendar days of the expiration of the time for filing a notice of appeal.” 43 CFR 4.21(b)(2), (b)(4).

We will revise these regulations to clarify the provisions addressing the effectiveness of decisions pending appeal, eliminate uncertainty as to when a stay may be sought, and update the criteria used for deciding whether to grant a stay.

#### *Effect of decision pending appeal*

Like current § 4.21(a), § 4.405(a) will address when a bureau or office decision is in effect during an appeal.



The differences between current § 4.21(a) and new § 4.405(a) are minor. As the current rule does, paragraph (a) will begin with an introductory proviso that acknowledges that the effectiveness provisions in § 4.21(a) may be overridden by other law. This occurs primarily when a decision is placed into immediate effect at issuance pursuant to a statute or regulation. We will modify the proviso to eliminate the unnecessary reference to regulations since they are encompassed within the term “law.”

The other changes to paragraph (a) are similarly minor. For example, paragraphs (a)(1) – (3) will be revised to refer to “persons or entities” instead of only “persons” and to “the Board” instead of “the Director or an Appeals Board.” In addition, we will revise paragraph (a)(1), to state that the Board may place a decision or part of a decision into immediate effect when the public interest requires “or to protect trust resources.” We will add “or to protect trust resources” to reflect the Department’s trust responsibilities to American Indians, Alaska Natives, and affiliated Island Communities. Paragraph (a)(3), like current § 4.21(a)(3), will state that a decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Board denies or partially denies the petition for a stay or fails to act on the petition within the time specified in paragraph (b)(8). The cross-referenced paragraph (b)(8) will impose the same time frame in current § 4.21(b)(4) within which the Board must grant or deny a petition for a stay: 45 days after the expiration of the time for filing a notice of appeal.

#### *Petitions for stay*

In paragraph (b), we will clarify certain procedural requirements, currently contained in § 4.21(b), for filing petitions for a stay. Like the current regulation, we will state in paragraph

(b)(1) that only an appellant who properly files an appeal may petition for a stay. This provision means that the party must have standing and meet all other jurisdictional requirements for bringing an appeal.

In paragraph (b)(2), we make a minor word change in the requirement to file a petition for a stay “together with a timely notice of appeal” to state instead that the petition must be filed “at the same time the appellant files a notice of appeal.” This change is intended to clarify that the deadline to file a petition for a stay is the same as the deadline for a notice of appeal. Related to this requirement, in paragraph (b)(8), we add a provision that specifies that we will deny any petition for a stay that is not filed at the same time the appellant files its notice of appeal. Unlike federal courts, where requests for stays or injunctive relief can be made at any time during the proceeding, parties appealing a bureau or office decision will be expected to file a petition for a stay at the beginning of the appeal or never at all. Although appellants will not be able to file a petition for a stay later in an appeal, they will be able to seek a stay or injunction in federal district court. Under both the current and revised regulations (current § 4.21(a)(3) and (c) and revised § 4.21(b)(2)), once a decision is in effect, it is final agency action for purposes of 5 U.S.C. 704 and may be challenged in federal court. See *In the Matter of Mandan, Hidatsa and Arikara Nation*, 53 OHA 198, 203 (2018) (ruling that, upon the expiration of 45 days or the denial of a stay petition, “a decision becomes not only effective, but also ‘subject to judicial review’ under the Administrative Procedure Act”). Accordingly, if circumstances compel an appellant to seek a stay later in the appeal process, the appellant could pursue a stay or injunction in federal court.

We recognize that, currently, § 4.21 does not prohibit late-filed petitions for a stay. But it is rare that appellants file petitions for a stay later than filing a notice of an appeal, and we are aware of only one instance in which we granted a petition for a stay that was filed after the notice of appeal. In *Colorado Wild Public Lands Inc.*, 189 IBLA 392, 399 (2017), *aff'd*, *Colo. Wild Pub. Lands, Inc. v. Shoop*, No. 17-cv-01564-MSK, 2021 U.S. Dist. LEXIS 56706 (D. Colo. Mar. 25, 2021), we denied a stay in 2015 because we found it unlikely that BLM will immediately consummate a land exchange, but we granted a renewed petition for a stay in 2017 when the appellant showed that the land exchange was imminent. By expressly stating that appellants may only file a petition for a stay at the same time they file a notice of appeal, § 4.405(b) will provide clarity for the parties and certainty to the bureaus and offices about when a decision on appeal may be implemented.

Paragraph (b)(3) will revise and clarify the filing and service requirements for a petition for a stay. It will require an appellant to file a petition for a stay with the Board and serve the petition for a stay on the bureau or office that made the decision being appealed, the appropriate Office of the Solicitor and, as in the current rule, all persons named in the decision. Paragraph (b)(3) will cross-reference the regulation at § 4.407, which will state in more detail how documents filed with the Board must be filed and served. This provision differs from the current regulation, which envisions that an appellant will file both a notice of appeal and a petition for a stay with the office of the official who made the decision being appealed and serve both documents on the Board. Consistent with the changes for notices of appeal in § 4.403, we will change the requirement for filing petitions for stay so that they will be filed with the Board.

The criteria that must be satisfied to receive a stay, currently in § 4.21(b)(1), are revised and reordered in paragraph (b)(4). Paragraph (b)(4) has three criteria, with all three reflecting criteria presently considered under the existing rule; namely, both current and rules require a showing of likelihood of irreparable harm, likelihood of success on the merits, and that the balance of harms weighs in favor of granting the stay.

This rule will not include the “public interest” criterion, however. Instead, we will follow the lead of federal courts that have held in the context of deciding whether to issue stays or preliminary injunctions that when the federal government is the opposing party, the balancing of the harms and the public interest “merge.” See *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that, in the context of a stay, assessing the harm to the opposing party and weighing the public interest “merge when the Government is the opposing party”); see also *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (applying *Nken* in denying a preliminary injunction of a final rule issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (applying *Nken* in denying a preliminary injunction concerning a National Park Service special use permit for oyster farming); *Colo. Wild Horse & Burro Coalition, Inc. v. Jewell*, 130 F. Supp. 3d 205, 22021 (D.D.C. 2015) (applying *Nken* in denying a preliminary injunction of a gather of wild horses). Under this principle, the consideration of the “public interest” as a separate element is unnecessary because the public interest is always deemed aligned with the balancing of harms. If the balance of harms weighs in favor of granting the stay, so does the public interest. If the balance of harms weighs in favor of denial, so does the public interest. We have favorably cited this reasoning in a published decision and adopted it in a number of unpublished stay orders, see *Western Watersheds Project v. BLM*,

195 IBLA 115, 137 n.135 (2020), so this rule will eliminate the public interest criterion as being superfluous given our retention of the balance-of-harms criterion.

Turning to the three stay criteria set out in paragraph (b)(4), the first criterion, will be that the appellants must show they “will likely be irreparably harmed by implementation of the decision pending resolution of the appeal, and that harm will be avoided by granting the stay.” This criterion corresponds to the current criterion requiring that the petitioner demonstrate “[t]he likelihood of immediate and irreparable harm if the stay is not granted.” The rule will eliminate the “immediate” terminology and instead will require a showing that irreparable harm is likely to occur “pending resolution of the appeal”—before the appeal is decided. This change will promote the purpose of granting stays, which is to prevent or minimize irreparable harm while an appeal is being considered, while also accounting for the fact that petitions for a stay will be filed at the beginning of the administrative appeal process, which may not correspond to when the harm is expected to occur. Given the restriction on when a petition for a stay may be filed in paragraph (b)(2), we will remove the immediacy requirement to better allow the Board to issue stays to prevent irreparable harm that is likely to occur while an appeal is pending.

The elimination of the term “immediate” is not intended to allow the Board to grant stays when the harm is speculative or is likely to occur at some indefinite time in the future. Similar to what the immediacy element currently requires, the appellant will be required to show that irreparable harm is likely to occur as a result of the decision at some definite time while the appeal is pending.

The irreparable harm criterion will also include a new ending clause that will codify another element needed to warrant a stay – that the irreparable harm to the appellant “will be avoided by granting the stay.” This clause will clarify that the Board will not grant a stay in situations in which a stay of the appealed decision will not prevent the harm alleged by an appellant. An example is an appeal from a discretionary decision denying a permit to undertake some activity, where the appellant’s injury is the inability to conduct the activity. A stay of the permit denial will not alleviate that injury because it will not grant the permit but merely return the application to a pending status. In fact, because an appeal divests a bureau or office of jurisdiction to undo or modify its decision, *Century Offshore Mgm’t Corp. (On Reconsideration)*, 196 IBLA 250, 253 (2021), the bureau or office will have no jurisdiction to grant the permit pending appeal. In such situations, because a stay of the decision will not prevent irreparable harm or afford the appellant with any legal or practical benefit, the Board denies the petition for a stay. See, e.g., *Triple Dare Running Co.*, 195 IBLA 224, 229 (2020). Making this concept an express part of the irreparable harm criterion will provide greater clarity to appellants and allow them to better determine whether it is necessary to seek a stay.

The second criterion, in paragraph (b)(4)(ii), will address the balance of harms and will be substantively identical to the current rule’s first criterion. The current rule states the criterion as the “relative harm to the parties if the stay is granted or denied.” The revised wording—that the “irreparable harm to the appellant absent a stay exceeds the harm to the United States and other parties from a stay being granted”—is designed to better express what harms are being considered and balanced, but the revision is not meant to change the meaning or operation of the existing “relative harm” criterion. The third criterion, in paragraph (b)(4)(iii), will address the

likelihood of success on the merits and will be the same as the current criterion in § 4.21(b)(1)(ii).

Paragraph (b)(5) will retain the requirement of current § 4.21(b)(2) that the appellant seeking a stay bears the burden of proof to demonstrate that a stay should be granted. We will add a phrase to this requirement to specify that the appellant's burden is to show that a stay should be granted, in whole or in part, under all three criteria set forth in paragraph (b)(4). This sentence reflects existing regulatory requirements and Board practice. See, e.g., *Tom Kitchar*, 195 IBLA 151, 159 (2020) (“A failure to satisfy any one of the stay criteria will result in denial of a petition for a stay.”). The inclusion of the words “in whole or in part” reflects the existing language in § 4.21(b)(4), which allows the Board to “grant or deny a petition for a stay pending appeal, either in whole or in part,” authorizing the imposition of stays of all aspects of a decision on appeal or only portions of it. See, e.g., *Deschutes River Landowners Committee*, 136 IBLA 105, 108 (1996) (noting that the Board granted the stay in part and denied it in part to allow certain actions authorized by the decision to proceed.). Including the phrase here recognizes that an appellant may seek a stay of only a portion of the decision on appeal.

Paragraph (b)(6) will retain the current regulation's provision that allows any party the option of responding to a petition for a stay, but it will provide a 14-day filing deadline instead of the current 10-day deadline. We believe providing the additional time for filing a response will still give the Board sufficient time to rule on the petition within the 45-day period set forth in paragraph (b)(8) (current § 4.21(b)(4)), especially because responses are now routinely electronically filed. This paragraph will also provide, similar to current § 4.21(b)(3), that a failure to respond to a petition for stay will not be construed as an admission that the Board

should grant the petition and therefore will not automatically result in the stay being granted based on default. Paragraph (b)(7) will prohibit appellants from filing replies to responses to petitions, which is not expressly stated in the current regulation.

Paragraph (c)(8) will retain the requirement for the Board to grant or deny a petition for a stay, in whole or in part, within 45 days of the expiration of the time for filing a notice of appeal. This paragraph will also state that, in appeals of decisions that have been placed in immediate effect, the Board will deny any petition for a stay that is not filed at the same time the appellant filed its notice of appeal. We seek comment on whether the rule should explicitly acknowledge that a joint petition for stay, which is consented to by all parties to an appeal, may be filed at any time. The rule is not intended to foreclose such a filing. In addition, this paragraph will specify that if the Board fails to act on a petition for a stay within 45 days of the expiration of the time for filing a notice of appeal, “the petition will be deemed denied.” This provision, which is not in the current regulation, will provide certainty to bureaus and offices that seek to implement a decision on appeal because the Board could not unexpectedly grant a stay after the 45-day period.

New paragraph (b)(9) will codify the Board’s authority to summarily grant a petition for a stay without addressing the stay criteria when all parties consent to the stay or affirmatively state they do not oppose the stay. See, e.g., *Linn Blancett*, 178 IBLA 272, 275 (2006) (stating that the Board had stayed the effect of the challenged decision with the consent of the bureau).

Request for comments on alternative approach.



In addition to seeking comments on § 4.405 as published, we also seek comments on an alternative procedure for how the Board would adjudicate petitions for a stay. Under the alternative procedure, we would distinguish between decisions that have been placed into immediate effect and decisions that have not been placed into immediate effect. Specifically, decisions that are placed into immediate effect pursuant to a statute or regulation would remain in effect pending the resolution of the appeal unless the appellant and the bureau or office that issued the decision on appeal file a joint petition for a stay. Keeping decisions that are immediately effective upon issuance in effect during an appeal is consistent with the Department's determination that that the public interest is served by having those decisions in effect regardless of whether an appeal is filed.

Examples of regulations that either automatically place a decision into immediate effect or authorize the deciding official to do so include the following:

- 30 CFR 290.7 (Bureau of Safety and Environmental Enforcement (BSEE) orders);
- 30 CFR 590.7 (Bureau of Ocean Energy Management (BOEM) orders);
- 43 CFR 2801.10(b), 2881.10(b) (Bureau of Land Management (BLM) rights-of-way decisions);
- 43 CFR 2920.2 (BLM minimum impact permit decisions);
- 43 CFR 2931.8(b) (BLM special recreation permit decisions);

- 43 CFR 3165.4(c) (BLM oil and gas operations decisions);
- 43 CFR 3200.5(b) (BLM geothermal leasing decisions);
- 43 CFR 3809.803 (BLM surface management decisions concerning mining);
- 43 CFR 3809.808(b) (BLM State Director decisions concerning mining surface management);
- 43 CFR 4770.3(b), (c) (BLM wild horse and burro decisions);
- 43 CFR 5003.1 (BLM forest management and wildfire decisions).

Under this alternative, these types of decisions, when in immediate effect, would remain in effect unless the bureau or office consents to a stay. We would not require the consent of all parties; a stay would be granted if the appellant and the bureau or office agree to a stay, even if one or more intervenors object. By keeping decisions in effect pending appeal unless the bureau or office consents to a stay, this alternative would honor the decision of the Department, codified in its rules, that certain types of decisions should be put into immediate effect despite the filing of an administrative appeal. Moreover, the proposal for granting stays of decisions that have been placed into immediate effect only when the bureau or office consents to a stay would not deprive an appellant of all remedies to prevent irreparable harm. Because the decision is in effect, it would be deemed a final agency action for purposes of judicial review, and therefore an appellant may file suit in federal court and seek a stay in that forum. We would allow a joint petition for a stay to be filed at any time during the appeal.

When a decision is not placed into immediate effect, the stay standards and procedures set forth in § 4.405 of this rule would apply.

#### § 4.406 Record on appeal

The Board's existing regulation at 43 CFR 4.411(d)(3) requires the office of the officer who made the decision to "promptly forward" to the Board "[t]he complete administrative record" associated with an appeal. The existing regulations do not otherwise provide direction on records. In this rule, we are adding a new regulation addressing records to clarify Board procedures, increase Board efficiency, and ensure that parties to an appeal have timely access to the documents supporting a bureau or office's decision on appeal. In this section of the rule, we describe the "record," rather than the "administrative record." We have made this change to distinguish what bureaus and offices submit to the Board (their record) from what Federal courts consider in the event a Board decision is appealed – namely, the administrative record that is reviewed under the Administrative Procedure Act.

In paragraph (a), we are changing the existing requirement in § 4.411(d)(3) to "promptly forward" to the Board the administrative record, and instead require that bureaus and offices promptly file the record with the Board and serve it on the parties to an appeal no later than 60 days after being served with the notice of appeal. This new requirement will accomplish two objectives. First, it will ensure that the parties to an appeal automatically receive a copy of the record submitted to the Board. While some bureaus and offices routinely provide their records to the parties to an appeal, not all do. By eliminating this inconsistency, and the need under the current rule for parties to affirmatively request a copy of the record, the rule will reduce delays in the briefing process and, therefore, the time appeals may be pending before the Board.

Second, the proposed rule's requirement will further improve the efficiency of the appeals process. The current regulation does not include a time frame within which records must be submitted, requiring only that bureaus and offices must "promptly" forward them to the Board. In many instances, this means an appellant does not have access to the record prior to its deadline for filing a statement of reasons. Without the record, appellants are at a disadvantage in crafting their statements of reasons and often seek extensions of time until they have received and had an opportunity to review the record, extending the time it takes an appeal to be adjudicated. By requiring bureaus and offices to promptly file and serve the record no later than 60 days after service of a notice of appeal, paragraph (a) provides certainty to appellants regarding when they will have access to the record underlying the bureau or office decision and will help guard against appeals that languish on the Board's docket for lack of a record. The rule works in concert with § 4.410(b), which shifts the deadlines for an appellant's statement of reasons to 30 days after the record is filed. Together, these changes will create a logical and streamlined timeframe for the appeals process. Because the Board recognizes that in limited circumstances a bureau or office may not be able to meet the 60-day deadline for filing its record, paragraph (a) also provides that the Board may allow extensions of the deadline.

Paragraph (b) will provide revised language describing the contents of the record, specifying that it contains "[a]ll documents and materials that the deciding officer directly or indirectly considered in reaching a final decision." This will replace the existing rule's description of the record, in § 4.411(d)(3), as the "complete administrative record compiled during the officer's consideration of the matter leading to the decision being appealed." The new language will identify, with more specificity, what comprises a record, emphasizing that the record consists only of documents and materials directly or indirectly considered by the decision

maker. See *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10th Cir. 1993) (“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.”); *Thompson v. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (“all documents and materials directly or *indirectly* considered by agency decision-makers”) (citations and internal quotations omitted). In particular, the new language is intended to clarify that the record is not necessarily the same as a bureau or office’s “case file,” which often includes documents that were not directly or indirectly considered by the decision maker (e.g., early drafts of documents, personal staff notes that were not available to the decision maker, etc.). See, e.g., *Wallace Forest Conservation Area Advisory Committee*, 192 IBLA 108, 126-27 (2017) (explaining that a bureau’s administrative record is not equivalent to its “case file”).

In paragraph (c), we will add new direction about how records are to be formatted. We will require that a record be in digital or electronic form and include an index of all documents. The bureau or office will be required to sequentially number the pages of each document and ensure that the text of all documents is electronically searchable. This requirement will enable the Board and the parties to navigate records more easily. Currently, records often come to the Board without the capability to be searched. Sometimes records are submitted without an index or as a single pdf document that does not separate out individual documents. Requiring records to be more easily accessible will be more efficient for the Board and aid the Board and the parties in understanding the decision-making process for the decision on appeal. The phrase “[u]nless otherwise ordered by the Board” at the beginning of paragraph (c) will be included to allow for special circumstances that prevent a bureau or office from meeting these formatting requirements. The bureau or office will be able to request that the Board authorize an alternative format for the record.

Finally, in paragraph (d), we will add a provision explaining how a bureau or office may complete the record if it inadvertently omitted a document from the record it filed with the Board. The bureau or office will be required to either secure a stipulation by all parties that the document was inadvertently omitted from the record or file a motion to complete the record and obtain the Board's approval to add the document to the record.

#### § 4.407 Filing, service, deadline computations, and issuance

Section 4.407 combines the requirements in several existing regulations, deletes unnecessary provisions, and adds new provisions to modernize Board practice by allowing for electronic filing of documents; clarifying service requirements; simplifying how we compute deadlines; and specifying how the Board will issue notices, orders, and decisions.

First, paragraphs (a)(1) and (a)(2) are new provisions that address how documents are filed with the Board. Paragraph (a)(1) will direct that documents must be delivered to the Board as specified in these rules and OHA Standing Orders on Contact Information and Electronic Transmission. Paragraph (a)(2) will specify that documents may be filed non-electronically and electronically, also as specified in OHA Standing Orders on Electronic Transmission. Due to the COVID-19 pandemic, in March 2020 the Board started allowing parties to submit documents electronically via email. Since that time, we have been able to successfully accommodate electronic filing, which has made it easier for parties to file documents and helped eliminate uncertainties in computing other filing deadlines. We are now codifying this practice to modernize our procedures. Paragraph (a)(2)(i) will specify that federal, state, and local agencies and any attorney representing a person or entity before the Board must file electronically unless

otherwise specified in the OHA Standing Orders on Electronic Transmission or when the Board has allowed non-electronic filing for good cause.

Paragraph (a)(3) institutes a new deadline for documents filed electronically with the Board: 11:59 p.m., Eastern Time on the due date. We will determine the date and time of filing by using the date and time of filing reflected by the electronic process the Board is using at the time. For example, while the OHA Standing Orders on Electronic Transmission provide that the Board is accepting filing by email, the date and time of filing is the date and time that appears on the email received by the Board. When the OHA Standing Orders on Electronic Transmission indicate that the new electronic filing system is deployed, the date and time of filing will be determined by that system.

For those who choose to file documents by mail, paragraph (a)(3) specifies that a document will be deemed timely if it is mailed to the Board on or before the last day for filing or if it is dispatched to a third-party commercial courier for delivery to the Board within 3 days. This provision is consistent with Federal Rule of Appellate Procedure 25, which similarly states that a brief not filed electronically is timely filed “if on or before the last day for filing[] it is . . . mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.” Paragraph (a)(3) will also specify that “[t]he date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgment from the carrier delivering the document for filing.” The intent of this language is to put parties on notice that there must be proof of the date a document is mailed to the Board for filing. Without such proof, a document may be deemed untimely. To account for the possibility of an error by the third-party carrier,

paragraph (a)(3) will specify that a document not received within seven business days of the filing deadline is presumed untimely, but that presumption may be overcome by the documentation establishing the date of mailing or dispatch.

Because the changes to paragraph (a) simplify filing deadlines, we no longer need the existing rule's "grace period," found in current § 4.401(a), and which provides that a document is timely filed when it "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 period in which it was required to be filed." We therefore have eliminated this provision.

The rule will delete current paragraph § 4.401(b) about transferees and encumbrancers. This paragraph has been in the Department's regulations since at least 1956, see, e.g., 21 FR 1845; March 27, 1956 (43 CFR part 221, Appeals and Contests), and although it has been carried forward since then, it is no longer necessary.

Paragraph (b) will update and clarify requirements for serving notices of appeal and all other documents that are filed with the Board, currently found in 43 CFR 4.401(c). Paragraph (b)(1) will state the general requirement that any person or entity who files a document in an appeal must also serve the document under the terms specified in this section (§ 4.407) and in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information.

Paragraph (b)(2)(i) will require that any person or entity filing a notice of appeal with the Board must serve a copy of it concurrently on the office of the officer who made the decision; each person or entity named in the decision on appeal; the appropriate official of the Office of



the Solicitor as set forth in subparagraph (b)(2)(iii); and if the decision involved a mining claim on national forest land, then on all parties who participated in the proceeding below. Paragraph (b)(2)(ii) will require that any person or entity filing any other document with the Board must serve a copy of it concurrently on the appropriate official of the Office of the Solicitor and on all other parties to the appeal, including intervenors. Paragraph (b)(2)(iii) will address who the appropriate official of the Office of the Solicitor is by requiring parties to serve the Office of the Solicitor as provided in the OHA Standing Orders on Contact Information until a particular attorney of the Office of the Solicitor files and serves a document in the appeal, after which time parties must serve the particular attorney.

Paragraph (b)(3) will retain the current rule's requirement, in § 4.401(c)(2), that service on parties known to be represented by an attorney or other designated representative must be made on the representative.

Paragraph (b)(4) will specify the address parties should use to serve their filings on other persons or entities. First, it will require every person or entity who files a document in connection with an appeal to provide the physical or electronic address that the person or entity intends to use for service in the appeal. If a person or entity wants to receive service by electronic mail, the person or entity will be required to consent to electronic service. The requirement to consent to electronic service is also stated in subparagraph (b)(6)(i), which allows a party to serve others electronically only if they have consented to electronic service in writing under the terms specified in the OHA Stating Orders on Electronic Transmission. If a person or entity has not consented to electronic service, then anyone serving a document on that person or entity will be required to use the mailing address in the person's or entity's most recent filing or,

if there has not been any filing, the mailing address of the person or entity as provided by the bureau or office where the appeal originated.

Paragraph (b)(5) will require that, when a party's mailing or email address changes while an appeal is pending, the party must promptly file and serve a written notice of the change identifying the appeal or appeals to which the notice applies using the applicable docket number or docket numbers when available. The intent of this new paragraph is to clarify that it is a party's responsibility to keep its service address up to date.

Paragraph (b)(6) will direct how service may occur. In paragraph (b)(6)(i), we will modernize our service requirements by allowing service to be made electronically on the Office of the Solicitor and the bureau or office whose decision is being appealed as specified in the OHA Standing Orders on Electronic Transmission. Also, this paragraph will retain the option to serve other persons or entities electronically when the person or entity to be served has consented to electronic service in writing as specified in the OHA Standing Orders on Electronic Transmission. Paragraph (b)(6)(ii) will address non-electronic service and provide that any document may be served non-electronically by United States mail or commercial courier for delivery within three days.

Paragraph (b)(7) will retain the requirement in existing § 4.401(c)(5) that a party must certify that service has been or will be made and specify the date and manner of service.

Paragraph (b)(8) will update and simplify when service is complete. Under the current rule at § 4.401(c)(6), service is complete when a document is

“[d]elivered to the party.” The rule will address both electronic and nonelectronic service, providing that service by electronic means is complete on sending or as otherwise directed by the OHA Standing Orders on Electronic Transmission, unless the party making service is notified that the document was not received by the party served, and service by mail or commercial courier will be complete on mailing or delivery to the carrier. By revising the rule so that service of a non-electronic document by mail or commercial courier is complete “on mailing or delivery to the carrier,” we will eliminate the uncertainty associated with determining when a document is actually delivered to a party. The rule will also specify that the date of mailing or delivery must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgment from the carrier delivering the document. We therefore will no longer need current § 4.401(c)(7), which specifies that in the absence of evidence to the contrary, delivery is deemed to take place five business days after the document was sent.

Paragraph (c) will provide new language simplifying how deadlines are computed when documents are not served electronically. It will provide that when a party may or must act within a specified time after being served, and the document is not served electronically or delivered on the date stated in the proof of service, 3 days will be added to the deadline. This new method for computing deadlines associated with nonelectronically served documents is consistent with Federal Rule of Appellate Procedure 25.

Finally, paragraph (d) will be a new provision about how the Board issues notices, orders, and decisions. The provision will state that the Board will issue notices, orders, and decisions to the party’s electronic mail address unless the party requests otherwise. If an electronic mail address is not provided by the party in a document filed in the appeal or in a document filed in

the proceedings below, then the Board will use the party's record address as provided under § 4.22(b) or, if not provided, the party's last known mailing address.

#### § 4.408 Document formatting requirements

In § 4.408, we will simplify and clarify the formatting requirements for documents filed with the Board, including documents filed electronically. The rule will modernize the current formatting requirements found in § 4.401(d) to accommodate electronically filed documents, but it will not substantially alter the requirements contained in the existing rule.

In paragraph (a), we will specify that the formatting requirements apply to all documents filed with the Board, both paper and electronic, excluding exhibits, attachments, and the administrative record. Paragraph (b) will identify the formatting requirements applicable to both paper and electronic documents and largely repeats the formatting requirements currently in § 4.401(d)(2). New requirements will specify that each motion, brief, or other document must be filed separately, and documents filed electronically must be in electronic text-searchable portable document format (PDF) while maintaining original document formatting, unless specified differently in the OHA Standing Orders on Electronic Transmission. We will delete the requirement that documents be typewritten, printed, or otherwise reproduced legibly because electronic filing has made this a rare issue that we can address on a case-by-case basis.

Like the current regulation, paragraph (c) will identify content that may be excluded from page limitations, for example, cover pages, tables of contents, certificates of service, and attachments.

Finally, paragraph (d) will replace the provision currently in § 4.401(d)(1)(ii), which provides that any document that does not comply with the formatting requirements "may be rejected." Paragraph (d) will clarify that when a document does not comply with the formatting

requirements, the Board may decide not to consider it. We included the phrase “decide not to consider” to clarify that the document will remain in the Board’s files but will not be considered in resolving the appeal. The Board will issue an order stating that it will not consider the document.

#### § 4.409 Motions

The Board’s procedural docket is robust—the Board adjudicates over 500 non-dispositive motions each fiscal year. But the current regulations that govern motions practice are unorganized and incomplete, which has led to confusion for the parties practicing before the Board. To better serve these practitioners, we will revise our current regulations to move all motions under one section.

##### *In general*

In paragraph (a)(1), we will replace the language in current § 4.407, which states that any motion filed with the Board must provide a concise statement of the reasons supporting the motion. Instead, we will add details to this requirement by specifying that any motion must be in writing, state with particularity the relief sought, and include the reasons it should be granted. We also will add a requirement in paragraph (a)(2) that any moving party must first confer with all other known parties to the appeal to determine whether they will agree to all or part of the relief sought in the motion before filing the motion with the Board, except for a motion by an appellant to withdraw or voluntarily dismiss an appeal or an adversarial motion, such as a motion to dismiss for lack of jurisdiction. A similar conferral requirement is currently in our extension-of-time regulation at § 4.405. By making this a requirement in our general motions regulation, we will promote amicable resolution of issues before the motion is filed. This should result in fewer

motions needing to be filed and, when one is filed, reduce the time the parties must wait for the Board to rule on a motion. On the latter point, under the current regulations, any party may file a motion and the opposing party has 15 days to respond. See 43 CFR 4.407(b). Our current regulations also require that we factor in the 10-day grace period if any response is filed by mail. See *id.* at § 4.401(a). Oftentimes, however, we receive no response, or we receive a non-opposition at the end of the response period. Updating this rule to require all moving parties to make reasonable efforts to confer with all other parties before filing the motion will permit the Board to rule on unopposed motions more efficiently.

Paragraph (a)(3) will provide that, except as provided in paragraph (b) about motions for extension of time or in a Board order governing filings in a particular appeal, any response to the motion be filed within 14 days after service, instead of 15 days after service as in the current regulation.

Paragraph (a)(4) will be new and will allow a party to file a reply to a response to a motion no later than seven days after service of the response. The reply will be limited to 10 pages and could only address new issues or arguments raised in the response.

#### *Extensions of time*

Formerly § 4.405, this provision in § 4.409(b) will retain much of the former language. However, the meet-and-confer paragraph will be eliminated because we have to make that a general requirement rather than one limited to extensions of time. In addition, unlike the current rules which expressly prohibit responses to motions for extensions of time, see current § 4.407(b), the rule will allow any party that opposes the motion to file a response within three business days after the motion is filed. We also will reduce the time in which a document must be

filed if the Board does not act on the motion before the document is due, from 15 days to 7 days after the original filing deadline. In addition, we will eliminate current § 4.405(f), which allows bureaus or offices one automatic extension of 30 days to file an answer. Because we are changing § 4.410(c) to expand the time that an answer is due, from 30 days to 60 days after a statement of reasons is filed, we believe the automatic extension provision will no longer be necessary.

*Intervention and amicus curiae*

We will update and streamline our current intervention and amicus curiae regulation set forth in § 4.406. We will include separate provisions addressing intervention (paragraph (c)) and amicus curiae (paragraph (d)).

First, in paragraph (c)(1), we will change the 30-day intervention period to a 60-day period. Also, in paragraphs (c)(1) and (d)(3), we will require that all movants seeking to intervene or file a brief as an amicus curiae in a pending appeal serve their motion on all parties in the appeal. Our current regulations only require that parties serve other parties; no provision currently exists for requiring a non-party movant to serve documents filed with the Board on parties to the appeal.

In paragraphs (c)(2) and (c)(3), we will continue to require a movant to either demonstrate that they had a right to appeal the decision in the first instance or show how they would be adversely affected if the Board reversed, vacated, set aside, or modified the decision being appealed. The Board considers these matters on a case-by-case basis.

In paragraph (c)(4), we will retain the Board's authority to grant, grant with limitation, or deny the motion to intervene, at which point the Board may allow the movant to file a brief as amicus curiae. We also will limit participation of an intervenor who had a right to appeal the

decision under § 4.402 (current § 4.410) to the issues raised by the other parties to the appeal. This provision is intended to prevent an intervenor who had a right to appeal the decision but failed to do so from circumventing the appeal deadline and raising new issues that should have been raised in a separate appeal.

In paragraph (d), we will address participation as *amicus curiae*. The current rule views such participation solely as an alternative that the Board may allow in lieu of granting a motion for intervention. The current rule thus does not address motions to participate as *amicus curiae*. Paragraph (d) will explicitly allow such motions and allow the Board to grant or deny them in its discretion. To assist the Board in exercising its discretion, the movant will state their interest in the appeal and tell the Board how a brief will contribute to resolving the issues on appeal. The rule will also retain the distinction that a movant who is granted intervenor status will be a party to the appeal while an *amicus curiae* will not be a party to the appeal.

#### *Consolidation*

Paragraph (e) will address consolidation and differs slightly from the current provision in § 4.404. Instead of allowing consolidation if the facts or legal issues are the same or similar, the rule will allow consolidation “when they involve common factual or legal issues.” The phrase is intended to be more specific than the current phrase, and like the current provision, it is intended to promote efficiency by avoiding duplicative adjudication. Any party may file a motion to consolidate two or more appeals pending before the Board. We have also retained our authority to consolidate appeals on our own initiative.

#### *Suspension of consideration of appeal*

We will add a new provision in § 4.409(f) addressing common motions to suspend consideration of an appeal while the parties, for example, attempt to settle the matter or wait for



a judgment in a related federal court case. Any party will be allowed to file a motion to suspend consideration of a pending appeal. If granted, the Board will toll any remaining filing deadlines until a date specified in a Board notice or order and could require the parties to file periodic status reports. This provision will also allow the Board to lift the suspension upon motion by any party or at the Board's initiative.

*Motion for evidentiary hearing*

The regulation governing motions for evidentiary hearing in paragraph (g) is in substance identical to the existing rule at § 4.415. The current rule has five lettered paragraphs (a)–(e). The rule instead uses numbered paragraphs, with paragraphs (1), (2), (3), and (4) substantively identical to existing paragraphs (a), (b), (c), and (e), respectively. As with the current rule, the rule will allow any party to move the Board to refer an appeal to DCHD for a hearing before an ALJ. The moving party must specify in their motion what the issues of material fact are, what evidence must be presented by oral testimony, what witnesses need to be examined, and what documentary evidence needs to be explained, if any. The Board may order a hearing before an ALJ in DCHD if the movant can demonstrate that disputed issues of material fact exist which, if proved, would alter the disposition of the appeal, or that disputed factual or legal issues cannot be decided without holding a hearing to resolve them. We have retained the portion of the regulation that will require us, upon ordering a hearing, to specify the issues of fact upon which the hearing is to be held. We will continue under the regulation to order the ALJ to issue findings of fact on specified issues, a recommended decision, or a decision that will be final in the absence of an appeal. The hearing will be conducted under the Hearings Procedures that govern the practice before DCHD.

The primary difference from the current hearing provision is the omission of the language in current § 4.415(d). That section authorizes, but does not require, the Board to order three things in conjunction with a hearing: suspend the effectiveness of the decision under review; authorize the ALJ to specify additional issues; and authorize the parties to stipulate to additional issues with the approval of the ALJ. In the rule, we will remove the authorization in current § 4.415(d)(1) to suspend the effectiveness of the decision under review and will instead grant a stay under § 4.405 if the requirements of that section are met. We will also delete the remaining two authorizations addressing additional issues for the ALJ to consider. Instead, paragraph (4) will provide that the ALJ may consider other relevant issues and evidence identified after referral of the case for a hearing unless the Board orders otherwise. This provision authorizes the ALJ to specify additional issues and accept stipulations of the parties, so current § 4.415(d)(2)-(3) will be omitted as redundant.

#### Attorney substitution and withdrawal

The Board currently does not have a procedural regulation governing the withdrawal or substitution of an attorney in a pending appeal. Withdrawal and substitution arise often enough that we will include a new provision to ensure consistency in the way they are handled. Paragraph (h)(1) will provide that a party can substitute an attorney by filing with the Board and serving a notice of substitution. The notice will be effective upon filing, and the Board will update its records accordingly upon receipt.

In paragraph (h)(2), we will require an attorney seeking to withdraw as counsel without providing a substitute to file a motion to withdraw. The attorney will be required to serve the motion to withdraw on all parties to the appeal and on the attorney's clients. The attorney will

be required to include in the motion pertinent contact information for the attorney's clients; a statement explaining why the withdrawal will not unfairly prejudice the attorney's clients, and a statement that the attorney has taken appropriate steps to protect the interests of the clients, such as giving the clients reasonable notice that provides adequate time for the employment of another attorney and surrendering files related to the appeal. Withdrawal will not be effective unless the Board grants the motion to withdraw, and the Board may condition or deny withdrawal to avoid prejudice to the clients and other parties.

#### § 4.410 Briefs

The Department's existing regulations set forth the briefing requirements for appeals before the Board in two provisions: 43 CFR 4.412 specifies the requirements for statements of reasons and reply briefs, and § 4.414 specifies the requirements for answers. To allow readers to find the Board's briefing requirements more easily, we will locate the requirements for statements of reasons, reply briefs, and answers in one section of the regulations entitled Briefs. In § 4.410, we have gathered the briefing requirements from existing §§ 4.412 and 4.414 and addressed each type of brief in the chronological order in which it will be filed.

Paragraph (a) will be new to the Department's regulations. Paragraph (a) will explain that § 4.410 governs the briefing of an appeal before the Board. It will also require that a party seek the Board's permission to depart from those requirements when the party wishes to exceed a page limit, extend a deadline, file a brief not expressly provided for in this section, or otherwise depart from the requirements of § 4.410. Only after a party has obtained the Board's permission to depart from the briefing requirements will it be allowed to file its brief. With the addition of this paragraph, the Board proposes removing as duplicative the current provisions in paragraphs

4.412(a), 4.412(d)(2), 4.414(b), which provide that the requirements for the specified briefs apply “[u]nless the Board orders otherwise upon motion for good cause shown.”

*Statements of reasons*

In paragraph (b), we will make several more changes to the requirements for statements of reasons. First, we will change when a statement of reasons is due. Under the existing regulation, a statement of reasons is due no later than 30 days after the notice of appeal was filed. Frequently, parties will ask the Board to extend this deadline until after the bureau or office provides the appellant the record supporting the decision on appeal, allowing the appellant an opportunity to view the information upon which the bureau or office made its decision and tailor its arguments to that information. Some bureaus consistently provide the record to appellants and consent to these extensions, and others require appellants to file a request under the Freedom of Information Act to obtain the record. As a matter of practice, the Board routinely grants motions to extend the deadline to file a statement of reasons until after an appellant has an opportunity to review the bureau or office’s record.

For consistency, and to ensure that appellants are aware of all information supporting the decision on appeal, we will change the deadline for a statement of reasons to “after the record on appeal is submitted to the Board.” With this requirement and § 4.406(a), the Board will require the bureau or office whose decision has been appealed to submit the record supporting the decision on appeal to the Board within 60 days from receiving the notice of appeal and serve it upon the appellant, and then allow the appellant 30 additional days to file its statement of reasons. This will allow the appellant to have the bureau or office’s rationale for the decision

when drafting its statement of reasons, which promotes fairness and eliminates the need for an appellant to file a Freedom of Information Act request to obtain the record.

Second, we will add a provision to explain what an appellant must include in its statement of reasons for its appeal. In paragraph (b)(3), we will add a sentence stating that the statement of reasons must set forth with specificity all legal and factual errors alleged to have been made in the decision being appealed. This sentence will be added to the regulation for clarity, consistency, and transparency, and is consistent with Board precedent. See, e.g., *Jean Public*, 194 IBLA 269, 273 (2019) (“[A]ppeals must be dismissed when an appellant fails to allege any legally cognizable error with a bureau’s decision”); *United States v. Fletcher De Fisher*, 92 IBLA 226, 226-27 (1986) (dismissing appeal when appellant filed five-sentence statement of reasons making only conclusory allegations of error in each sentence because it “does not adequately point out the basis for appellants’ belief that the decision appealed from is in error”); *United States v. Lewis Maus*, 6 IBLA 164, 165 (1972) (“The statement [of reasons] does not meet the requirements of the rules of practice in that it does not point out the grounds upon which the decision appealed from is in error.”). We also will specify in paragraph (b)(4) that an appellant must include all arguments in support of the appeal in the statement of reasons and may not incorporate by reference arguments made in other documents.

Consolidating an appellant’s arguments in the statement of reasons facilitates the Board’s review and helps ensure that an appellant complies with the page limit for statements of reasons.

Appellants will still be able to attach declarations and other exhibits to their statements of reasons as authorized by § 4.408(c) (Document Elements Excluded from Page Computations).

Third, we will add a provision to this section about the issues a party may raise on appeal when the bureau or office provided an opportunity for participation in its decision-making process. This provision appears in current § 4.410(c), in a regulation about who may appeal to the Board. We will move this provision to § 4.410(b) about the briefing requirements because it is more relevant to the content of the statement of reasons than it is to the entities that may file an appeal and therefore fits more logically in § 4.410(b). Also, we will amend the existing provision in two ways: 1) We will change the phrase “as party to the case, as set forth in paragraph (a) of this section,” to simply “a party,” because, in this context, the other words are unnecessary; and 2) we will revise the provision to allow a party to raise on appeal not only those issues the party raised during its participation in the decision making process, but also any issues raised by anyone else who participated in the decision-making process. This expansion of the rule will allow for the possibility that a party intentionally did not raise an issue to the bureau or office because the issue was already adequately presented by another person or entity. A party should not be prevented from raising an issue on appeal that it did not raise below only because it chose not to duplicate other participation or burden the bureau or office with redundant comments or objections.

Finally, with respect to statements of reasons, we will make three additional changes so that readers may find requirements where they most logically fit. We will move existing 4.412(b), about statements of standing in appeals related to land selections under the Alaska Native Claims Settlement Act, to § 4.403(a)(2), where we will expand its requirements to all appellants. Please see the discussion of § 4.403(a)(2) for an explanation of that change. We also will remove the provision in paragraph 4.412(c) about summary dismissal for failure to file a statement of reasons because it is addressed by § 4.412, Affirming without opinion. Last, we will

remove the provision in paragraph 4.412(e) stating that the formatting requirements in existing paragraph 4.401(d) apply to statements of reasons because that requirement will be covered by § 4.408, which provides the formatting requirements for any document filed in an appeal to the Board.

### *Answers*

Section 4.410(c) contains the requirements for the bureau or office's answer to the appellant's statement of reasons, which are currently set forth in existing § 4.414. We will make several changes to the requirements for an answer. First, instead of stating that any person or entity served with a notice of appeal may file an answer, we will revise the requirement to state that the bureau or office may file one answer. Typically, the bureau or office is the only entity that files an answer. The change will have the effect of requiring any entity, other than the bureau or office whose decision is on appeal, who wants to participate in the proceeding to seek the Board's permission to intervene or file an amicus brief in the appeal. We anticipate that this change will have minimal effect on those with an interest in an appeal and will serve to clarify the requirements for properly participating in that appeal before the Board.

Second, we will change the deadline for filing an answer from 30 days after service of the statement of reasons to 60 days after service of the statement of reasons or an intervenor's brief filed in support of an appellant under paragraph (d). Although the existing regulation at § 4.414(a) requires the bureau or office to file the answer within 30 days, the regulation at existing § 4.405(f) allows one automatic 30-day extension of the deadline, which bureaus and offices routinely seek. To prevent the need to seek the automatic 30-day extension and make the appeals process more efficient for the Department, we will extend the deadline to 60 days. Also, because

we will add paragraph (d), which will allow an intervenor in support of an appellant to file a brief within 14 days after service of the statement of reasons, we will allow the bureau or office to delay filing an answer until it receives both the statement of reasons and the intervenor's brief. This will allow the bureau or office to respond to the arguments of both the appellant and the intervenor in one answer, reducing the need to file two separate answers.

In addition to these changes, we will remove the provision from existing paragraph 4.414(b)(2) that states that the party that filed an answer may not file any further pleading. The next document a bureau, office, or intervenor will file after an answer will be a sur-reply, which we will address in paragraph (f). We also will remove certain phrases and sentences from the requirements for filing an answer. The existing regulation at § 4.414 refers in several places to the "answer or motion." Because we will add a new section of the regulations specifically addressing the requirements for motions (§ 4.409), we will remove the references to motions from § 4.410(c). Existing paragraph 4.414(c) states that, if an answer is filed or served after the time required, the Board may disregard it in deciding the appeal. We will remove that sentence from the requirements for answers because it is covered by § 4.411, Sanctions. Finally, we will remove the provision in existing paragraph 4.414(d) stating that the formatting requirements in existing paragraph 4.401(d) apply to answers because that requirement will be covered by § 4.408.

#### *Intervenor briefs*

We will add a new paragraph specifically addressing the requirements for intervenors' briefs. Paragraph (d) will establish deadlines for intervenors to file a brief either in support of the appellant or the bureau or office. Subparagraph (d)(1) will require an intervenor in support of an appellant to file a brief within 14 days after service of the statement of reasons, and subparagraph



(d)(2) will require an intervenor in support of the bureau or office to file a brief within 14 days after service of the answer. Allowing the intervenor to review the brief of the party it supports should allow it to omit duplicative arguments and tailor its briefing to its unique perspective. subparagraph (d)(3) will limit an intervenor's brief to 20 pages, excluding exhibits, declarations, or other attachments. Ordinarily, intervenors should be able to rely on the briefs of the party they support to make the relevant arguments, so they should require fewer pages than those allotted to the appellant and bureau or office. This is particularly true where the intervenor had a right to appeal the decision because § 4.409(c)(4) will limit that intervenor's participation to those issues raised by the other parties to the appeal.

#### *Reply briefs*

The requirements for reply briefs are set forth in current § 4.412(d). We will move those requirements to § 4.410(e) with a few changes. First, the existing requirements state that the filing of a reply brief is discouraged. We will remove that sentence and expressly allow appellants to file a reply to an answer because it is common for appellants to do so. Section 4.410(e) will allow the appellant to file one reply brief. The reply brief must be filed within 21 days after service of the answer or, if intervention has been granted in support of the bureau or office, within 14 days of service of the intervenor's brief. To limit repetitive arguments that do not meaningfully add to those that should have been contained in the statement of reasons, we revise the statement in existing paragraph 4.412(e)(2) that the reply brief is limited to the issues raised in the answer to specifying that it is limited to *new* issues raised in the answer or an intervenor's brief filed in support of the bureau or office. In other words, appellants will not be allowed to use a reply brief to raise new arguments not raised in their statement of reasons, the answer, or the intervenor's brief or to repeat arguments they already made in their statements of

reasons. We modeled this provision after United States Supreme Court Rule 15, which says, in briefing petitions for certiorari, “Any petitioner may file a reply brief addressed to new points raised in the brief in opposition.

...”

Finally, as mentioned in the explanation of the changes to the requirements for statements of reasons, we will remove the provision in paragraph 4.412(e) stating that the formatting requirements in existing paragraph 4.401(d) apply to statements of reasons and reply briefs because that requirement will be covered by § 4.408, which provides the formatting requirements for any document filed in an appeal to the Board.

#### *Sur-replies*

Paragraph (f) will state that the Board will not accept a sur-reply unless a party first files a motion demonstrating a compelling reason to file a sur-reply and the Board grants the motion. This provision will allow a party that filed an answer to file a sur-reply if it can show compelling reasons to do so, which is a change from the existing rule at § 4.414(b)(2) that prohibits the party that filed an answer from filing any further pleading. We will add this provision after the requirements for a Reply Brief so that it appears in the order in which briefs will be filed chronologically.

#### *Attachments*

In § 4.410(g), we will add a provision addressing how the Board considers attachments to briefs. Paragraph (g) will expressly allow a party to attach exhibits, declarations, or other documents to a brief. This paragraph will then state, consistent with the Board’s practice, that the Board will consider attachments to the extent it finds them reliable and relevant to the issues on

appeal. Parties do not need to seek permission to attach exhibits, declarations, or other documents to statements of reasons, answers, intervenor briefs, and replies.

#### *Notices of supplemental authority*

In § 4.410(h), we will add a provision allowing the parties to file notices of supplemental authority after the statement of reasons, answer, and reply have been filed. The Board does not currently have a regulation to this effect, so the Board considers supplemental authority on a case-by-case basis. Adding a provision expressly addressing these notices will ensure consistency and reduce the possibility that a party will submit new briefing without the Board's approval under the guise of a notice of supplemental authority. The language in paragraph (h) will promote efficiency by limiting the number of pages for the notice and any response to the notice and specifying a deadline for a response, and it will be consistent with recent Board precedent. See, e.g., *WildEarth Guardians*, 196 IBLA 1, 30-31 (2020) (explaining that the supplemental authority may only be authority that has come to a party's attention after that party's brief has been filed and could not have been presented to the bureau before it made its decision).

#### § 4.411 Sanctions

4.411 will codify the Board's authority to enforce its rules and orders through appropriate sanctions, something the existing rules do not explicitly address. By doing so, the rule will provide notice to all persons and entities appearing before the Board about the penalties that we may impose for failure to comply with the rules and Board orders. While failure to comply is not prevalent, it does happen, and we currently have express authority to sanction only in specified situations, such as for improper *ex parte* communications under current 43 CFR 4.27(b)(2) or for

filing and service violations under the existing summary dismissal provisions of § 4.402. Section 4.411 will provide more general authority and eliminate the need for the existing summary dismissal provisions in § 4.402(b)-(d). The existing summary dismissal provision in § 4.402(a) will be replaced with § 4.412(a), which allows the Board to affirm without opinion a challenged decision when an appellant fails to file a statement of reasons within the time required, which currently can result in summary dismissal pursuant to existing § 4.402(a).

Section 4.411 will authorize the Board to impose appropriate sanctions on any person or entity who violates the regulations in part 4, an order of the Board, or any other statute or regulation that governs the appeal. Paragraph (a) will state that the sanction may include, after notice and opportunity for the person or entity to respond, dismissal of all or part of an appeal, denial of a motion, refusal to consider a filing, and the exclusion of evidence from consideration. Paragraph (b) will set out the circumstances under which the Board will, absent extenuating circumstances, sanction a party by dismissing its appeal. Specifically, the Board will dismiss the appeal if the appellant has failed to provide financial security when required by regulation or order; violated the regulations in part 4 repeatedly; or caused prejudice to another party because of a violation of a Board order or the regulations in part 4.

#### § 4.412 Affirming without opinion

Section 4.412 will provide two circumstances in which the Board will affirm a decision on appeal without issuing a detailed order or decision analyzing the appellant's arguments and the bureau or office's rationale.

First, § 4.412(a) will address the circumstance in which an appellant does not file a statement of reasons or state any reasons for its appeal in a filing with the

Board. In this circumstance, paragraph (a) will authorize the Board to “affirm without opinion” the decision on appeal. Although the effect of summarily dismissing an appeal is similar to affirming the decision on appeal without issuing a decision, the term “affirm” more accurately reflects the result from an appellant’s failure to articulate the reasons for its appeal. Under Board precedent, an appellant must show error in the challenged decision to prevail on appeal. See, e.g., *Enterprise Field Services, LLC*, 193 IBLA 313, 320 (2018) (“The appellant has the burden to show error in [the] decision.”); *Wells J. Horvereid*, 88 IBLA 345, 348 (1985) (“The burden of proof is on appellant to show error in the decision appealed from”). Because this burden cannot be satisfied if the appellant fails to articulate any reasons for its appeal, the proper result is to affirm the challenged decision, as opposed to dismissing the appeal. See, e.g., *Chugach Alaska Corp.*, 143 IBLA 127, 132 (1998) (affirming the challenged decision because the appellant had not satisfied its burden of demonstrating error in the decision).

Paragraph (a) will, in conjunction with § 4.411 (sanctions), replace our existing summary dismissal authority in § 4.402(a). Existing § 4.402(a) provides that an appeal “will be subject to summary dismissal” for four specified reasons. Dismissal is a type of sanction that is now expressly authorized under § 4.411, and that section lists the circumstances under which the Board will dismiss an appeal absent extenuating circumstances. But when an appellant fails to articulate the reasons for its appeal, it is more appropriate to summarily affirm the decision being appealed rather than dismissing the appeal and § 4.412(a) addresses that situation.

Section 4.412(a)’s use of the word “may” reflects that it is within the Board’s discretion to affirm without an opinion and that the Board is not required to do so in all instances, e.g., if the statement of reasons is belatedly filed and no prejudice is shown.

This is consistent with the Board’s prior practice. See *United States v. Lee H. Rice*, 2 IBLA 124, 126 (1972) (holding that when an appellant neglects to file a statement of reasons, the regulation stating that the appeal “will be subject to summary dismissal” does not require dismissal and the circumstances “must be evaluated within the discretionary power of the Secretary’s appellate authority”).

Paragraph 4.412(b) will provide another circumstance in which the Board may affirm the decision on appeal without an issuing an opinion documenting reasons for doing so. This paragraph will address the circumstance in which a bureau or office has provided a previous level of administrative review before the appeal to the Board—for example, BLM State Director Review, review of a royalty decision by the Director of ONRR, or review by an ALJ in DCHD. Where a bureau or office decision has been reviewed by one of these bureau or office officials or an ALJ, this new regulation will authorize the Board to affirm the official’s or ALJ’s decision without opinion if the Board makes certain determinations. Specifically, the Board will have to determine that (1) the official or ALJ reached the correct result; (2) any errors in the decision were harmless or nonmaterial; and (3) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the appeal warrants the issuance of a written opinion by the Board. If the Board can make these three determinations, it will be able to affirm the decision on appeal without issuing a detailed opinion analyzing the appellant’s arguments and the bureau, office, or ALJ’s rationale.

This new provision is similar to IBIA’s “affirming without opinion” provision in § 4.312(c). In the section of the preamble addressing that section,

IBIA explains that the provision is based on a regulation for the Department of Justice’s Board of Immigration Appeals, which requires its Board members to affirm the results reached below without opinion in the same circumstances included in § 4.312(c) and § 4.412(b)(1)-(3). See 8 CFR 1003.1(e)(4) (2022). Like IBIA, the Board will adopt this practice to promote efficient docket management. Also, as IBIA explains, a Board order affirming without opinion does not reflect an abbreviated review of an appeal; it reflects the use of an abbreviated order to describe the Board’s review where the regulatory requirements of paragraph (b) are met. As in paragraph (a), paragraph (b)’s use of the word “may” reflects that it is within the Board’s discretion to affirm without opinion under this provision and that the Board is not required to do so.

Paragraph (c) will state what must be included in a Board order affirming an appealed decision without opinion. Specifically, the Board’s order must cite this section (§ 4.412), state that it affirms the decision on appeal, and expressly adopt the decision on appeal. Once the Board issues an order stating these three things, the Board’s order will become the final decision for the Department and subject to judicial review.

#### § 4.413 Scope of review, burden to show error, and standards of review

We will add a new section that will set forth the scope of the Board’s review, the appellant’s burden to show error in the decision on appeal, and the Board’s standard of review. The Department does not have regulations that address these topics, and we will add provisions codifying the Board’s case law and providing clarity and consistency for those bringing and responding to appeals before the Board.

#### *Scope of Review*

In paragraph (a), the Board will restate the principle that is set forth in current § 4.1 (and new § 4.1, with minor modification) that the Office of Hearings and Appeals, which includes the Board, “may hear, consider, and decide those matters [within the jurisdiction of the Department] as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary.” In the Board’s decisions, we have cited this statement from § 4.1 in explaining that the scope of our review is *de novo*.

The Board’s review authority is *de novo* in scope because we decide matters “as fully and finally as might the Secretary.” This means that unlike Federal courts, which are limited in their review to the administrative record created before the agency under the Administrative Procedure Act, the Board is “not limited by the record before [a bureau] at the time it [made a decision on appeal] in determining the correctness of that decision.” There are instances, therefore, when the Board may, in its discretion, accept and consider information provided by parties on appeal, in furtherance of carrying out our “duty to have before us as complete a record as possible.” *SUWA*, 191 IBLA 37, 44 (2017) (quoting *Wyoming Outdoor Council*, 160 IBLA 387, 398 (2004)). Moreover, the Board’s “review is not limited to the theories upon which the parties have proceeded,” *Oregon Cedar Products Co*, 119 IBLA 89, 93 (1991), and our *de novo* review authority “includes the right to determine for ourselves any factual or legal question necessary to adjudicate an appeal.” *Benton C. Cavin*, 83 IBLA 107, 125 (1984). Paragraph (a) will codify these principles.

In addition, paragraph (a) will state that the Board may affirm, modify, vacate, set aside, or reverse any decision properly brought before it for review, and may remand the matter as may be just under the circumstances. This statement will codify Board practice to provide clarity and transparency. The Board will use language that mirrors the authority in 28 U.S.C. 2106, which



provides that an appellate court “may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” The Board uses the terms “vacate” and “set aside” interchangeably because we interpret them to have the same meaning. See Black’s Law Dictionary (8<sup>th</sup> ed. 2004) (defining “set aside” as “to annul or vacate”).

*Burden to show error*

In paragraph (b), the Board will codify the appellant’s burden to show that the bureau, office, or ALJ made an error in the decision the appellant has appealed. This statement will be consistent with § 4.410(b)(3), which will specify that, in the statement of reasons, the appellant must set forth with specificity all legal or factual errors alleged to have been made in the decision on appeal. This statement will also be consistent with the Board’s precedent. See, e.g., *Enterprise Field Services*, 193 IBLA at 320; *Wells J. Horvereid*, 88 IBLA at 348.

*Standards of review*

In paragraph (c), we will adopt general standards of review the Board will use in resolving appeals. Subparagraph (c)(1) will draw upon language in the APA to set forth the overarching standard of review the Board uses in every appeal. In 5 U.S.C. 706 (sec. 10(e) of the APA), Congress directed that courts reviewing agency action must, among other things, “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. (2)(A). The APA also directs courts to set aside agency action after formal adjudication proceedings when they are unsupported by substantial evidence. 5 U.S.C. (2)(E). The Supreme

Court explained the application of 5 U.S.C. 706(2)(A) and (2)(E) in *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999): “A reviewing court reviews an agency’s reasoning to determine whether it is ‘arbitrary’ or ‘capricious,’ or, if bound up with a record-based factual conclusion, to determine whether it is supported by ‘substantial evidence.’”

Subparagraph (c)(1) of § 4.413 will reference the APA standards for judicial review of agency action and, by doing so, codify the standard of review set forth in numerous Board decisions. See, e.g., *Larry Marker*, 194 IBLA 283, 290 (2019) (“[T]he Board will uphold [a decision] which has a rational basis that is stated in the decision and supported by facts of record demonstrating that the decision is not arbitrary, capricious, or an abuse of discretion.”); *Desert Sportsman’s Rifle and Pistol Club, Inc.*, 188 IBLA 339, 346 (2016) (“The Board will therefore set aside a BLM decision if we conclude it is arbitrary, capricious, an abuse of discretion, or lacks a rational basis supported in the record”); *David L. Antley*, 178 IBLA 194, 197 (2009) (“BLM’s exercise of its discretionary authority . . . must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion.”). Subparagraph (c)(1) does not apply to DCHD and therefore will not alter the requirement that, when reviewing grazing decisions issued by BLM, an ALJ in DCHD will not set aside the BLM decision if it is reasonable and represents substantial compliance with BLM’s grazing regulations, in accordance with current 43 CFR 4.480(b) and 43 CFR 4.173(c)(2). Subparagraph § 4.413(c)(1) will indicate the standard of review we will apply to the ALJ’s decision, not the standard of review the ALJ will use in reviewing BLM’s grazing decision. See, e.g., *Southern Nevada Water Authority*, 191 IBLA 382, 403 (2017) (holding that the ALJ erred by “failing to accord

BLM’s decision, and the opinion of its experts, appropriate deference”). We recognize that applying the APA standards to all appeals before the Board, regardless of the subject matter, will be a change from historical Board practice, where the standard of review has sometimes varied by subject matter. For example, in reviewing a decision assessing civil penalties for violations of offshore oil and gas regulations, the Board stated that it will uphold the decision when there is a reasonable explanation for the agency’s decision and a rational connection between the agency’s findings and choice. *Petro Ventures, Inc.*, 167 IBLA 315, 325 (2005). But in reviewing a BLM decision on an application for a right-of-way, the Board said it will uphold the decision “when the record shows that the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest, and no sufficient reason is shown to disturb BLM’s decision.” *Harriet Natter*, 181 IBLA 72, 82 (2011). By consistently applying the APA standards to appeals before the Board, subparagraph (c)(1) will provide consistency, transparency, and ease of application by both the Board and practitioners by invoking familiar standards backed by a long history of judicial case law.

In subparagraph (c)(2), we will codify the principle, employed in appeals since the inception of the Board, that we review questions of law de novo, without deferring to the legal interpretations of the bureau, office, or ALJ. See, e.g., *WildEarth Guardians*, 196 IBLA 227, 237 (2020); *Davis Creek Mining Co.*, 194 IBLA 173, 188 (2019); *United States v. Scavarda*, 189 IBLA 9, 13 (2016); see also *Statoil Gulf of Mexico LLC*. 42 OHA 261, 289 (2011) (stating that the Board is not “obliged to defer to [a bureau’s] legal interpretations”).

In paragraph (c)(3), we will codify the principle that the Board will not overturn a bureau or office decision based on a “harmless error,” which we define as an error that does not prejudice a party or affect any party’s substantial rights. This principle is based on the APA’s “prejudicial error” rule, which directs courts reviewing agency decisions to take “due account . . . of the rule of prejudicial error.” 5 U.S.C. 706; see *Shinseki v. Sanders*, 556 U.S. 396, 406-11 (2009) (explaining that the APA’s prejudicial error rule summarizes the “harmless error” rule courts apply in reviewing decisions by lower courts and administrative bodies); see also, e.g., *Gino Foianini*, 171 IBLA 244, 251 n.7 (2007) (modifying an ALJ’s decision “to the extent it misstated the burden of persuasion,” finding “this misstatement is harmless error, as appellant did not satisfy” the proper burden); *ASARCO Inc.*, 152 IBLA 20, 27-28 (2000) (finding a bureau’s failure to consider appellant’s evidence was harmless error because appellant did not explain how consideration will have changed the analysis or result); *Michael P. Grace*, 50 IBLA 150, 152 (1980) (finding BLM’s misstatement of the county in which a lease was located was harmless error because “the lease was properly identified by number, and the well by section and township”). These provisions will provide transparency to the public and a greater understanding of how the Board resolves appeals.

#### § 4.414 Interlocutory appeals

In the Department’s current regulations, interlocutory appeals to the Board of an ALJ’s ruling are governed by § 4.28 in subpart B. Under that provision, a party may only appeal an ALJ’s interlocutory ruling if the Appeals Board grants permission to do so and the ALJ either certifies the interlocutory ruling for appeal or abuses their discretion in failing to do so. The provision explains that permission for an interlocutory appeal will only be granted if the

appellant shows “that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision.” Finally, the current provision specifies that an interlocutory appeal does not operate to suspend a hearing before the ALJ unless the Board orders otherwise.

The Department will carry these principles forward into this rule with a few modifications. As explained in the preamble for subpart C, DCHD proposes its own interlocutory appeal regulation, § 4.122, to address in more detail the requirements for seeking review of a non-final DCHD order. The regulation will specify the content of and deadlines for an application for the ALJ’s certification of a ruling and a petition for the Appeals Board’s permission to file an interlocutory appeal. DCHD’s regulation will also clarify that an ALJ uses the standard currently set forth in § 4.28 to determine whether to certify the order or deny the application for certification. Specifically, the ALJ will determine whether “[t]he order involves a controlling question of law about which there are substantial grounds for difference of opinion” and whether “[a]n immediate appeal will materially advance the completion of the proceeding.”

The Board will add a complementary section to subpart E, § 4.414, which confirms § 4.122’s applicability to interlocutory appeals from DCHD and specifies how the Board will decide whether to grant permission to file an interlocutory appeal. Like DCHD’s § 4.122(b), paragraph (a) will explain that permission to file an interlocutory appeal is a two-step process requiring an application in accordance with § 4.122(d) asking the ALJ to certify the interlocutory order and a petition to the Board for permission to file an interlocutory appeal under § 4.122(g).

Paragraph (b) will state when the Board will grant permission to file an interlocutory appeal. Subparagraphs (b)(1) and (2) will specify that the Board will grant permission to file an interlocutory appeal if it (1) agrees with the ALJ that the interlocutory ruling involves a controlling question of law about which there are substantial grounds for a difference of opinion and that an immediate appeal will materially advance the completion of the proceeding or (2) determines that the ALJ abused their discretion by denying certification.

#### § 4.415 Petition for reconsideration

In the Department's current regulations, requests for reconsideration of the Board's dispositive orders and decisions are governed by §§ 4.21(d) and 4.403. Current § 4.21(d), which applies to all units of the Office of Hearings and Appeals, provides that the Board may grant reconsideration of a decision only in extraordinary circumstances, where sufficient reason exists, when a request for reconsideration is filed within the time required by the regulations governing practice before the Board. The regulations governing practice before the Board are currently found in § 4.403 and provide additional requirements for reconsideration.

We will move the detailed requirements for reconsideration of Board decisions from § 4.403 to § 4.415 and revising those requirements in several ways. We will remove the language in current § 4.403(a), stating that the Board's decision is final agency action and effective on the date issued, because that principle will be stated in § 4.21(b)(3). We will rephrase and reorder the provisions in the remaining paragraphs of § 4.403—the provisions of paragraphs 4.403(b), (c), (d), (e), and (f)—so that § 4.415 first addresses how petitions for reconsideration may be filed and then addresses when the Board will grant them.

One change will appear throughout § 4.415. We will replace the phrase “motion for reconsideration” with “petition for reconsideration” because motions generally are filed during a proceeding while petitions for reconsideration are filed after a proceeding.

In § 4.415(a), we will specify that parties may petition for reconsideration of only dispositive orders or decisions—those that finally resolve an appeal—instead of interlocutory decisions such as rulings on motions or petitions for a stay. The time in which a party may petition for reconsideration will remain 60 days, and the time for filing a response, which will be addressed in § 4.415(c), will remain at 21 days. Both the petition and any response to the petition will be limited to 15 pages to discourage parties from rearguing the original bases of the appeal and encourage focusing on one or more of the three reasons for reconsideration identified in § 4.415(b). Because the bases for reconsideration will be limited to one or more of the three reasons, we believe the page limits will be reasonable and promote efficiency. Paragraph (a) will also state that the deadline to file a petition for reconsideration cannot be extended. This paragraph will include the sentence in current § 4.403(b)(2) stating that a motion for reconsideration may include a request that the Board stay the effectiveness of its decision.

Finally, this paragraph will state that the Board will not accept a petition for reconsideration of a Board order affirming without opinion the decision on appeal under § 4.412.

In paragraph 4.415(b), we will state affirmatively that the Board will grant the petition for reconsideration only in extraordinary circumstances where sufficient reason exists, using the same language as in current § 4.21(d). We remove the language in current § 4.403(c) that instructs those moving for reconsideration to “[s]pecifically describe the extraordinary circumstances that warrant reconsideration” and “[i]nclude all arguments and supporting

documents,” and replacing that language with the instruction that the moving party must establish that one of three enumerated reasons for reconsideration exists. We will move the statement that the Board will deny a petition that merely repeats arguments made in the original appeal from current § 4.403(f)(1) to § 4.415(b).

Paragraph (b) will then specify, in subparagraphs (1) through (3), the three reasons that will warrant reconsideration. Before 2010, the regulation at § 4.403 stated only that “The Board may reconsider a decision in extraordinary circumstances for sufficient reason,” 43 CFR 4.403 (2009), and did not specify or provide examples of those circumstances. In a proposed rule in 2007, the Board explained that it “has had sufficient experience with the regulation to enable it to identify circumstances that have frequently been found ‘extraordinary’” and decided to “amend the regulation to provide guidance based on this experience.” Interior Board of Land Appeals Procedures, 72 FR 10454; March 8, 2007). In the final regulation in 2010, the Board added a list of examples of circumstances that may warrant the Board granting a motion for reconsideration. Interior Board of Land Appeals and Other Appeals Procedures, 75 FR 64655; October 20, 2010. Our additional experience since 2010 leads us to conclude that further refinement of these circumstances is warranted and will be beneficial to those who practice before the Board.

Paragraphs (b)(1) through (3) will provide the exclusive list of reasons that, in our experience, covers all of the circumstances in which the Board will exercise its discretion to grant reconsideration.

The first reason for reconsideration, which will appear as § 4.415(b)(1), will be that the Board misstated a material fact, resulting in an erroneous decision. This reason is similar to the first example of an extraordinary circumstance in the current



regulation at § 4.403(d)(1), which is “[e]rror in the Board’s interpretation of material facts,” but the new language clarifies that it will not be sufficient to simply fault the Board’s factual finding or interpretation of the facts. Instead, the moving party will be required to show that the Board misstated a fact, and that the Board’s reliance on that misstated fact resulted in an erroneous decision. The fact that a party disagrees with the Board’s interpretation of a material fact or its resolution of a disputed fact, however, does not amount to a “misstatement” of that fact and will not justify reconsideration.

The second reason for reconsideration, which will appear as § 4.415(b)(2), will be that evidence exists that was not before the Board at the time it issued the final decision and that demonstrates error in the decision. This language is in current § 4.403(d)(4) as an example of an extraordinary circumstance that may warrant reconsideration. The Board will move language from current § 4.403(e), which requires the party moving for reconsideration on the basis of new evidence to “explain why the evidence was not provided to the Board during the course of the original appeal,” so it directly follows the language from current 4.403(d)(4). Section 4.415(b)(2) will add that the petitioner must submit that evidence with the petition for reconsideration.

The third reason for reconsideration, which will appear as § 4.415(b)(3), will be that the Board’s decision failed to cite and address a binding statute, regulation, or decision that would require a different outcome in the decision. The reference to a binding “decision” is intended to include judicial decisions as well as all types of binding Departmental decisions, including Secretary Orders and Solicitor M Opinions. The provision will also state that it will not be sufficient to argue only that the Board misinterpreted or misapplied the law cited in the decision, because that will amount to mere disagreement with the Board’s decision, which is better addressed by

seeking judicial review in Federal court.

The Board's list of reasons for reconsideration will not include two examples of extraordinary circumstances that were included in the 2010 rulemaking: recent judicial development and change in Departmental policy. With respect to recent judicial developments, in its 2007 proposed rule, the Board cited the case of *Amoco Production Co.*, 143 IBLA 45, 54A-54E (1998), dismissed with prejudice, Civ. No. 1:99CV00538 RMU (D.D.C. Aug. 28, 2002), as an example of the Board granting reconsideration on this ground. In that case, the Board was alerted to a ruling by the United States District Court for the District of Columbia, issued while the petition for reconsideration was pending, reaching a legal conclusion contrary to the Board's original decision. The Board found that the District Court's decision "controls our disposition of this case on reconsideration." *Amoco Production Co.*, 143 IBLA at 54E. Besides this case, we found no published decision of the Board citing a recent judicial development as a basis for reconsideration. If the situation arises in the future, we believe reconsideration would be warranted only in the rare situation where the subsequent judicial decision was binding on the Board, and the rule will allow that circumstance to serve as a basis for reconsideration under paragraph (b)(3).

We also will remove a change in Departmental policy as a basis for reconsideration. While a Departmental policy expressed in a regulation, Secretary's Order, or Solicitor's Memorandum Opinion binds the Board, other Departmental policies do not. See, e.g., *Center for Native Ecosystems*, 182 IBLA 37, 53 (2012) ("[S]tatements of policy and instructional memoranda do not have the force and effect of law or establish binding legal norms unless they are issued pursuant to notice-and-comment under the Administrative Procedure Act"). When the Board proposed adding changes in Departmental policy as a basis for

reconsideration in its 2007 proposed rule, it cited as examples *Conoco, Inc.*, 164 IBLA 237, 241-42 (2005), *Conoco, Inc.*, 115 IBLA 105, 106 (1990), and *Ladd Petroleum Corp.*, 107 IBLA 5, 8 (1989), none of which were decisions made in response to a petition for reconsideration. In each of these appeals, the Board applied a new regulation or a new interpretation of a regulation to a pending appeal where doing so would benefit appellants and there were no countervailing regulations, public policy considerations, or intervening rights. The application of the new policy or regulation was discretionary, and in at least one of these decisions, the basis for the Board's conclusion was the absence of a rational basis for the decision on appeal. Since the Board added this basis for reconsideration to the regulations, we have not applied this provision in any published reconsideration decision. Applying a new policy, opinion, or regulation retroactively to already decided appeals through reconsideration raises due process and fairness issues entirely different from those associated with a pending appeal because the parties would not have prior notice of the application of the new rule. To the extent the Board's decision fails to cite and address a binding regulation, Secretary's Order, or M-Opinion that existed before the Board issued its decision, a party could seek reconsideration citing paragraph (b)(3). We therefore will omit "change in Departmental policy" from the list of reasons for reconsideration.

The list of three reasons for the Board to grant reconsideration is consistent with Federal Rule of Civil Procedure 59(e), Motion to Alter or Amend a Judgment, which Federal courts have found provide them discretion to grant a motion to alter or amend a judgment if there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error. See *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). It is also consistent with Federal Rule of Civil Procedure 60(b), which provides that grounds for relief

from a final judgment of a Federal court include mistake and newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial.

The remainder of § 4.415 draws upon the language in current paragraphs 4.403(b)(4) and (b)(5). Paragraph 4.415(d) will include the principle, currently stated in § 4.403(b)(4), that a petition for reconsideration will not stay the effectiveness or affect the finality of the Board's order or decision unless so ordered by the Board for good cause. The language will replace "the Board's decision" with "the Board's order or decision" because the Board issues dispositive orders and dispositive decisions.

We also will add a sentence clarifying the effect of a stay on the finality of the Board's order or decision. The sentence will explain that, if the Board stays the effectiveness of the order or decision, that order or decision will not be final until the Board rules on the petition. We will retain the language in current § 4.403(b)(5), stating that a party does not need to file a motion for reconsideration to exhaust its administrative remedies, but moving it to paragraph 4.415(e).

Finally, we will remove the language in existing § 4.403(f)(2), stating that we will not grant a motion for reconsideration that seeks relief from legally binding consequences of a statute or regulation. A petitioner who only seeks that relief will not be able to show one of the three enumerated reasons for reconsideration, so this statement will no longer be necessary.

#### § 4.416 Appeals of wildfire management decisions

In § 4.416, the Board will revise language in current § 4.416 to clarify the deadline by which the Board must decide appeals of BLM wildfire management decisions. The existing regulation states that the Board must decide these appeals "within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed." The word "and" has caused

confusion and uncertainty: if the Board must decide an appeal both in “60 days after all pleadings have been filed” and “within 180 days after the appeal was filed,” the effect of the regulation is to provide a shifting deadline of whichever event occurs first. Using only the deadline of 60 days after all pleadings have been filed is also uncertain because the Board does not know whether BLM will file an answer, or the appellant will file a reply in a particular appeal. To provide the most certainty, we will specify that the Board must decide an appeal of a BLM wildfire management decision within 180 days after the notice of appeal was filed. We will also state that the Board may issue an expedited briefing schedule to meet this deadline. Because this provision will remain in § 4.416, the cross-references to § 4.416 in 43 CFR 4190.1(b), 5003.1(c) will remain accurate.

#### § 4.417 Coordination with judicial review

Section 4.417 will be new and will provide express, codified authority to the Board so that it may coordinate its work with that of the judiciary if a bureau or office decision is appealed to the Board and challenged in Federal court at the same time. The Board continues to have jurisdiction to decide an appeal even when the decision at issue is being litigated in Federal court. But as the Tenth Circuit Court of Appeals has noted, “an IBLA appeal and a federal lawsuit proceeding on parallel tracks is not ideal and may undermine judicial and administrative efficiency, which the exhaustion doctrine is intended to protect.” *Farrell-Cooper Mining Co. v. U.S. Dep’t of the Interior*, 864 F.3d 1105, 1117 (10th Cir. 2017). These “parallel tracks” could significantly complicate and delay court proceedings if the Board were to rule on the bureau or office decision while the court is reviewing that same decision. Accordingly, the Board exercises its jurisdiction sparingly when an

appellant has elected to seek judicial review concurrently with a Board appeal or when an appellant appeals a decision that is also the subject of judicial review.

Under this section, when an appellant has sought judicial review of the appealed decision, the Board “may suspend consideration or dismiss” the appeal after providing notice to the parties. While the Board currently has implied authority to take these actions and has done so in the past, the paragraph makes that authority explicit and highlights a way the Board may ensure efficient coordination with the courts.

#### § 4.418 Precedential effect of decisions and orders

We will add a new section that explains the differing legal significance of dispositive orders and decisions. In resolving an appeal, the Board will issue either a dispositive order or a decision. While each is binding on the parties to the appeal, only a decision establishes binding precedent on the Board and bureaus and offices for future appeals. An order has no precedential value. See, e.g., *Colorado Environmental Coalition*, 173 IBLA 362, 369 (2008). The Board has on occasion needed to remind parties that dispositive orders should not be cited as binding precedent in arguing their appeals. See, e.g., *Southern Utah Wilderness Alliance*, 177 IBLA 284, 286 n.2 (2009) (“Counsel are reminded that unpublished orders of the Board are not binding precedent.”).

To provide the public and appellants with a clear understanding of the distinction, the section explains that dispositive orders “resolve an appeal and are binding on the parties, but they are not precedential, and the Board is not obligated to follow or distinguish them in orders or decisions issued in other appeals.” The regulation then explains that orders may nonetheless be

appropriately cited to establish res judicata, estoppel, or the law of the case. It then contrasts orders with decisions, explaining that decisions “are precedential” and “may be cited as binding precedent in other appeals.” By expressly stating the distinction by rule, the Board ensures the public understands this longstanding principle and why orders cannot be cited as binding precedent.

*Subpart G - Rules Applicable to Proceedings before the Director*

We will modify this subpart by modernizing the language, consolidating existing sections, and adding language to address and distinguish hearing requests from appeals. We also will add several new sections to codify specific rules applicable to the practice before an Ad Hoc Board or Hearing Official. The new § 4.703 will codify procedures for hearings that were not previously provided in this part, and new §§ 4.705 to 4.706 will provide specific guidance relating to other adjudications not covered by other subparts in this part. The new § 4.704 will contain rules regarding reconsideration that are currently in § 4.21(d) of this part. \ § 4.700 Scope.

We will define in this paragraph the scope of subpart G and its relationship to subparts A and B.

§ 4.701 Who may appeal; who may request a hearing

We will modify this section to add a description of who may request a hearing from the OHA Director. The existing language of § 4.700 describing who may appeal to the OHA Director has been retained as paragraph (a). New language is as paragraph (b) to mirror that language with regard to hearing requests that are provided in other regulations or in Departmental policy.

§ 4.702 Appeals procedures

We will add a new § 4.701 that provides timeframes and parameters for appeal procedures before the Director or the Ad Hoc Board. The new § 4.701 combines the existing §§ 4.701, 4.702, and 4.704, and portions of the existing § 4.703, and adds additional clarification regarding the procedures applicable to appeals to the Director. The breadth of cases considered for appeal by the Director or Ad Hoc Board is extremely varied and, as such, we will add basic appeal procedures to allow for consideration of the different types of matters that may be appealed.

#### § 4.703 Hearings procedures

We will add a new § 4.702 that provides timeframes and parameters for hearings before the Director or presiding officers appointed by the Director. This section also provides specific reference to the regulations applicable to hearings in Administrative Wage Garnishment proceedings and regulations applicable to referrals for a hearing from the National Indian Gaming Commission. These references clarify in OHA rules that these hearing matters are handled by the Director's Office and provide the applicable authority for clarity.

#### § 4.704 Reconsideration

We will move the existing § 4.21(d) to this new section. The IBLA, IBIA, and DCHD each have reconsideration provisions in their rules. As such, the existing § 4.21(d) only applies to matters before the Director and is more appropriately located here.

#### § 4.705 Department of the Interior employee matters

We will add a new § 4.704 addressing employee matters that are regularly filed with the Director's Office but are unaddressed in the existing subpart G. These matters have constituted



the bulk of the Director's Office docket in recent years. Because the matters are internal to the Department – the disputes are between the Department and its employees rather than external parties – the specific procedures applying to these matters are contained in a variety of Departmental policies rather than in published regulations.

We may publish additional procedures regarding these employee matters in OHA Standing Orders issued by the Director, which are referenced in this section. The OHA Standing Orders will reference the existing Departmental policies and provide OHA-specific procedural guidance to employees involved in these matters.

*Subpart H—Rules Applicable to Proceedings under the White Earth Reservation Land Settlement Act*

The rules and procedures for determining the heirs of any person who dies entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985 (WELSA) are presently located at 43 CFR 4.350–4.357. We will relocate these rules to subpart H, which is presently reserved, and to modernize, clarify, reorganize, and otherwise revise these rules to reflect current practice, take advantage of technological advances, and make the rules more user friendly.

To better inform potential heirs, virtually all of whom are not represented by counsel, the revisions will convert the rules to a question-and-answer format, divide the rules into more sections under several subheadings, and provide more detail and clarity. Use of the question-and-answer format is consistent with its use in part 30 pertaining to OHA probates of trust or restricted property, and in current subpart D in the subsection concerning appeals of probate orders. Some of the rules are patterned after or reference as guidance the rules in part 30.

The rules will also create procedures for reopening a closed case that are consistent with present practice, and more detailed procedures for handling a case remanded to the presiding officer by the Board of Indian Appeals. We believe the latter changes will obviate any need for the statement in § 4.354(d) that “[n]othing herein shall be considered as a bar to the remand of a case by the Board for further reconsideration, hearing, or rehearing after appeal.” Therefore, this statement will be removed.

We also will remove procedures that are never or rarely used. We will remove all rehearing procedures or references in §§ 4.352(c), 4.354, and 4.356 because no rehearing has been requested or conducted for at least the last decade.

We also will remove § 4.355. That section directs the Project Director to furnish the administrative judge with copies of modifications to the report of compensation due a decedent when the modifications are made after a final order determining heirs has been issued. However, the Project Director has never done so because it is unnecessary, given that the administrative judge does not determine compensation, and modifications to the report of compensation do not change the administrative judge’s determination of heirs. The section contains other directions, but they do not govern actions in the heir determination process before OHA. Therefore, the entire section will be removed.

subpart H will contain newly defined terms, some of which will replace terms both defined and undefined in the existing regulations. To avoid confusing variation in terminology, this preamble often uses the newly defined regulatory terms when referring to the existing regulations. To facilitate understanding of the preamble, table 1, below, identifies the key newly defined terms in the regulations and the terms that they will replace in the existing regulations:

<b>Table 1. Subpart H Regulatory Terms</b>	
Newly Defined Regulatory Term	Existing Regulatory Term
final decision	final order or final order determining the heirs or final order determining heirs
notice of the preliminary decision	notice of the preliminary determination or notice of preliminary determination
preliminary decision	preliminary determination of heirs or preliminary determination
presiding officer	administrative judge

Note also that the definition of “party (parties) in interest” will be modified not to include the Project Director. In provisions applicable to the parties in interest and the Project Director, the Project Director will be specifically referenced.

#### Cross Reference

We will add a cross reference to subparts A and B of part 4, which contain rules generally applicable to all types of proceedings before OHA’s Hearings Divisions and Appeal Boards, and to 43 CFR 4.310- 4.318, which contain general rules applicable to proceeding before the Board of Indian Appeals.

#### General provisions

*§ 4.710 What is this subpart’s authority and scope?*

Existing § 4.350 addresses three topics: (1) the rules' authority and scope, (2) applicable definitions, and (3) applicable inheritance laws. We will address these topics in three separate sections—§§ 4.710, 4.712, and 4.713—under a new subheading:

“General Provisions.” Consistent with § 4.350, § 4.710 identifies the authority and scope of the subpart as applying to the heir determination process under WELSA.

*§ 4.711 To what extent do other regulations and OHA Standing Orders apply?*

Existing § 4.352(c) provides that any prehearing conference, hearing, or rehearing will be governed insofar as practicable by “the regulations applicable to other hearings under [part 4] and the general rules in subpart B.” We will amend and expand upon this provision in § 4.711(a).

Specifically, we will provide that the general rules contained in both subparts A and B will apply to the entire WELSA heir determination process unless they are inconsistent with the rules in subpart H or the rules in subparts A and B provide otherwise. This will help clarify which rules apply to the determination process to better inform the public.

Changes to subpart A include those that will: (1) clarify that § 4.3, which references provisions of part 1 on representation of parties, applies to all of OHA; and (2) add § 4.6 consolidating into one section many definitions and acronyms repeated in various portions of part 4.

In subpart B, we will move the filing provisions from §§ 4.22 to 4.32 and will require a person or entity filing documents electronically to provide their electronic mailing address. §§ 4.23(b) and 4.25 will authorize conducting status conferences and hearings by video, teleconference, or other suitable technology. § 4.26 will clarify that a presiding officer may issue subpoenas to the extent authorized by law. § 4.27(a)(2)(v) will clarify that communications

between employees of the WELSA Project Office or the Bureau of Indian Affairs (BIA) and OHA employees about a WELSA case are not ex parte communications unless the WELSA Project Office or BIA has filed a request for hearing, petition for reopening, or petition for reconsideration in that case.

The other paragraphs of § 4.711 will add provisions describing the extent to which other regulations and OHA Standing Orders apply. Paragraph (b) will state that specific portions of the rules in part 30 governing the process for probating restricted land or trust property may be used as guidance in the determination process unless they are inconsistent with the rules in this subpart. Those portions pertain to the following topics: (1) presumption of death of an heir; (2) renunciation of an interest in an estate; and (3) formal hearing, discovery, and other procedures. Referencing specific formal procedures (topic (3)) rather than vaguely referencing “the regulations applicable to other hearings under [part 4],” as existing § 4.352(c) does, will provide clearer guidance for the public and the presiding officer.

Paragraph (c) will clarify that the general rules in 43 CFR 4.310 - 4.318 apply to appeals to the Board under subpart H unless they are inconsistent with the rules in subpart H. Paragraph (d) instructs that the OHA Standing Order on WELSA Proceedings issued by the OHA Director will also apply to the determination process.

*§ 4.712 What definitions apply to this subpart?*

Existing § 4.350(c) contains definitions applicable to the WELSA determination process. We will relocate them to § 4.712. To promote clarity and brevity, we also will amend some of them and add or replace definitions directly or by including language that the new definitions section in subpart A applies to subpart H.

Additions will include definitions of “decedent,” “determination process,” “estate,” “final decision,” “heir,” “preliminary decision,” and “presiding officer” in subpart H and “judge” in subpart A.

“Final decision” and “preliminary decision” will supplant the undefined terms “final order determining the heirs” and “preliminary determination of heirs”, respectively, used in the existing regulations. “Final decision” will be labeled as a decision rather than an order and defined to clearly differentiate it from an order upon reconsideration, order upon reopening, and order upon remand, all of which are final orders.

The definition of “administrative judge” will be moved to subpart A, and “administrative judge” throughout subpart H will be replaced with “presiding officer.” This term has a broader meaning than administrative judge, including not only an administrative judge, but also other types of judges or appropriate officials. The broader meaning comports with recent and present practices of Administrative Law Judges and Indian probate judges presiding over WELSA cases, and administrative judges on the Board hearing appeals. It affords the OHA Director the flexibility to assign appropriate officials to preside over WELSA cases, if necessary, for effective and efficient case management.

Existing §§ 4.356(a) and 4.354(a) state that a “party aggrieved” by an administrative judge’s final decision may appeal or petition for reconsideration, respectively. “Party” is not a defined term, so we will identify who may take these actions by using the defined term “party in interest” rather than “party.” We also will replace the term “aggrieved” with the term “adversely affected” because “adversely affected” is more commonly used in OHA regulations and interpreted in OHA case law. We believe that a “party in interest” who is adversely affected by a

final order and the Project Director, without consideration of any effect on the Project Director, are the persons who should be able to petition for reconsideration or appeal.

This dictates that the Project Director will be removed from the definition of party (parties) in interest.” The rules will be reworded elsewhere so that this change does not affect the Project Director’s authority to seek review of WELSA decisions or orders.

The definition of “Project Director” will also be amended to clarify that it includes a person in charge of the WELSA project pursuant to a contract executed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5321-5332, because this inclusion better describes the current Project Director.

*§ 4.713 What law governs the determination of heirs?*

Existing § 4.350(b) directs application of inheritance laws in accordance with WELSA, notwithstanding that the decedent may have died testate. That provision will be placed in a separate section, § 4.713, and reworded for clarity. This will include stating more specifically, as WELSA does, that the Minnesota inheritance laws of intestate succession in effect on March 26, 1986, apply.

*§ 4.714 What authority does the presiding officer have during the determination process?*

Section 4.714 will list various actions a presiding officer may take and has no counterpart in the existing regulations. It is patterned after § 30.120, which lists actions an OHA judge may take under part 30 when probating restricted land or trust property. However, for most of these actions, we will not include separate sections detailing parameters for those actions, unlike part 30, because most of these actions are rarely taken during a WELSA determination process.

Instead, we will state in § 4.711(b) that certain portions of part 30 may be used as guidance. This approach will clarify the presiding officer's authority without cluttering subpart H with provisions that will rarely be applied.

*§ 4.715 How may minors or other legal incompetents be represented?*

Existing § 4.357, which provides that minors and other legal incompetents who are parties in interest may be represented by guardians, has been relocated to § 4.715.

Filing and Issuance

*§ 4.720 Where and how must documents be filed with the presiding officer?*

The existing WELSA regulations contain no provisions addressing where and how documents must be filed with the presiding officer. Section 4.720 will provide that documents must be filed with the presiding officer as specified in the OHA Standing Order on WELSA Proceedings, including requiring that the Project Director and attorneys must file electronically unless otherwise specified or allowed by the presiding officer. The OHA Standing Order on WELSA Proceedings will provide the proper address and methods for filing either electronically or non-electronically. These changes will accommodate the electronic filing of documents and maintaining of up-to-date addresses.

*§ 4.721 When is a filing with the presiding officer timely?*

The existing WELSA regulations do not contain any provisions specifically addressing when a filing with the presiding officer is timely. However, existing § 4.352(c) states that the



general rules in subpart B—which address, among other topics, filing requirements—apply insofar as practicable.

In subpart B, existing § 4.22(a) states that a document is filed when it is received during regular business hours in the office where the filing is required. This requirement is changed by § 4.721, which will provide that a document electronically filed is deemed timely if received by 11:59 p.m. Central Time on the date the document is due, and that a document filed non-electronically is considered filed on the date it is sent by first-class United States mail or dispatched to a commercial carrier if certain conditions are met.

*§ 4.722 To whom will a presiding officer issue a notice, order, or decision?*

Existing §§ 4.352(b)(1), (b)(3), and (c) and 4.354(b) and (c) require that certain specified orders and notices be issued by the administrative judge to each party in interest. Section 4.722 will apply this requirement to every notice, order, or decision of the presiding officer to compile a complete record.

*§ 4.723 By what means may the presiding officer issue a notice, order, or decision?*

Existing §§ 4.352(b)(1), (b)(3), and (c) and 4.354(c) require that certain specified orders and notices of the administrative judge be mailed to each party in interest. Section 4.723 will give a person the option to receive all notices, orders, and decisions of the presiding officer electronically or non-electronically under the terms specified in the OHA Standing Order on WELSA Proceedings. Non-electronic methods will be U.S. mail or commercial courier.

*§ 4.724 How will issuance of a presiding officer's notice, order, or decision be documented?*

Existing § 4.352(b)(1) requires the administrative judge to cause preparation of a certificate identifying the date and manner of mailing of the preliminary decision and notice thereof. Section 4.724 will modify this requirement by requiring that the date and method of issuance, as well as the names of the persons to whom each document is issued, must be included in the document itself rather than a separate certificate. This change will enhance efficiency and provide the public with the pertinent information in one document instead of two. To compile a complete record, § 4.724 will also apply the requirement to each notice, order, or decision rather than just the preliminary decision and notice.

#### Commencement of Determination Process

##### *§ 4.730 How does the Project Director commence the determination process?*

Existing § 4.351 describes how the heir determination process is commenced by the Project Director and that no process will be commenced if a certain type of heir determination already exists. For clarity and ease of use, we will reorganize, reword, and separate the description into two sections under a new subheading:

“Commencement of Determination Process.”

Section 4.730 will state generally how the process will commence and that the Project Director will not commence the process if a court of Minnesota has already made a determination of a decedent’s heirs recognized as effective under § 5(a) of WELSA. This description of this heir determination is more detailed than that in existing § 4.351(a) to better inform the reader.

##### *§ 4.731 What evidence must the Project Director file with the presiding officer?*

Existing § 4.351(a) requires the Project Director to file with the administrative judge “all data . . . shown in the records relative to the family of the decedent.” This language will be reworded in § 4.731(a), requiring “sufficient evidence to enable the presiding officer to determine the decedent’s heirs under the Act.” This sufficiency requirement will promote full development of the records before they are transmitted to the presiding officer, promoting efficiency and minimizing the need for the presiding officer to request additional information or dismiss a case to gather sufficient evidence.

Section 4.731 will also require specific information. Except for the following information, the specific information is also required in existing § 4.351(b): dates of births and deaths of the parties in interest and copies of documents evidencing these dates and whether the relationships of decedent’s potential heirs and other known parties in interest arose by marriage, blood, or adoption.

*§ 4.732 What will the presiding officer do after receiving the evidence filed by the Project Director?*

Existing § 4.352 describes the process by which the administrative judge issues a preliminary decision and final decision, including the Project Director’s involvement in notifying the parties in interest of the preliminary decision. We will separate this description into numerous sections under three new subheadings: “Commencement of

Determination Process,” “Preliminary Decision—Content, Notification, Objections,” and “Final Decision and Lodging of Record.”

Existing § 4.352(c) provides that when the administrative judge determines either before or after issuance of a preliminary decision that there are issues of fact, or when a party objects to

the preliminary decision and/or requests a hearing, the administrative judge may pursue various options to resolve the issues and then enter a final decision. Section 4.732(b) will expand the list of options in that the presiding officer may take to resolve issues of fact to include any action authorized by subpart H.

Existing § 4.352(b) and (c) are ambiguous as to whether issuance of a preliminary decision is always required and may be interpreted as allowing issuance of a final decision without first issuing a preliminary decision if there are issues of fact. Section 4.732(c) and (d) will clarify that the presiding officer will issue a preliminary decision if no hearing is held but may issue a final decision without first issuing a preliminary decision if a hearing is held.

#### Preliminary Decision—Content, Notification, Objections

##### *§ 4.740 What must the preliminary decision determining decedent's heirs contain?*

Section 4.740 will require that the preliminary decision contain the same contents as required under existing § 4.352(b).

##### *§ 4.741 How will notification of the preliminary decision be provided?*

Section 4.741 will set forth the process for notifying parties in interest of the preliminary decision. That process will generally be the same as the process established in existing § 4.352(b)(1) and (2), with the following clarifications or differences. Section 4.741(a) will clarify that the notice of the preliminary decision will be issued on the same day that the preliminary decision is issued. Section 4.741(b) and (c) will remove the Minnesota Chippewa Tribe from the list of sites where posting of the notice is mandatory; remove the addresses of the mandatory posting sites; remove the list of sites where posting may be deemed appropriate by the Project Director; and provide that the OHA Standing Order on WELSA Proceedings on OHA's website

will specify the addresses of the mandatory sites and any additional appropriate sites identified by the Project Director. This will allow for changes in addresses and locations without the need to amend the regulations.

*§ 4.742 What evidence of posting of the notice of preliminary decision must be filed with the presiding officer?*

Section 4.742 will retain but reword for readability the provisions of existing § 4.352(b)(2) for preparation and filing of certificates regarding the posting of the notice of the preliminary decision.

*§ 4.743 What are the filing requirements for objecting to a preliminary decision and requesting a hearing?*

Existing § 4.352(b)(1) and (3) imply but do not specifically state that a party in interest may file a written objection or request for hearing after a preliminary decision is issued. Section 4.743 will specifically state that they may file a written objection and that the objection may include a request for hearing, as opposed to filing a request for hearing separate from an objection. Section 4.743(b) will specify the following new details that must be included in an objection: an allegation of error of fact or law in the preliminary decision; a specific and concise statement of the grounds on which the objection is based; and if the objection includes a request for hearing, the disputed issues of fact.

*§ 4.744 What happens if no timely objection to the preliminary decision is filed?*

Existing § 4.352(b)(3) states that a final decision will be issued if no request for hearing or written objection is timely filed after issuance of a preliminary decision. Section 4.744 will

state that a final decision will be issued if no timely written objection is filed; any request for hearing will be included in the objection pursuant to § 4.743(c).

*§ 4.745 What happens if an objection to the preliminary decision is filed?*

Existing § 4.352(c) provides that when a party objects to the preliminary decision and/or requests a hearing, the administrative judge may pursue various options to resolve the issues of fact and then enter a final decision. Section 4.745 will generally follow this approach but add detail as to when the presiding may deny an objection without providing the parties in interest and Project Director with the opportunity to file responses to the objection, and when the presiding officer will provide them with this opportunity and copies of the objection and any supporting papers. Section 4.745 also specifically requires resolution of the objection in the final decision, unlike § 4.352(c).

Final Decision and Lodging of Record

*§ 4.750 What must the final decision determining decedent's heirs contain?*

Existing § 4.352(b) and (d) specify the same heir information as content requirements for the preliminary decision and final decision, respectively. Section 4.750 will specify the same content requirements for the final decision and add to them, including that the final decision must resolve any objection to the preliminary decision, set forth the reasons for the resolution, and notify any party in interest who is adversely affected by the final decision, and the Project Director, of their right to petition for reconsideration of or appeal the final decision.

Existing § 4.352(b)(3) states that the administrative judge will issue a final decision declaring the preliminary decision to be final if no written objection to the preliminary decision or request for hearing is filed with 40 days of issuance of the preliminary decision. Section 4.750

will modify this somewhat, providing that the heir information may be incorporated from the preliminary decision into the final decision if no timely objection to the preliminary decision is filed within 40 days or if otherwise appropriate. This change comports with current practice.

*§ 4.751 What happens to the determination process record and what must it include?*

Section 4.751 will contain the same requirements as existing § 4.353 for lodging the determination process record and its contents, except: (1) the public notice of hearing and certification thereof will not be specifically listed in the content requirements because the record rarely contains these documents, given that hearings are rarely conducted, and the presiding officer may include any such documents under the catchall provision of documents deemed relevant; (2) the content requirements will not include a certificate or proof of mailing for each notice and the final decision because the distribution information for each notice, order, or decision will be contained in the document itself rather than a separate document pursuant to § 4.724; and (3) each notice, order, or decision will be included in the record, whereas § 4.353 only requires that certain notices and orders be included.

#### Reconsideration of Final Decision

*§ 4.760 How can a final decision be challenged?*

Section 4.760 will identify the options for challenging a final decision. Section 4.354 states that a “party aggrieved by” a final decision may petition for reconsideration, but the term “party” is not defined and “aggrieved” is not commonly used by OHA. We to clarify in § 4.760 that a “party in interest adversely affected” by a final decision, or the Project Director, may file a petition. “Party (parties) in interest” is a defined term and “adversely affected” is more commonly used in OHA regulations and interpreted in OHA case law than “aggrieved.” We will

also clarify that these entities may either file a petition for reconsideration with the presiding officer or file an appeal with the Board under § 4.783, but not both.

*§ 4.761 What are the requirements for filing a petition for reconsideration?*

Section 4.761 will detail the filing requirements for a petition for reconsideration. Existing § 4.354(a) sets a deadline of 30 days after the date of mailing of the final decision to file a petition. Section 4.761(a) sets the same deadline: 30 days after the date of issuance of the final decision, i.e., the date it is mailed or otherwise transmitted.

Existing § 4.354(a) contains content requirements for the petition, including that it must be under oath and that if it is based on newly discovered evidence, the petitioner must state justifiable reasons for the prior failure to discover and present the evidence and must provide witness affidavits describing the evidence. The petition content requirements of § 4.761(b) will differ in that no affidavits or petitioner's oath will be mandated because the rules of evidence and procedure should be less formal in administrative proceedings, especially where, as in the determination process, the parties in interest are rarely represented by counsel. Section 4.761(b) will also more precisely define when the statement and description regarding newly discovered evidence are required. They will be mandated if the petition is based on evidence newly discovered after, or evidence that was unavailable before, issuance of the final decision.

*§ 4.762 Does any distribution of the estate occur while a petition for reconsideration is pending?*

Section 4.762 will contain new language, modeled after 43 CFR 30.238(f) and 30.239, that the Project Director must not initiate distribution of the estate while a petition for



reconsideration is pending. If the petition is filed by a party in interest, the presiding officer will issue a notice of receipt of the petition to the Project Director as soon as practicable.

*§ 4.763 How will the presiding officer decide a petition for reconsideration?*

Like existing § 4.354, § 4.763 will describe the process the presiding officer will follow to decide a petition for reconsideration. Section 4.354(c) states that the process will culminate in issuance of a “final order upon reconsideration,” whereas § 4.763(a) states the process will result in issuance of an “order upon reconsideration,” removing the word “final” to more clearly differentiate it from the “final decision.”

Section 4.354(b) describes the circumstances under which the administrative judge will deny a petition. Section 4.763(b) will state that denial is discretionary rather than mandatory under those circumstances (paragraphs (b)(1) and (b)(5)), add paragraphs (b)(2), (b)(3), and (b)(4) to the list of circumstances, and add language that the denial may occur without providing the Project Director and the parties in interest with an opportunity to respond to the petition.

Section 4.354(c) contains procedures that apply if the petition is not denied under § 4.354(b). Section 4.763(c) will reword the same procedures for clarity, including allowing the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the petition. We also will add a provision in § 4.763(a) stating that the presiding officer may take any action listed in § 4.732(b) to resolve any issues of fact.

*§ 4.764 What will the order upon reconsideration contain?*

Section 4.764, like existing § 4.354(c), will state that the presiding officer, in the order upon reconsideration, may affirm, modify, or vacate the final decision. However, they differ in several respects. First, under § 4.764, the other option of denying the petition in accordance with

§ 4.763(b) will be effectuated in the order upon reconsideration, whereas § 4.354(b) provides for denial in a separate unnamed order. Second, § 4.764 will require the presiding officer to state the reasons for selecting any of the four options, but this requirement only applies to a denial of a petition under § 4.354(a). Third, § 4.764, unlike § 4.354, will provide that the order upon reconsideration contain a notice stating that any party in interest who is adversely affected by the order upon reconsideration, as well as the Project Director, have the right to appeal the order to the Board.

*§ 4.765 How can an order upon reconsideration be challenged?*

Existing § 4.356(a) provides that an order upon reconsideration may be appealed to the Board within 30 days of mailing. Section 4.765 will state that an order upon reconsideration may be appealed to the Board as provided in § 4.783, which allows an appeal within 30 days of the date of issuance of the order, which could be issued by mail or by electronic transmission.

Existing § 4.354(d) provides that successive petitions for reconsideration or rehearing are not allowed. Section 4.764 will also prohibit successive reconsideration petitions but will omit any reference to rehearing petitions because none have been filed in at least a decade.

Reopening of Closed Case and Correction of Errors

*§ 4.770 What are the methods and standards for reopening a closed case?*

OHA has found that reopening's of closed cases are occasionally necessary to correct errors of fact or law in a final decision, but the existing regulations do not address reopening a closed case. Therefore, we will add new provisions addressing reopening, including § 4.770, which will set forth the methods and standards for reopening a closed case.

Under paragraph (b), methods for instituting a reopening will be the filing of a petition for reopening by an adversely affected party in interest or the Project Director, or the presiding officer reopening on their own initiative. Under paragraph (c)(1), an error will have to be discovered more than 30 days after the final decision's date of issuance; otherwise, the appropriate remedy will be to file a petition for reconsideration. If a reopening is sought more than 3 years after the final decision's date of issuance, reopening will be permitted under paragraph (c)(2)(ii) only if the presiding officer finds that the need to correct the error outweighs the interests of the public and heirs in the final decision's finality.

*§ 4.771 When must a petition for reopening be filed?*

Under § 4.771, the Project Director will be permitted to file a petition at any time. All other petitioners will have to file their petitions within one year after the petitioner discovers the alleged error. Petitions for reopening filed before the deadline for filing a petition for reconsideration will be treated as a petition for reconsideration. *§ 4.772 What must be included in a petition for reopening?*

Under § 4.772(a), a petition will be required to contain a statement of the grounds for the petition and the requested relief and to append relevant documentary evidence. Under paragraph (b), a petition by a party in interest will also be required to state the date of discovery of the error and to append relevant documentary evidence about when and how it was discovered. Under paragraph (c), a petition filed more than 3 years after the final decision will be required to show that the need to correct the error outweighs the interests of the public and heirs in the final decision's finality, and relevant factors will be listed.

*§ 4.773 What is not appropriate for a petition for reopening?*

Section 4.773 will identify actions a petition may not take, including raising issues or objections that were previously addressed in an order issued in the case or when the petitioner had the opportunity to raise them earlier, and submitting evidence that was available or discoverable when the final decision was issued, or available during any period of reconsideration of the final decision.

*§ 4.774 How will the presiding officer decide a petition for reopening?*

Section 4.774 will describe the method for deciding a petition as a two-stage process. First, under paragraph (b), the presiding officer will have the discretion to deny the petition under certain circumstances without providing the Project Director and the parties in interest an opportunity to respond to the petition. Those circumstances will include not meeting the standards set forth in § 4.770(c); raising issues that were previously addressed in an order issued in the case or for the first time on reopening and the petitioner is a party in interest who received proper notice of the preliminary decision or hearing; basing the petition on newly discovered evidence which fails to meet the requirements of § 4.761(b)(2); or otherwise failing to assert proper grounds for reopening.

Second, under paragraph (c), if the presiding officer does not deny the petition, the presiding officer will issue a notice, along with a copy of the petition and any supporting papers, allowing the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the petition. The presiding officer will then consider, with or without a hearing, the issues raised.

*§ 4.775 How will the presiding officer decide a case reopened on their own initiative?*

Under § 4.775, when a presiding officer reopens a case on their own initiative, they will issue a notice identifying the error, explaining how the presiding officer intends to modify the final decision to correct the error, and allowing the Project Director and any party in interest a reasonable, specified time in which to file a written response to the notice. They will then consider, with or without a hearing, the issues raised.

*§ 4.776 What will the order upon reopening contain?*

Under § 4.776, the presiding officer will have discretion in the order upon reopening to deny the petition for reopening, if any, in accordance with § 4.774(b) or affirm, modify, or vacate the final decision. The order will also contain the reasons for doing so and a notice that any party in interest who is adversely affected by the order upon reopening, as well as the Project Director, have the right to appeal the order to the Board.

*§ 4.777 What happens to the record after the presiding officer issues an order upon reopening?*

Section 4.777 will provide that the presiding must submit the record made on reopening to the Project Director.

*§ 4.778 What are non-substantive errors in an order or decision and how may they be corrected?*

In § 4.778, we will codify the present practice of a presiding officer being able to issue orders correcting non-substantive errors in an order or decision, either on their own initiative or pursuant to a request filed by the Project Director or any party in interest. A correction order will not be subject to appeal to the Board.

## Finality and Appeal of Final Decision and Orders

*§ 4.780 When will the final decision and orders upon reconsideration, reopening, or remand become final?*

Existing §§ 4.352(c) and 4.354(c) state that an administrative judge's final decision or final order upon reconsideration become final 30 days from the date they are mailed. A separate section, § 4.356(a), provides that either of these final documents may be appealed to the Board within 30 days of mailing. These provisions are in conflict because on the 30th day from the mailing date, the decision or order becomes final, yet it is still appealable on the 30th day.

Section 4.780 will remedy this conflict and state more clearly: (1) that the presiding officer's final decision will become final on the expiration of the 30 days allowed for filing a notice of appeal or petition for reconsideration unless a notice of appeal or petition for reconsideration is timely filed; and (2) that an order upon reconsideration, order upon reopening, or order upon remand will similarly become final on the expiration of the 30 days allowed for filing a notice of appeal unless a notice of appeal is timely filed.

As previously mentioned, § 4.354(c) classifies an administrative judge's order addressing any of the following as a final order upon reconsideration: (1) a petition for reconsideration of a final order determining the heirs, (2) a reconsideration of a final order determining the heirs initiated by the administrative judge, or (3) issues before the presiding officer after the Board remands a case. We will treat order (1) as an order upon reconsideration, order (2) as an order upon reopening, and order (3) as an order upon remand.

*§ 4.781 Which presiding officer decisions or orders may be appealed and who may appeal them?*

Existing § 4.356 addresses numerous topics regarding appeals to the Board. For better clarity and readability, we will divide the topics into several sections and reword them.

Section 4.356(a) states that a “party aggrieved” by a final decision or “final order upon reconsideration” may appeal to the Board. “Final order upon reconsideration” includes not only what the rules will refer to as an “order upon reconsideration,” but also what the rules will refer to as an “order upon reopening” and what is referred to as an “order upon remand.” All of these orders will be appealable to the Board and therefore § 4.781 will list them and the final decision as appealable.

Because the term “party” is not defined and “aggrieved” is not commonly used by OHA, we also will clarify in § 4.781 that a “party in interest” who is “adversely affected” by a listed decision or order, or the Project Director, may appeal. “Party (parties) in interest” is a defined term and “adversely affected” is more commonly used in OHA regulations and interpreted in OHA case law than “aggrieved.”

*§ 4.782 What happens if a petition for reconsideration and a notice of appeal are timely filed?*

The content of § 4.782 is new. It will clarify that if both a petition for reconsideration and an appeal are timely filed, the Board will dismiss the appeal without prejudice and the presiding officer will issue an order upon reconsideration.

*§ 4.783 When and how may a presiding officer’s decision or order be appealed?*

Section 4.783(a) will reword § 4.356(b) and part of § 4.356(d) for clarity and apply the 30-day deadline for filing a notice of appeal and the 30-day deadline for filing a statement of

reasons not only to appeals of a final decision or order upon reconsideration, but also to appeals of an order upon reopening or order upon remand.

Section 4.783(b) will contain a new provision, patterned after the revised version of § 4.321(b). Paragraph (b) will require that both the notice of appeal and statement of reasons be signed by the appellant, the appellant's attorney, or other qualified representative and must be filed by electronic transmission, mail, commercial courier, or hand delivery, in accordance with § 4.310(b).

*§ 4.784 What are the requirements for serving the notice of appeal and statement of reasons?*

Section 4.784, like existing § 4.356(a), will require the appellant to serve a copy of the notice of appeal on the Project Director and the presiding officer. However, there will be several differences. Section 4.356(a) requires service by mail, while § 4.784(a) will require service in accordance with § 4.310(d), which allows for other methods under certain circumstances. Also, § 4.784, unlike § 4.356, will apply its service provisions to the statement of reasons as well, including a new service requirement to provide a certificate of service.

*§ 4.785 When will the determination process record be forwarded to the Board?*

Like existing § 4.356(c), § 4.785 will require the Project Director to ensure that the determination process record is expeditiously forwarded to the Board.

*§ 4.786 What actions may the Board take to resolve a timely appeal?*

Section 4.786 will slightly reword but make no substantive changes to the actions in existing § 4.356(d) and (e) that the Board may take to resolve a timely appeal.



*§ 4.787 What happens to the record after disposition?*

Section 4.787 will be a new provision identifying what happens to the record after disposition on appeal.

Procedures after Board Remand

*§ 4.790 What happens if the Board remands the case to the presiding officer?*

Existing § 4.354(c) characterizes several types of orders, including an order upon remand, as a final order upon reconsideration, and states that the administrative judge will issue the order after considering, with or without a hearing, the issues of fact. It also contains a requirement that the administrative judge will, in appropriate cases, serve all parties in interest with a Board decision vacating and remanding a case and allow them a reasonable specified time to file responses.

Section 4.790 will eliminate this requirement because the Board itself will serve its decision on those parties. Section 4.790 will provide more broadly that the presiding officer may, after a Board decision remanding a case and subject to any directions or restrictions in the Board's decision and § 4.315, take any action authorized by subpart H to resolve any issues of fact or law and will issue an order named "order upon remand" determining those issues. This broad authority will include allowing the parties in interest to respond to the Board decision when the presiding officer deems it proper.

*§ 4.791 What will the order upon remand contain?*

Existing § 4.354(c) states that the final order upon reconsideration (i.e., the order upon remand) will affirm, modify, or vacate the original final order (i.e., final decision). Because the

Board may remand a case for findings of fact alone or other purposes that may not involve affirming, modifying, or vacating the final decision, § 4.791 will require the order upon remand to resolve the issues of fact or law. This may or may not include affirming, modifying, or vacating the final decision.

Section 4.791 will also include new provisions that require the order upon remand to include the reasoning for the resolution of the issues and a notice stating that any party in interest who is adversely affected by the order, as well as the Project Director, have the right to appeal the order to the Board.

*§ 4.792 What happens to the record after the presiding officer issues an order upon remand?*

Section 4.792 contains a new provision stating that the presiding officer must submit the record made upon remand to the Project Director.

*Subpart I - Specific Rules Applicable to Proceedings under Part 17 - Nondiscrimination in Federally Assisted Programs*

The rule will shorten the title and update nomenclature in Subpart I by providing gender-neutral language, consistent with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, signed by President Joseph R. Biden, Jr., on January 20, 2021. No other substantive changes will be made.

*Subpart J - Specific Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties*

Subpart J of the Department’s regulations at 43 CFR part 4 contains the Specific Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties. These regulations implement the Federal Oil and Gas Royalty Simplification and Fairness Act (FOGRSFA) and apply to appeals of decisions by the Office of Natural Resources Revenue (ONRR) determining royalties due the United States under Federal oil and gas leases.

Under this rule, Subpart J will include a new, brief paragraph cross-referencing subpart A, which identifies the authority, jurisdiction, and membership of the Interior Board of Land Appeals (IBLA) within the Office of Hearings and Appeals, and subpart B, which contains the general rules applicable to proceedings before IBLA as well as the other units of the Office of Hearings and Appeals. Subpart J will also include a new section, 4.900, describing the scope of the subpart J rules. We also will change §§ 4.903, 4.904, 4.906, and 4.409. We propose no changes to the remaining regulations in this subpart (§§ 4.901, 4.902, 4.905, 4.907, and 4.908).

#### § 4.900 Scope of rules

We will add new § 4.900 to make clear that the rules in subpart J will govern appeals before IBLA concerning Federal oil and gas royalties. We will expressly state that the rules in subpart E are applicable to proceedings before the Board unless they are inconsistent with the rules in subpart J, and when there is a conflict between the regulations in subpart E and subpart J, the rules in subpart J will govern.

#### §§ 4.903, 4.904, and 4.906 When does an administrative proceeding commence?

Under FOGRSFA, 30 U.S.C. 1724(h), the Department has 33 months to resolve challenges to royalty decisions—or “administrative proceedings”—starting when those

proceedings are “commenced.” After 33 months, the Department loses jurisdiction over an appeal of a royalty decision, and the decision is deemed either affirmed or reversed depending on the amount of money at issue (if under \$10,000, the decision is deemed reversed, and if over \$10,000, the decision is deemed affirmed).

There is a difference between the language in FOGRSFA and the language in the Department’s existing regulations with respect to when an administrative proceeding commences. This difference was highlighted and criticized by the United States Court of Appeals for the District of Columbia Circuit in *Murphy Exploration & Production Co. v. U.S. Department of the Interior*, 252 F.3d 473, 481, *modified on other grounds on denial of petition for reh’g*, 270 F.3d 957 (D.C. Cir. 2001). The Department’s current regulation at 43 CFR 4.904(a) states that an “appeal” “commences” when a notice of appeal is filed. The Court of Appeals held that this interpretation of the statute is inconsistent with the statute’s text, which states that an “administrative proceeding” “commences” when an order has been issued and is subject to appeal. The Court opined that, by stating that an appeal commences when it is filed, the Department had read “‘subject to appeal’ out of the statute.” *Murphy Explo. & Prod. Co.*, 252 F.3d at 481 (citing 30 U.S.C. 1702(18)).

This difference between FOGRSFA and the Department’s regulations can operate to give the Department an additional 2 months to decide a royalty appeal because appellants have 60 days to appeal a royalty order. But the Board is bound to follow the Department’s regulations. See, e.g., *Pac. Offshore Operators, Inc.*, 165 IBLA 62, 76 (2005) (“Duly promulgated regulations have the force and effect of law and are binding on the Department and this Board.”). And for that reason, the Board has applied the Department’s regulations despite the criticism of the Court of Appeals. Nevertheless, because of the

inconsistency between the statute and the regulations, it is not uncommon for appellants to cite the *Murphy Exploration & Production Co.* decision and argue that the Board has calculated the 33-month deadline incorrectly.

To resolve this conflict between the current regulations and the decision by the Court of Appeals for the District of Columbia Circuit in *Murphy Exploration & Production Co.*, we will revise current §§ 4.903, 4.904, and 4.906. First, we will add a definition of “administrative proceeding” to § 4.903 that is consistent with FOGRSFA, 30 U.S.C. 1702(18). The new definition will define “administrative proceeding” as “any process in which an order is issued by ONRR or a delegated State and is subject to appeal or has been appealed either to the ONRR Director or IBLA under 30 CFR 1290.105.” Second, we will revise current §§ 4.904 and 4.906 to use the term “administrative proceeding” instead of the word “appeal” where appropriate. Third, we will revise 43 CFR 4.904(a) to specify that an administrative proceeding commences on the date you receive an ONRR order.

Our change to the subpart J regulations leaves one aspect of the *Murphy Exploration & Production Co.* decision unaddressed. With respect to administrative proceedings that arise from a lessee’s demand that ONRR refund money that the lessee overpaid, the Court of Appeals held that it is the lessee’s demand, not ONRR’s response to the demand, that begins an administrative proceeding under FOGRSFA. *Murphy Explo. & Prod. Co.*, 252 F.3d at 480 (“We conclude that Murphy’s request that DOI refund its royalty overpayments triggered an ‘administrative proceeding’ within the meaning of § 1702(18).”). The regulation at 43 CFR 4.904(a), however, which specifies that an administrative proceeding commences on “the date you receive ONRR’s order,” will also apply to an administrative proceeding involving a refund request. When a lessee demands a refund, the administrative proceeding will commence when the lessee receives

ONRR's order responding to that request. We believe this construction is consistent with FOGRSFA, which defines an administrative proceeding as an "agency process in which a demand, decision or order issued by the Secretary is subject to appeal or has been appealed." 30 U.S.C. 1702(18). It is the Secretary's "demand, decision or order" that triggers an administrative proceeding because only the Secretary's demand, decision or order will be subject to appeal. The lessee's demand will not be the subject of an appeal until the Secretary acts on it by issuing a decision or order. Furthermore, we believe this reading of the statutory language avoids any logistical or practical difficulty caused by determining when ONRR receives a lessee's demand.

§ 4.906 What if the Department does not issue a decision by the date my appeal ends?

In addition to replacing the word "appeal" with "administrative proceeding," we will clarify edits in § 4.906. For example, in paragraph 4.906(a), we will omit as unnecessary current subparagraphs (a)(1) and (a)(2) because those subparagraphs simply repeat the statutory language contained in 30 U.S.C. 1724(h)(2), which is referenced in paragraph 4.906(a). In addition, we will simplify paragraph 4.906(b)(1) by referring to 30 U.S.C. 1724(h)(2), omitting current subparagraph (b)(2), and renumbering paragraph (b)(3) as (b)(2).

We also will add a new paragraph 4.906(d) to clarify when the 33-month period ends and the 180-day period to seek judicial review begins. 30 U.S.C. 1724(j) states that "a judicial proceeding challenging the final agency action" is "timely so long as such judicial proceeding is commenced within 180 days from receipt of notice by the lessee or its designee of the final agency action." In 2017, the D.C. Circuit rejected the Government's argument that the 180-day period begins on the date of the final Departmental decision, as dictated by the end of the 33-month review period. The Court held that "[Section] 1724(j) provides that the 180-day period runs not from the date of the final decision, but from the lessee's 'receipt of notice' of the final

decision.” *Cont’l Res., Inc. v. Jewell*, 846 F. 3d 1232, 1234-35 (D.C. Cir. 2017). Our addition will identify the notice that will start the beginning of the 180-day period.

Specifically, consistent with the D.C. Circuit’s holding, paragraph 4.906(d) will provide that, if your administrative proceeding ends while your appeal is pending before the Board, the appeal is automatically dismissed as of the expiration of the 33-month period, and the Board will issue a notice reflecting this dismissal and removing the appeal from the Board’s docket. The appellant’s receipt of this notice begins the 180-day period in which a judicial proceeding challenging the final agency action must be brought under 30 U.S.C. 1724(j).

#### § 4.909 How do I request an extension of time?

Existing § 4.909 explains how parties may request an extension of time during an appeal of a royalty decision to the IBLA. Paragraph (b) specifies where and how a written request for an extension of time must be filed. We will revise this paragraph to refer to IBLA’s filing regulations in § 4.407 of subpart E. That reference will replace the current detailed instructions in subparagraphs (b)(1) and (b)(2). We also will change the requirement in paragraph (b) that someone seeking an extension of time file a “written request” to requiring a “written motion,” and for consistency, we will replace “request” with “motion” in paragraphs (c), (e), and (f).

#### *Subpart K – Specific Rules Applicable to Hearings Concerning the Acknowledgment of American Indian Tribes*

As part of this regulatory update, DCHD will revise the filing and service provisions of subpart K at 43 CFR 4.1012, 4.1013 as well as a minor revision to correct a cross-reference related to ex parte communications in § 4.1017. The revisions will provide additional detail regarding the electronic filing and service of documents while maintaining the existing options

for filing and service using express mail and overnight delivery. DCHD initially began allowing parties to file and serve documents electronically by email in response to the exigent circumstances presented by the COVID-19 pandemic. Since email filing began, DCHD's experience has been positive. Filing by email has made it easier for parties to transmit documents to DCHD while also allowing for the more expeditious issuance of notices, orders, and decisions. OHA is currently working to develop an electronic filing system that will ultimately replace the use of email. On March 16, 2023, OHA implemented a Direct Final Rule that allowed for the electronic transmission of documents and the use of OHA Standing Orders to convey information concerning the electronic transmission of documents (88 FR. 5792; January 30, 2023).

#### § 4.1012 Where and how must documents be filed?

The revisions will modify this section to provide additional detail concerning the electronic filing of documents. Paragraph (a) will require documents to be filed with DCHD in accordance with the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information, which will be available on OHA's website. OHA's Standing Orders are issued to update filing and service procedures, provide current contact information, and notify parties of technological developments such as the anticipated implementation of a new electronic filing system.

Paragraph (b) will replace existing paragraph (e) and will specify that filing could occur either electronically or non-electronically. However, a person or entity represented by an attorney will be required to file electronically under subparagraph (b)(1), unless otherwise specified in the OHA Standing Orders on Electronic Transmission or the ALJ has allowed non-electronic filing



for good cause. While the existing regulation allows for filing by facsimile, that option will be eliminated going forward.

Paragraph (c) addresses timeliness and will replace the 5:00 p.m. deadline currently contained in existing paragraph (c). For electronic filing, a document will be deemed timely if filed by 11:59 p.m. Mountain Time on the date the filing is due. For non-electronic filing, a document will be deemed timely if, on or before the last day for filing, the document is sent by express mail or dispatched to a third-party commercial courier for delivery on the next business day. The party filing the document will be responsible for obtaining proof of mailing or dispatch. A document not received within two business days of the filing deadline will be presumed untimely, but the presumption could be overcome by appropriate documentation establishing the date of mailing or dispatch.

Paragraph (d) will maintain the language in existing paragraph (d) and will continue to allow the ALJ to reject a document that does not comply with the filing requirements in this subpart or other applicable order. If the defect is minor, the party filing the document may be notified of the defect and given an opportunity to correct.

#### § 4.1013 How must documents be served?

Paragraph (a) will retain the requirement that documents filed with DCHD be concurrently served on all parties to the proceeding and will additionally require compliance with the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information. Paragraphs (b), (c), and (d) will explain the process for: serving represented parties, identifying the service address, and providing notice of address changes.

As explained in paragraph (c), every person or entity who files a document with DCHD will be required to provide the mailing or electronic address that the person or entity intends to use for service in the proceeding. A person or entity seeking to receive service electronically will be required to consent to electronic service. If a person or entity does not consent to electronic service, then service will need to occur using the mailing address in the person's or entity's most recent filing or, if there has not been any filing, the mailing address of the person or entity as provided by the Office of Federal Acknowledgment (OFA) within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior.

The manner of service will be described in paragraph (e). Persons or entities will be allowed to serve the Office of the Solicitor electronically as specified in the OHA Standing Orders on Electronic Transmission. In addition, electronic service will be allowed if the person or entity consents to electronic service under the terms specified in the OHA Standing Orders on Electronic Transmission. Non-electronic service will be authorized using personal delivery, express mail, or third-party commercial courier for delivery on the next business day. As specified in paragraph (f), a certificate of service will be required at the conclusion of any document indicating the date and manner of service.

Service will be deemed complete as set forth in paragraph (g) and will replace the existing language in (c)(4) concerning electronic confirmation of transmission. For electronic service, a document will be served when the document is sent, unless the serving party receives notice that the document was not received. For documents served by express mail or commercial courier for delivery on the next business day, service will be complete on mailing or dispatch to the courier as documented by a postmark, acceptance scan, receipt, or other similar written acknowledgement.

An ALJ will generally issue a notice, order, recommended decision, or other document electronically as set forth in paragraph (h), and service will be complete on sending, unless otherwise directed by the OHA Standing Orders on Electronic Transmission. If an electronic service address has not been provided, then a notice, order, or other document will be issued by first-class United States mail or third-party commercial courier to the address provided or, if not provided, to the last known address, and service will be complete on mailing. If an electronic service address has not been provided, then a recommended decision will be sent by certified United States mail to the mailing address provided or, if not provided, to the last known address, and service will be complete when received. If the certified mail is not claimed or is returned as undeliverable, then service will be made by first-class United States mail and service will be deemed complete on mailing.

#### § 4.1017 Are ex parte communications allowed?

The only modification to this section will change the cross-reference in paragraph (a) from § 4.27(b) to § 4.27 to reflect the changes made to subpart B as part of this regulatory overhaul.

#### *Subpart L – Specific Rules Applicable to Hearings and Appeals Concerning Surface Coal Mining*

As part of this regulatory update, OHA will revise select provisions in subpart L. These changes will provide additional detail regarding the electronic filing and service of documents, update cross-references, and create uniformity and consistency with the new comprehensive procedural rules governing practice before DCHD in subpart C of this part.

#### General Provisions

##### *§ 4.1100 Scope and Definitions*

This proposal will modify the existing definitions section by adding a new paragraph (a) that discusses the scope of the rules. Most of the definitions will be moved to subpart A and paragraph (b) will only retain the following three definitions:

“Act,” “Administrative Law Judge or ALJ,” and “Board.” The definition of Administrative Law Judge will also be revised to include “ALJ” as the commonly used acronym and to specify that ALJs are appointed to DCHD.

*§ 4.1101 Jurisdiction of the Board*

The revision will omit the existing cross-reference to § 4.21 to account for changes made to § 4.21 as part of this regulatory update.

*§ 4.1107 Filing of documents*

The revisions to this section will provide additional detail concerning the electronic filing of documents. In recent years, DCHD and IBLA have allowed parties to file documents electronically by email. This change made it easier for parties to timely transmit documents while also facilitating the expeditious issuance of notices, orders, and decisions. OHA is currently working to develop an electronic filing system that will ultimately replace the use of email. On March 16, 2023, OHA implemented a Direct Final Rule that allowed for the electronic transmission of documents and the use of OHA Standing Orders to convey information concerning the electronic transmission of documents (88 FR. 5792; January 30, 2023).

As part of the revisions to this section, paragraph (a) will govern filings with DCHD, and paragraph (b) will govern filings with IBLA. This section will also include specific cross-references to the filing and service rules for DCHD (§ 4.102) and IBLA (§ 4.407) to ensure

uniformity and consistency with other types of proceedings. In addition, this section will continue to rely on Standing Orders that will be posted on OHA’s website. Standing Orders are issued to update filing and service procedures, provide current contact information, and notify parties of technological developments such as the anticipated implementation of a new electronic filing system.

Under paragraph (a)(1), the filing of initial pleadings and all documents before DCHD will be governed by § 4.102 of this part as well as the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information. The effective filing date for documents will also be determined as specified in § 4.102, and the person or entity filing the document will have the burden of establishing the filing date.

Paragraph (b)(1) will require that a notice of appeal, petition for review, or other documents in a proceeding being conducted by the IBLA be filed as specified by § 4.407 of this part as well as the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information. The effective filing date will also be determined as specified in § 4.407, and the person or entity filing the document will have the burden of establishing the filing date.

*§ 4.1108 Form of documents*

This section will make minor modifications to the existing rule to modernize and update the language. The revisions to paragraph (e) will require a document to be signed or “digitally signed” by the “person or entity” submitting the document. Paragraph (f) will require an email address to be included along with the other contact information. In paragraph (g), the revisions

will cross-reference the document formatting requirements contained in § 4.103 (DCHD) of this part and § 4.408 (IBLA) of this part.

*§ 4.1109 Service*

Paragraph (a) will maintain the existing requirement that all documents initiating a proceeding be concurrently served on the Office of the Solicitor. It will also carry forward existing language in paragraph (a)(2) that refers parties to the OHA Standing Orders on Contact Information for the applicable addresses, telephone numbers, and geographic information. To create consistency with other service provisions, paragraphs (c) and (d) will require parties to serve documents for matters pending before DCHD in accordance with § 4.102 of this part and for matters pending before IBLA in accordance with § 4.407 of this part.

*§ 4.1110 Intervention*

We propose no changes to § 4.1110.

*§ 4.111 Voluntary dismissal*

We propose no changes to § 4.1111.

*§ 4.112 Motions*

We propose no changes to § 4.1112.

*§ 4.113 Consolidation of proceedings* We

propose no changes to § 4.1113.

*§ 4.114 Advancement of proceedings* We

propose no changes to § 4.1114.

*§ 4.115 Waiver of right to hearing*

We propose no changes to § 4.1115.

*§ 4.116 Status of notices of violation and orders of cessation pending review by the Office of Hearings and Appeals.*

We propose no changes to § 4.1116.

*§ 4.1117 Reconsideration*

The revisions to this section will add cross references to the reconsideration provisions as part of this rulemaking for DCHD (§ 4.130) and IBLA (§ 4.415). At present, the existing reconsideration provision only references reconsideration to IBLA. As revised, paragraph (a) will generally allow a petition for reconsideration to be filed with DCHD in accordance with § 4.130 of this part but will not allow petitions for reconsideration in proceedings involving an expedited review under § 4.1180 or a suspension or revocation under § 4.1190. Paragraph (b) will specifically cross-reference IBLA's reconsideration provision at § 4.415 of this part.

Hearings and Discovery

*§ 4.1120 Proceedings before an Administrative Law Judge*

As part of OHA's larger regulatory update, DCHD established a new subpart C that contains general procedural rules applicable to the prehearing, hearing, and post-hearing stages of a proceeding. To ensure consistency and uniformity in adjudications by an ALJ within DCHD, the current provisions at 43 CFR 4.1120-4.1141, which discuss the evidentiary hearing and discovery processes, will be eliminated and replaced with the General Procedural Rules for Practice before DCHD contained in subpart C at §§ 4.100 through 4.131. The General Procedural

Rules for Practice before DCHD will govern proceedings before an ALJ in addition to any other specific provisions retained in subpart L.

The General Procedural Rules for Practice before DCHD in subpart C of this part comprehensively discuss the powers of an ALJ as well as the procedures relevant to discovery and evidentiary hearings. For example, prehearing conferences are addressed at § 4.104, subpoenas are discussed at § 4.120, discovery authority is explained in rules §§ 4.112 through 4.119, summary judgment procedures are described in § 4.111, hearing scheduling is addressed in § 4.124, hearing processes are set forth in § 4.126, evidentiary issues are discussed at § 4.127, and interlocutory review is addressed with more specificity in § 4.122. Consequently, paragraph (a) will require compliance with those General Procedural Rules for Practice before DCHD.

As explained in paragraph (b), an ALJ will have the authority to preside over any hearing required by the Act to be conducted pursuant to 5 U.S.C. 554. The ALJ will conduct the hearing in an orderly and judicial manner and will be authorized to take any action authorized by the Act, subpart C of this part, subpart L of this part, or 5 U.S.C. 554-557.

#### *§ 4.1121 Initial orders and decisions*

This section combines the existing regulations set forth in §§ 4.1127 and 4.1128 with some revisions to modernize the language and to correct the cross-references that changed as part of this regulatory update.

#### *§ 4.1122 Termination of jurisdiction*

This provision is currently set forth in existing rule § 4.1121(c) and will be retained in its own section so that issues surrounding the termination of jurisdiction will be more clearly highlighted.



*§§ 4.1123 through 4.1141 [REMOVED]*

As part of this regulatory update, the provisions at §§ 4.1123 through 4.1141 will be removed and replaced with the General Procedural Rules for Practice before DCHD contained in subpart C as well as any other specific provisions retained in subpart L. The General Procedural Rules for Practice before DCHD at §§ 4.100 through 4.131 of this part have been and developed to establish uniform and consistent procedures for case processing before DCHD.

Petitions for Review of Proposed Assessments of Civil Penalties

*§ 4.1150 Who may file*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1153 Answer*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1161 Who may file*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1182 Where to file*

The only modification to this section will replace the words “the Hearings Division” with “DCHD.”

*§ 4.1190 Initiation of Proceedings*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1191 Answer*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1200 Filing the application for review with the Office of Hearings and Appeals*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1201 Request for scheduling of a hearing*

The only modifications to this section will replace the words “the Hearing Division, OHA” in paragraphs (a) and (b) with “DCHD” and will replace the words “the main office of OHA” in paragraph (c) with “DCHD.”

*§ 4.1202 Response to request for the scheduling of a hearing*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1203 Application for temporary relief from alleged discriminatory acts*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1262 Where to file*

The only modification to this section will replace the words “the Hearings Division, OHA” with “DCHD.”

*§ 4.1272 Interlocutory appeals*

The revisions to this section will remove existing paragraphs (a) through (g) and replace them with a new paragraph (a). Paragraph (a) will cross-reference the interlocutory appeal procedures created as part of this regulatory update for DCHD (§ 4.122) and IBLA (§ 4.414). Paragraph (b) will carry forward the existing language in paragraph (h).

*§ 4.1286 Motion for a hearing on an appeal involving issues of fact*

The revision to this section will correct the cross-references that changed as part of this regulatory update.

*§ 4.1287 Action by Administrative Law Judge*

The revisions to this section will remove existing paragraphs (a) through (c) and replace them with a new paragraph. The new paragraph will cross-reference the rules for adjudicating referrals at §§ 4.150 through 4.151 of this part.

*§ 4.1301 Who may file*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1303 Contents and service of petition*

The revision to this section will correct a cross-reference that changed as part of this regulatory update.

*§ 4.1304 Answer, motion, or statement of OSM*

The only modification to this section will replace the words “the Hearings Division” with “DCHD.”

*§ 4.1352 Who may file; where to file; when to file*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1362 Where to file; when to file*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1367 Request for temporary relief*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1371 Who may file, where to file, when to file*

The only modifications to this section will replace the words “the

Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” in paragraph (a) with “DCHD” and will replace the words “the Hearings Division” in paragraph (c) with “DCHD.”

*§ 4.1376 Petition for temporary relief from notice of proposed suspension or rescission or notice of suspension or rescission; appeal from decisions granting or denying temporary relief*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1381 Who may file; when to file; where to file*

The only modifications to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” in paragraph (a) with “DCHD” and will replace the words “the Hearings Division” in paragraph (c) with “DCHD.”

*§ 4.1386 Petition for temporary relief from decision; appeals from decisions granting or denying temporary relief*

The only modification to this section will replace the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” with “DCHD.”

*§ 4.1393 Status of decision pending administrative review*

The existing rule contains a cross-reference to § 4.21(a) that has changed as part of this regulatory update. The substance of IBLA’s rule at § 4.405(a)(1) will be inserted so that the cross-reference to § 4.21 will no longer be necessary.

## **RULE TEXT**

### **List of Subjects in 43 CFR Part 4**

Administrative practice and procedure, Claims.

### **Proposed Regulation Promulgation**

For the reasons given in the preamble, we propose to amend 43 CFR part 4 as set forth below:

## **PART 4—DEPARTMENT OF THE INTERIOR HEARINGS AND APPEALS**

### **PROCEDURES**

1. The authority citation for part 4 continues to read as follows:

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.

2. Revise the part heading to read as set forth above.

3. Revise subparts A and B to read as follows:

### **Subpart A – General Information and Authorities—Office of Hearings and Appeals**

Sec.

4.1 Scope of authority; applicable regulations.

4.2 Membership and duties.

4.3 Representation before OHA.

4.4 Public records; contact information for offices.

4.5 Power of the Secretary and Director.

4.6 Definitions and acronyms.

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.

**§ 4.1 Scope of authority; applicable regulations.**

(a) *In general.* The Office of Hearings and Appeals (OHA), 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, including those established by statute, regulations, or policy. OHA may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its delegated authority imposed by the Secretary.

(b) *OHA Units:*

(1) *Departmental Cases Hearings Division.*

(i) The Departmental Cases Hearings Division (DCHD) is composed of administrative law judges (ALJs) who conduct formal hearings under the Administrative Procedure Act, 5 U.S.C. 554, as well as other evidentiary hearings in accordance with statutes and regulations or by referral from an Appeals Board or other Departmental entity.

(ii) Rules applicable to proceedings before DCHD are contained in procedures in subpart C of this part, and, for particular types of proceedings, in regulations located in other parts and subparts of title 43 as well as in other parts of the Code of Federal Regulations.

(2) *Probate Hearings Division.*

(i) The Probate Hearings Division (PHD) is composed of ALJs and Indian probate judges (IPJs) who conduct formal hearings to determine the rightful heirs and devisees of decedents who owned trust or restricted property. ALJs, IPJs, or other presiding officers may also conduct related informal proceedings.

(ii) Rules applicable to proceedings before PHD are contained in part 30 of this subtitle and in regulations in other parts of the Code of Federal Regulations. Wherever there is any conflict between part 30 of this subtitle and subpart B of this part, part 30 will govern.

(3) *Interior Board of Indian Appeals.*

(i) The Interior Board of Indian Appeals (IBIA) is composed of administrative judges (AJs) who issue final decisions for the Department on appeals of decisions issued by Departmental officials including the following:

(A) 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;

(B) Decisions and orders of ALJs and IPJs in Indian probate matters; and

(C) Such other matters pertaining to Indians as are referred to IBIA by the Secretary, the OHA Director, or the Assistant Secretary-Indian Affairs for exercise of review authority of the Secretary.

(ii) Rules applicable to appeals before IBIA are contained in subpart D of this part and in regulations in other parts of the Code of Federal Regulations.

(4) *Interior Board of Land Appeals.*

(i) The Interior Board of Land Appeals (IBLA) is composed of AJs who issue final decisions for the Department on appeals of decisions issued by Departmental officials related to the following:

(A) The use and disposition of public lands and resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended;

(B) The use and disposition of resources in, and authorization of activities on, the submerged lands of the Outer Continental Shelf;



(C) The collection of revenue from the development of Federal minerals and resources on the Outer Continental Shelf;

(D) In certain instances, minerals held in trust or restricted status for Indian tribes and individual Indians, and royalties from leases of those minerals, subject to the restrictions in § 4.330 of this part; and

(E) The conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977.

(ii) Rules applicable to appeals before IBLA are contained in subpart E of this part and, for specific types of appeals, in subparts J and L of this part, and in regulations in other parts of the Code of Federal Regulations.

(c) *Director's Office and Ad Hoc Boards of Appeals.*

(1) Appeals to the head of the Department that do not lie within the appellate review jurisdiction of a Standing Appeals Board and that are not specifically excepted in the general delegation of authority to the Director may be considered and ruled upon by the Director or an Ad Hoc Boards of Appeals appointed by the Director to consider the appeals and issue decisions.

(2) The Director or Ad Hoc Board of Appeals may decide finally for the Department all questions of fact and law necessary to complete adjudication of the issues. Jurisdiction of the Ad Hoc Board 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.

(3) The Director may designate appropriate presiding officers and identify processes in accordance with statutes and regulations for hearings and appeals that are not specifically covered by an OHA Unit in paragraph (b) of this section. Rules applicable to hearings or appeals in the Director's office are contained in subpart G of this part, in procedures in other subparts in

this part, and in other parts of the Code of Federal Regulations that address particular types of proceedings.

#### **§ 4.2 Membership and duties.**

(a) *Standing Appeals Boards.* The Standing Appeals Boards consist of AJs and the Director as an ex officio member.

(1) The Director may designate a Chief Judge for each Standing Appeals Board. A Chief Judge is responsible for internal management and administration of the Standing Appeals Board, including management of the case docket. A Chief Judge is authorized to carry out such other duties as may be necessary to conduct the routine business of the Standing Appeals Board.

(2) A Chief Judge of a Standing Appeals Board may assign an appeal to a panel of any two AJs of the Standing Appeals Board, but if the AJs assigned to the panel cannot agree on a decision, a Chief Judge may assign one or more additional AJs to consider the appeal. The concurrence of a majority of the AJs who consider an appeal is sufficient for a decision.

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

(b) *Hearings Divisions.* The Hearings Divisions consist of ALJs and, where authorized, IPJs. The Director may designate a Chief Judge for each Hearings Division. A Chief Judge is responsible for internal management and administration of the Hearings Division, including management of case dockets. A Chief Judge is authorized to carry out such other duties as may be necessary to conduct the routine business of the Hearings Division.

(c) *Other Hearings and Appeals.* For hearings and appeals that are not within the jurisdiction of an OHA Unit, the Director will designate or appoint the appropriate OHA officials to an Ad Hoc Board of Appeals or as a presiding officer consistent with the applicable statute or regulation.

#### **§ 4.3 Representation before OHA.**

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

(b) *Representation of the Government.* When the Department's Office of the Solicitor represents an agency, bureau, or office of the Department in a proceeding before OHA, it will do so in the same manner as private counsel represents a client. Government counsel for other agencies, bureaus or offices of the Federal Government involved in any proceeding before OHA will represent the Government agency in the same manner as a private counsel represents a client.

(c) *Appearances as amicus curiae.* Any person or entity who seeks to appear as amicus curiae in a proceeding must make a timely request within 30 days of the date the matter is docketed by OHA unless another time period is specified by regulation. The request must state the grounds for the request. OHA retains sole discretion to grant or deny each request. If OHA grants a request, it retains sole discretion to determine the scope of the amicus appearance.

#### **§ 4.4 Public records; contact information for offices.**

Part 2 of this subtitle prescribes the rules governing availability of the public records of OHA. Contact information for offices referenced in this part is available in the OHA Standing

Orders on Contact Information on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

**§ 4.5 Power of the Secretary and Director.**

(a) *Secretary*. Nothing in this part may deprive the Secretary of any power conferred upon the Secretary by law including:

(1) The authority to take jurisdiction at any stage of any case before any employee of the Department, including any judge or other presiding officer of OHA, 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 of the Department, including any judge or other presiding officer of OHA, or to direct any such employee or employees to reconsider a decision; and

(3) The authority to appoint judges to OHA.

(b) *Director*. Nothing in this part may deprive the Director of any power delegated by the Secretary or otherwise conferred upon the Director by law.

(1) The Director may assume jurisdiction of any case before any Appeals Board or review any decision of any Appeals Board or direct reconsideration of any decision by any Appeals Board.

(2) The Director has the authority to appoint an Ad Hoc Board of Appeals, designate presiding officers to conduct hearings or proceedings, identify appropriate procedures if not otherwise specified by statute or regulations, or fulfill other hearings and appeals needs of the Department.

(3) The Director is responsible for the internal management and administration of OHA and its units including managing case dockets. The Director is authorized to carry out such other duties as may be necessary to conduct the routine business of OHA and its units.

(4) The Director may issue OHA 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 for Department of the Interior offices referenced in this part and the OHA Standing Orders on Electronic Transmission to convey information related to electronic transmission, including filing and service. The OHA Standing Orders may be issued in the event of an emergency or other contingency. The OHA Standing Orders are available on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

(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 of such action, the administrative record will be requested, and, after the review process is completed, the Secretary or Director will issue a decision.

#### **§ 4.6 Definitions and acronyms.**

In this part:

*Administrative judge* or *AJ* means an administrative judge in the Office of Hearings and Appeals.

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

*Appeals Board* means the Interior Board of Land Appeals, the Interior Board of Indian Appeals, or an Ad Hoc Board of Appeals in the Office of Hearings and Appeals.

*BIA* means the Bureau of Indian Affairs in the Department of the Interior.

*BIE* means the Bureau of Indian Education in the Department of the Interior.

*BLM* means the Bureau of Land Management in the Department of the Interior.

*BOEM* means the Bureau of Ocean Energy Management in the Department of the Interior.

*BOR* means the Bureau of Reclamation in the Department of the Interior.

*BSEE* means the Bureau of Safety and Environmental Enforcement in the Department of the Interior.

*Bureau* or *Office* means one of the bureaus or offices within the Department of the Interior, other than OHA, and may include BIA, BIE, BLM, BOEM, BOR, BSEE, FWS, ONRR, OSMRE, or any predecessor or successor organization, as appropriate.

*DCHD* means the Departmental Cases Hearings Division in the Office of Hearings and Appeals.

*Department* means Department of the Interior.

*Director* means the Director of the Office of Hearings and Appeals.

*FWS* means the U.S. Fish and Wildlife Service in the Department of the Interior.

*IBIA* means the Interior Board of Indian Appeals in the Office of Hearings and Appeals.

*IBLA* means the Interior Board of Land Appeals in the Office of Hearings and Appeals.

*Indian probate judge* or *IPJ* means an attorney in the Office of Hearings and Appeals authorized to adjudicate Indian Probate cases under 25 U.S.C. 372-2.

*Interested person or entity* means any person or entity with an interest in the agency proceeding that is greater than the interest that the public as a whole may have.

*Judge* means an administrative judge, an Indian probate judge, or an administrative law judge in the Office of Hearings and Appeals.

*OHA* means the Office of Hearings and Appeals in the Department of the Interior.

*OHA Standing Order* means a notice that contains information for parties and the public that is issued by the OHA Director pursuant to § 4.5(b)(4) of this part and made available on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

*OHA Unit* means the DCHD, IBIA, IBLA, or PHD.

*ONRR* means the Office of Natural Resources Revenue in the Department of the Interior.

*OSM* or *OSMRE* means the Office of Surface Mining Reclamation and Enforcement in the Department of the Interior.

*Person or entity* means an individual; a corporation; partnership; trust; institution; association; organization; any other private entity; any officer, employee, agent, department, or instrumentality of the United States; any officer, employee, agent, department, or instrumentality of any Indian tribe; or any officer, employee, agent, department, or instrumentality of any state or political subdivision.

*PHD* means the Probate Hearings Division in the Office of Hearings and Appeals.

*Presiding officer* means a judge, attorney, or other official designated by the Director to adjudicate a matter pending before the Office of Hearings and Appeals.

*Secretary* means the Secretary of the Interior.

*Solicitor's Office* means the Department of the Interior Solicitor's office.

*Standing Appeals Board* means the IBIA or IBLA.

*WELSA* means White Earth Reservation Land Settlement Act.

## **Subpart B—General Rules Relating to Procedures and Practice**

Sec.

4.20 Purpose and scope.

4.21 Exhaustion and finality.

- 4.22 Retention of documents; record address; and extensions of time.
- 4.23 Hearings or related proceedings.
- 4.24 Basis of decision.
- 4.25 Oral argument and status conferences.
- 4.26 Subpoena power and witness provisions for probate proceedings.
- 4.27 Ex parte communication and disqualification.
- 4.28 Interlocutory appeals.
- 4.29 Disqualification of Presiding Officers and Board Members.
- 4.31 Limiting disclosure of confidential information.
- 4.32 Filing; service; issuance.

**§ 4.20 Purpose and scope.**

(a) *Purpose.* The purpose of this subpart is to establish general rules of practice, where appropriate.

(b) *Scope.* General rules applicable to proceedings before OHA are set forth in subparts A and B of this part. Rules applicable to particular units or a particular type of proceeding are set forth in other subparts of this part. Wherever there is any conflict between one of the general rules in subparts A or B of this part and a rule in another subpart of this part, the specific rule will govern. Other laws, regulations, and policies of the Department may also address and be applicable to a particular type of proceeding. In addition, part 1 of this subtitle, which regulates practice before the Department of the Interior, applies to proceedings before OHA.

**§ 4.21 Exhaustion and finality.**

(a) *Exhaustion.* An appeal must be filed with the Director or applicable Appeals Board to exhaust administrative remedies unless otherwise provided by applicable law or the decision is immediately effective.

(b) *Finality.*



(1) *Decisions not in effect.* A decision that is not in effect does not constitute final agency action for purposes of 5 U.S.C. 704 and may not be challenged in Federal court.

(2) *Decisions in effect.* A decision that is in effect is final agency action for purposes of 5 U.S.C. 704 and may be challenged in Federal court.

(3) *Final Department Decision.* The final decision of the Director or an Appeals Board constitutes the final agency action of the Department for purposes of 5 U.S.C. 704 and may be challenged in Federal court. The Director's or Appeals Board's final decision is effective on the date it is issued unless the decision provides otherwise.

#### **§ 4.22. Retention of documents; record address; and extensions of time.**

(a) *Retention of documents.*

(1) *In general.* All documents received in evidence in a hearing or submitted for the record in any proceeding before an OHA Unit will be retained in the official record of the proceedings.

(2) *Withdrawal and substitution of original documents.* The substitution of original documents may be permitted while the case is pending upon the submission of true copies. When a decision has become final for the Department, an Appeals Board in its discretion may, upon request and after notice to the other party or parties, permit the withdrawal of original documents in whole or in part. As a condition of granting permission for such withdrawal, the Appeals Board may require the substitution of true copies in its discretion and as necessary to ensure an accurate record of the proceeding.

(3) *Sealed against disclosure.* Transcripts of testimony and/or documents received or reviewed pursuant to § 4.31 of this subpart will be sealed against disclosure to unauthorized

persons and retained with the official record, subject to the withdrawal and substitution provisions.

(b) *Record address information.* At the time of initial filing, every person or entity who files a document in connection with any proceeding before OHA must provide their mailing address. A person or entity filing electronically must also provide the electronic mailing address that the person or entity intends to use in the proceeding.

(1) *Address changes.* A person or entity who has provided their address in a proceeding must promptly file and serve upon other parties to the proceeding, written notice of any change to their address information with the OHA Unit in which the matter is pending.

(2) *Successors.* The successors of a person or entity who has provided their address in a proceeding must promptly file notice of their own addresses.

(3) *Failure to provide or update a record address.* A person or entity who fails to provide or update their address information as required is not entitled to notice or service in connection with the proceeding until they have provided or updated their address information.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, the following rules apply when computing any time period specified in a regulation, notice, order, or decision.

(1) Exclude the day of the event that triggers the time period;

(2) Count every day, including intermediate Saturdays, Sundays, and Federal holidays;

and

(3) Include the last day of the period, but if the last day is a Saturday, Sunday, Federal holiday, or other nonbusiness day, the period continues to run until the end of the next day that is not a Saturday, Sunday, Federal holiday, or other nonbusiness day.

(d) *Extensions of time.*

(1) The time for filing or serving any document may be extended by the presiding 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 proceeding is pending.

#### **§ 4.23 Hearings or related proceedings.**

(a) *Transcripts.* Hearings may be recorded, transcribed verbatim, or both. Interested parties may request a copy of the transcripts or recording of the hearing. The requesting party is responsible for fees and expenses of preparing their copy of a transcript or recording. For transcripts prepared by a contractor with a Department of the Interior bureau or office, each party is responsible for obtaining and paying for its copy of the transcript consistent with any statutory provisions governing the proceeding.

(b) *Video, teleconferencing, or other suitable technology.* In circumstances that the presiding officer deems appropriate, a hearing or proceeding may be conducted, in whole or in part, using video, teleconferencing, or other suitable technology.

#### **§ 4.24 Basis of decision.**

(a) *Record.*

(1) The record of a hearing consists of the transcript of testimony or summary of testimony and exhibits together with all documents filed in conjunction with the hearing.

(2) If a hearing has been held on a referred issue of fact pursuant to § 4.337 or § 4.415 of this part, this record is the sole basis for decision on the referred issues of fact that 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 is 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 may be based upon any record, statement, file, or similar document that 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.* The presiding officer or an Appeals Board may take official notice of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice.

#### **§ 4.25 Oral argument and status conferences.**

The Director or the presiding officer or an Appeals Board may, in their discretion, order or grant upon a written request, an opportunity for oral argument or status conferences. An oral argument or status conference may be conducted by video, teleconferencing, or other suitable technology.

#### **§ 4.26 Subpoena power and witness provisions for probate proceedings.**

(a) *Purpose.* To the extent authorized by law, subpoenas may be issued by PHD ALJs or IPJs in a probate proceeding under part 30 of this subtitle, or by the presiding officer in a probate proceeding under subpart H of this part, to require the attendance of a person, the giving of testimony, or the production of documents or other relevant materials.

(b) *Issuance.* The ALJ, IPJ, or presiding officer may issue a subpoena on a form that contains the caption for the proceeding, specifies the name and address of the person or entity from whom the testimony or material is sought, and orders one or more of the following:

(1) If the subpoena requires the person to testify in person at a hearing or deposition, then the subpoena will order the person to appear at a specified date, time, and place;

(2) If the subpoena requires the person to testify at a hearing or deposition using video, teleconferencing, or other suitable technology, then the subpoena will order the person to appear at a specified date and time and will contain the information necessary to testify remotely; or

(3) If the subpoena requires the production of designated documents, electronically stored information, or other tangible materials by a nonparty, then the subpoena will order production by a specified date and will designate whether the production must occur in person, by mail, by third party commercial courier, or by electronic means.

(c) *Service.* A subpoena must be served by one of the following methods:

(1) *In person.* A subpoena may be served by any person who is not a party to the proceeding and is 18 years of age or older by hand-delivering a copy of the subpoena to the person or entity named in the subpoena; or

(2) *By registered or certified mail.* A subpoena may be served by registered or certified mail, with a return receipt requested, to the last known residential address or place of business of the person or entity named in the subpoena.

(d) *Geographic limits.* A witness may be required to attend a deposition or hearing at a place not more than 100 miles from the place of service, except that no geographic limits apply to attendance at a deposition or hearing that is conducted using video, teleconferencing, or other suitable technology that allows a witness to testify remotely.

(e) *Witness fees.* Witnesses subpoenaed by any party will be paid the same fees and mileage as are paid for like service in District Courts of the United States under 28 U.S.C. 1821. The witness fees and mileage will be paid by the party who requested the appearance. Any witness who appears without being subpoenaed is also entitled to the same fees and mileage to be paid by the party who requested the appearance. This paragraph does not apply to Government employees who are called as witnesses by the Government.

**§ 4.27 Ex parte communication and disqualification.**

(a) *Definition of ex parte communication.*

(1) An ex parte communication is any oral or written communication related to the merits of a pending proceeding or appeal before OHA that was not on the record, not furnished to all other parties, or not made in the presence of all parties, and that takes place between:

(i) Any party to the proceeding or appeal or any person or entity interested in the proceeding or appeal; and

(ii) Any OHA personnel who is involved in, or who may reasonably be expected to become involved in, the decision-making process in that proceeding or appeal.

(2) The following types of communications are not ex parte communications:

(i) Communications concerning case status, case scheduling, or the availability of Alternative Dispute Resolution;

(ii) Communications concerning compliance with procedural requirements, unless that compliance is an area of controversy in the proceeding or appeal;

(iii) Communications between Bureau of Indian Affairs (BIA) employees and PHD employees about a probate case held pursuant to 43 CFR part 30, unless BIA has filed a petition for rehearing, reopening, or reconsideration in that case;

(iv) Communications between Interior Business Center (IBC) employees and OHA employees about an employee debt waiver request or appeal held pursuant to § 4.704 of this part; and,

(v) Communications between employees of the White Earth Reservation Land Settlement Act (WELSA) Project Office or the Bureau of Indian Affairs (BIA) and OHA employees about a probate case held pursuant to 43 CFR part 4, subpart H, unless the WELSA Project Office or BIA has filed a request for hearing, petition for reopening, or petition for reconsideration in that case.

(b) *Prohibition.* Any ex parte communication is prohibited.

(c) *Procedure for addressing ex parte communication.*

(1) OHA personnel receiving an ex parte communication must place in the record for the pending proceeding or appeal the written communication or, if oral, a memorandum stating the substance of the oral communication.

(2) The affected OHA unit must provide, or order the person or entity that made the ex parte communication to provide, the communication to all parties and provide them with an opportunity to respond in writing, and any response must be placed in the record for the pending proceeding or appeal.

(d) *Sanctions for ex parte communication.*

(1) After considering the relevant circumstances and the nature of the violation, the Director, Appeals Board, or presiding officer may impose appropriate sanctions on a party who knowingly made or knowingly caused to be made a prohibited ex parte communication.

Appropriate sanctions for an ex parte communication may include:

(i) Ruling adversely on the issue that was the subject of the ex parte communication; or

(ii) Requiring the party to show cause why its claim, motion, or interest should not be dismissed, denied, or otherwise adversely affected.

(2) Before imposing sanctions, the Director, Appeals Board, or presiding officer will provide notice and an opportunity to respond.

(3) The appropriate supervisor is responsible for notifying the Director and, in accordance with Department regulations and policy, disciplining OHA personnel who knowingly made or caused to be made a prohibited ex parte communication.

#### **§ 4.28 Interlocutory appeals.**

Interlocutory appeals from a ruling of an ALJ or IPJ are not permitted unless an ALJ or IPJ has certified the interlocutory ruling or abused their discretion in refusing a request to certify and an Appeals Board has granted permission for such an appeal. An Appeals Board will not grant permission for an interlocutory appeal except upon a showing that the interlocutory ruling involves a controlling question of law about which there are substantial grounds for a difference of opinion and that an immediate appeal will materially advance the completion of the proceeding. An interlocutory appeal will not operate to suspend the hearing unless otherwise ordered by the Appeals Board.

#### **§ 4.29 Disqualification of Presiding Officers and Board members.**

(a) A presiding officer or Board member must withdraw from a case if circumstances exist that would disqualify a judge under the recognized canons of judicial ethics.

(b) A party may file a motion seeking the disqualification of a presiding officer or Board member, setting forth in detail the circumstances that the party believes require disqualification. Any supporting facts must be established by affidavit or other sufficient evidence. The moving party must also send a copy of the motion to the Director.



(c) The Chief Judge of the appropriate OHA unit or the Director may decide whether disqualification is required if the presiding officer or Board member does not withdraw under paragraph (a) of this section or in response to a motion under paragraph (b) of this section.

#### **§ 4.30 Alternative Dispute Resolution.**

While a matter is before OHA, the Director or OHA Unit may notify the parties at any time that the matter has been identified as a candidate for Alternative Dispute Resolution (ADR). The notice will describe the available options and may include an order directing the parties to participate in an assessment conference or otherwise communicate whether they are willing to participate in an ADR process. While a matter is pending before OHA, an individual party or the parties jointly may ask the Director or OHA Unit about the availability of ADR in the matter. The use of an ADR process is entirely voluntary and will only be used if all parties agree to participate.

#### **§ 4.31 Limiting disclosure of confidential information.**

(a) *Confidential information.* Confidential information includes information that is exempt from public disclosure under:

- (1) The Freedom of Information Act (5 U.S.C. 552);
- (2) The Trade Secrets Act (18 U.S.C. 1905); or
- (3) Other laws that exempt the information from public disclosure.

(b) *Filing a motion for a protective order.* A person or entity who intends to file a document that may contain confidential information, and who wishes to prevent or limit disclosure of that confidential information, must also file and serve a motion for a protective order. The motion for a protective order must include the following.

- (1) A statement specifying the factual and legal justification for nondisclosure.

(2) A copy of the document with the information exempt from disclosure redacted, or if it is not practicable to submit a copy of the document because redaction of the information would render the document unintelligible, a description of the document.

(3) A statement indicating one of the following:

(i) That the confidential information may be disclosed to other parties to the proceeding or appeal who agree in a written affidavit or declaration under penalty of perjury to the following conditions:

(A) Not to use or disclose the information except in the context of the proceeding or appeal;

(B) Not to retain the information in any format after the conclusion of the proceeding or appeal; and

(C) To return all physical copies of the information at the conclusion of the proceeding or appeal to the person or entity who submitted the information; or

(ii) That disclosure of the identified confidential information in that document to another party to the proceeding is prohibited by law, notwithstanding the conditions provided in paragraph (b)(3)(i) of this section. This paragraph (b)(3)(ii) does not apply to hearings conducted pursuant to 5 U.S.C. 554. When this paragraph (b)(3)(ii) applies, the person or entity submitting the confidential information must include the following in the motion for a protective order:

(A) A request that the presiding officer or Appeals Board consider the confidential information as a basis for its decision without disclosing it to the other party or parties.

(B) A statement explaining why disclosure is prohibited, citing pertinent statutory or regulatory authority. If the prohibition on disclosure is intended to protect the interest of a person or entity who is not a party to the proceeding, the person or entity making the request must

demonstrate that such person or entity refused to consent to the disclosure of the confidential information to other parties to the proceeding.

*(c) Ruling on motion for a protective order.*

(1) If the motion for a protective order satisfies the requirements of paragraph (b)(3)(i) of this section, the presiding officer or Appeals Board will grant the protective order. The presiding officer or Appeals Board may direct that the information be filed under seal and will require service of the information on the other parties to the proceeding or appeal upon filing of the written agreement required in paragraph (b)(3)(i) of this section. The information will be disclosed to the parties to the proceeding or appeal only under the conditions of paragraph (b)(3)(i) of this section unless the Department determines the confidential information must be released under the Freedom of Information Act or in accordance with part 2 of this title.

(2) If the motion for a protective order satisfies the requirements of paragraph (b)(3)(ii) of this section, the presiding officer or Appeals Board will grant the protective order. The presiding officer or Appeals Board may direct that the information be filed under seal and will not disclose the information unless the Department determines the confidential information must be released under the Freedom of Information Act or in accordance with part 2 of this title.

(3) If the presiding officer or Appeals Board denies a motion for a protective order seeking to prevent disclosure of confidential information to the parties to a proceeding or appeal under paragraph (b)(3)(ii) of this section, the presiding officer or Appeals Board must provide the person or entity who submitted the information an opportunity to withdraw the information before it is further considered by the presiding officer or Appeals 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.

(d) *Waiver.* If the person or entity submitting a document does not specify that the document contains confidential information, the presiding officer or Appeals Board may assume that the person or entity submitting the document does not object to public disclosure of any confidential information contained in that document or may allow a reasonable period of time to redact any confidential information identified after filing.

(e) *Confidential information in an OHA decision.* Where a decision by a presiding officer or Appeals Board is based, in whole or in part, on confidential information subject to a protective order, the presiding officer or Appeals Board must specify the nature of the confidential information and the provision of law under which disclosure was denied and must retain the confidential information under seal as part of the official record.

#### **§ 4.32 Filing; service; issuance.**

The provisions of this section do not apply to proceedings under subparts C, D, E, H, J, K and L of this part.

(a) *Filing.*

(1) *Generally.* A document required or permitted to be filed in a proceeding must be delivered to the office where the filing is required as specified in this part or part 30 of this title, the OHA Standing Orders on Contact Information, and the OHA Standing Orders on Electronic Transmission.

(2) *Methods of filing.*

(i) *Electronic.* A document may be filed electronically under the terms specified in the OHA Standing Orders on Electronic Transmission. Any Federal, state, or local agency, or any attorney representing a person or entity, must file electronically, unless otherwise specified in the

OHA Standing Orders on Electronic Transmission or when the OHA unit where the filing is required has allowed non-electronic filing for good cause.

(ii) *Non-electronic.* Any document filed non-electronically must be delivered to the office where the filing is required at the address specified in the OHA Standing Orders on Contact Information.

(3) *Timeliness.*

(i) *Electronic.* A document filed electronically is deemed timely if filed by 11:59 p.m. in the time zone of the office where the document is due on the date the document is due under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) *Non-electronic.* A document not filed electronically is deemed timely filed if, on or before the last day for filing, it is sent by first-class United States mail, or other class of mail that is at least as expeditious, postage prepaid; or it is dispatched to a third-party commercial courier for delivery within 3 days. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the company delivering the document for filing. A document not received within 7 business days of the filing deadline is presumed untimely, but the presumption may be overcome by the appropriate documentation establishing the date of mailing or dispatch.

(b) *Service.*

(1) *Generally.* Any person or entity who files a document in a proceeding before OHA must also serve the document under the terms specified in this section and in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information.

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

(3) *Manner of service.*

(i) *Electronic.* Service may be made electronically on the Office of the Solicitor and the bureau or office whose decision is being appealed under the terms specified in the OHA Standing Orders on Electronic Transmission. Service may be made electronically on all other persons or entities who have consented to electronic service under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) *Non-electronic.* Service may be made non-electronically by United States mail or third-party commercial courier for delivery within 3 days.

(c) *Issuance.*

(1) *Electronic.* A notice, order, or decision by an OHA Unit may be issued electronically under the terms specified in the OHA Standing Orders on Electronic Transmission, or in specific rules applicable to particular OHA Units or particular types of proceedings.

(2) *Non-electronic.* Unless otherwise specified, non-electronic issuance may be made by U.S. mail, personal delivery, or third-party commercial courier.

4. Add subpart C to read as follows:

## **Subpart C – Rules Applicable to Proceedings Before the Departmental Cases Hearings**

### **Division**

GENERAL PROCEDURAL RULES FOR PRACTICE BEFORE THE DEPARTMENTAL CASES HEARINGS

DIVISION

PURPOSE, SCOPE, AND DEFINITIONS

Sec.

4.100 Purpose and scope.

4.101 Definitions.

FILING, SERVICE, AND FORMATTING OF DOCUMENTS

4.102 Filing, service, and issuance.

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#### PREHEARING PROCEDURES

4.104 Prehearing conferences.

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4.106 Extension of time.

4.107 Consolidation and severance.

4.108 Intervention and amicus curiae.

4.109 Notice of appearance; substitution of attorneys; and attorney withdrawal.

4.110 Voluntary withdrawal and stipulated dismissal.

4.111 Summary judgment.

#### DISCOVERY

4.112 Discovery generally.

4.113 Interrogatories.

4.114 Requests for production.

4.115 Requests for admission.

4.116 Depositions.

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4.119 Sanctions for failure to comply with a discovery order.

#### OTHER PROCEDURES

4.120 Subpoenas.

4.121 Sanctions.

4.122 Interlocutory appeal.

4.123 Alternative Dispute Resolution.

#### HEARING PROCESS AND PROCEDURE

4.124 Hearing scheduling.

- 4.125 Hearing postponements.
- 4.126 Hearing procedures generally.
- 4.127 Evidence.
- 4.128 Transcripts and reporting.
- 4.129 Decision.

#### RECONSIDERATION, APPEAL, AND REVIEW

- 4.130 Reconsideration.
- 4.131 Appeal and review.

#### SPECIFIC RULES APPLICABLE TO CERTAIN TYPES OF PROCEEDINGS BEFORE THE DEPARTMENTAL CASES HEARINGS DIVISION

##### SPECIFIC RULES APPLICABLE TO REFERRALS FOR FACT-FINDING HEARINGS

- 4.150 Procedures for hearing referrals.
- 4.151 Resolution of hearing referrals.

##### SPECIFIC RULES APPLICABLE TO CONTEST PROCEEDINGS

- 4.160 Private contests; initiation of a private contest.
- 4.161 Private contests; protests.
- 4.162 Private contests; complaint.
- 4.163 Private contests; service.
- 4.164 Private contests; answer to complaint.
- 4.165 Government contests; initiation of a government contest.
- 4.166 Government contests; complaint and service.
- 4.167 Government contests; answer to complaint.
- 4.168 Proceedings before Administrative Law Judge.
- 4.169 Appeal.

##### SPECIFIC RULES APPLICABLE TO GRAZING PROCEEDINGS (INSIDE AND OUTSIDE OF GRAZING DISTRICTS)

- 4.170 Appealing a grazing decision.



- 4.171 Petitions for stay.
- 4.172 BLM document filing requirements and initial disclosures.
- 4.173 Adjudication of grazing appeal.
- 4.174 Effect of decision pending appeal; exhaustion and finality.
- 4.175 Appeal and review.

GENERAL PROCEDURAL RULES FOR PRACTICE BEFORE THE DEPARTMENTAL CASES HEARINGS  
DIVISION

**PURPOSE, SCOPE, AND DEFINITIONS**

**§ 4.100 Purpose and scope.**

(a) *Purpose.* This subpart contains the general procedural rules for practice before the Departmental Cases Hearings Division (DCHD) at §§ 4.100 through 4.131, as well as the specific rules applicable to certain types of proceedings before DCHD at §§ 4.150 through 4.175.

(b) *Scope.* The general procedural rules for practice before DCHD at §§ 4.100 through 4.131 of this subpart apply to all types of proceedings within the jurisdiction of DCHD except the following:

- (1) Hydropower proceedings governed by part 45 of this title;
- (2) Tribal Acknowledgement proceedings governed by subpart K of this part;
- (3) Indian Self-Determination and Education Assistance Act proceedings governed by 25 CFR part 900 and 42 CFR part 137, subpart P;
- (4) Administrative Remedies for Fraudulent Claims and Statements governed by 43 CFR part 35 of this title; and
- (5) Debt collection proceedings governed by the Departmental Manual.

(c) *Subparts A and B.* The general rules contained in subparts A and B of this part are applicable to proceedings before DCHD unless they are inconsistent with the rules in this

subpart. Subpart A contains the authority, jurisdiction, and membership of DCHD. Subpart B contains the general rules applicable to proceedings before DCHD and other components of the Office of Hearings and Appeals (OHA).

(d) *Other regulations.* Rules applicable to specific types of proceedings within the jurisdiction of DCHD are contained throughout title 43 and in other portions of the Code of Federal Regulations, including, but not limited to, titles 25, 30, 34, and 50. To the extent that a rule applicable to a specific type of proceeding directly conflicts with the general procedural rules for practice before DCHD in this subpart, the specific rule will apply. If a specific rule contains references to outdated or inapplicable procedures, the ALJ may direct the parties, in writing, to follow some or all of the procedures contained in the general procedural rules for practice before DCHD in this subpart.

(e) *Standing Orders.* Standing Orders issued by the Director of OHA may also apply to proceedings before DCHD. Standing Orders are available on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

#### **§ 4.101 Definitions.**

In addition to the definitions in subpart A, the following definitions apply to this subpart:

*Administrative Law Judge (ALJ)* means an administrative law judge appointed to the Departmental Cases Hearings Division (DCHD).

*DCHD* means the Departmental Cases Hearings Division in the Office of Hearings and Appeals.

#### **FILING, SERVICE, AND FORMATTING OF DOCUMENTS**

##### **§ 4.102 Filing, service, and issuance.**

(a) *Filing.*

(1) *Generally.* Any document filed in a proceeding before DCHD must be delivered as specified in this subpart and in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information found on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

(2) *Methods of filing.*

(i) *Electronic.* A document may be filed electronically under the terms specified in the OHA Standing Orders on Electronic Transmission. Any Federal, state, or local agency and any attorney representing a person or entity must file electronically, unless otherwise specified in the OHA Standing Orders on Electronic Transmission or when the ALJ has allowed non-electronic filing for good cause.

(ii) *Non-electronic.* A document not filed electronically must be delivered to DCHD at the address specified in the OHA Standing Orders on Contact Information.

(3) *Timeliness.*

(i) *Electronic.* A document filed electronically is deemed timely if filed by 11:59 p.m. Mountain Time on the date the document is due under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) *Non-electronic.* A document not filed electronically is deemed timely filed if, on or before the last day for filing, it is sent by first-class United States mail, or other class of mail that is at least as expeditious, postage prepaid; or it is dispatched to a third-party commercial courier for delivery within 3 days. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the carrier delivering the document for filing. A document not received within 7 business days of the filing deadline is

presumed untimely, but the presumption may be overcome by the documentation establishing the date of mailing or dispatch.

(b) *Service.*

(1) *Generally.* Any person or entity who files a document in a proceeding before DCHD must also serve the document under the terms specified in this section and in accordance with the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information.

(2) *Person or entity to serve.* A person or entity that files any document with DCHD must serve a copy of the document concurrently as follows:

(i) For a notice of appeal or other document initiating a proceeding, on the bureau or office where the proceeding originated; on each person or entity named in the decision on appeal or identified in the document authorizing the initiation of the proceeding; and on the appropriate official of the Office of the Solicitor as specified in the OHA Standing Orders on Contact Information; and

(ii) For all other documents, on each party to the proceeding (including intervenors).

(3) *Service on represented parties.* Service on a party known to be represented by an attorney, or another designated representative, must be made on the representative. Parties must serve the appropriate office of the Office of the Solicitor as provided in the OHA Standing Orders on Contact Information until a particular attorney of the Office of the Solicitor files and serves a notice of appearance or other document in the proceeding, after which that attorney must be served. If the proceeding involves another Federal Government agency, such as a mining claim on national forest land, service must be on the appropriate office of the Government

agency involved until a particular attorney serves a notice of appearance or other document in the proceeding, after which that attorney must be served.

(4) *Service address.* Every person or entity who files a document in connection with a proceeding before DCHD must provide the mailing or electronic address that the person or entity intends to use for service in the proceeding. A person or entity seeking to receive service electronically must consent to electronic service as required by paragraph (b)(6)(i) of this section. If a person or entity has not consented to electronic service, then anyone serving a document on that person or entity must use the mailing address in the person's or entity's most recent filing or, if there has not been any filing, the mailing address of the person or entity as provided by the bureau or office where the proceeding originated.

(5) *Address changes.* A party whose mailing or electronic address changes during the proceeding must promptly file and serve a written notice of the change. The notice must specify the proceedings to which the notice applies using the applicable docket number or docket numbers when available.

(6) *Manner of service.* A document may be served electronically or non-electronically as follows:

(i) *Electronic.* Service may be made electronically on the Office of the Solicitor and the bureau or office under the terms specified in the OHA Standing Orders on Electronic Transmission. Service may be made electronically on all other persons or entities who have consented to electronic service under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) *Non-electronic*. Service may be made non-electronically by United States mail or third-party commercial courier for delivery within 3 days. In contest cases, service may be made by publication for complaints initiated under § 4.163.

(7) *Certificate of service*. At the conclusion of any document that a party must serve under the regulations in this subpart, the party or the party's representative 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.

(8) *Completion of service*.

(i) *Electronic*. Service by electronic means is complete on sending or as otherwise provided under the terms specified in the OHA Standing Orders on Electronic Transmission, unless the party making service is notified that the document was not received by the party served.

(ii) *Non-electronic*. Service by mail or by commercial courier is complete on mailing or dispatch to the carrier. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or other similar written acknowledgement from the carrier delivering the document.

(iii) *Publication*. Service by publication is complete when the requirements set forth in § 4.163 have been satisfied.

(c) *Issuance*. An ALJ may issue notices, orders, decisions, or other documents electronically or non-electronically as follows:

(1) *Electronic.* A notice, order, decision, or other document will be issued electronically to the electronic service address provided by the person or entity, and service is complete on sending or as otherwise specified by the OHA Standing Orders on Electronic Transmission.

(2) *Non-electronic.* If an electronic service address has not been provided, then:

(i) A non-appealable notice, order, decision, or other document will be issued by first-class United States mail or third-party commercial courier to the mailing address provided by the person or entity or, if not provided, to the last known address, and service is complete on mailing or dispatch; and

(ii) An appealable order or decision will be sent by certified United States mail to the mailing address provided by the person or entity or, if not provided, to the last known mailing address, and service is complete when received. If an order or decision sent by certified mail is not claimed by the recipient or is returned as undeliverable, then service will be made by first-class United States mail, and service is deemed complete when mailed.

#### **§ 4.103 Document formatting.**

(a) *Scope.* The formatting requirements of this section apply to any notice, motion, brief, or other document filed under this subpart, whether filed electronically or in paper form. These formatting requirements do not apply to exhibits, attachments, or documents appended to or provided in addition to a party's notice, motion, brief, or other pleading.

(b) *General requirements.* All documents must:

(1) Be captioned with a docket number and a document title;

(2) Be formatted for 8.5 by 11-inch paper, and if filed in paper form, be printed on just one side of the page with a staple or other binding in the upper left-hand corner;

- (3) Be typewritten, printed, or otherwise reproduced so that the document is clearly legible;
- (4) Use 12-point font size or larger;
- (5) Be double-spaced except for the caption, argument headings, long quotations, and footnotes which may be single-spaced;
- (6) Have margins of at least 1 inch on all four sides;
- (7) Have pages that are numbered sequentially;
- (8) Be signed, or digitally signed, by the party or the party's representative;
- (9) Include the mailing or electronic address that the person or entity intends to use for service in the proceeding; and
- (10) Be in an electronic text-searchable portable document format (PDF) if filed electronically, maintaining original document formatting unless otherwise provided by the OHA Standing Orders on Electronic Transmission.

(c) *Exclusions from page numbering computations.* Any document subject to page limitations as set forth in this subpart or an order issued by the ALJ may exclude from the page numbering computations: any cover page, table of contents, table of authorities, signature blocks, certificates of service, indices, attachments, and exhibits.

(d) *Consequences of noncompliance.* The ALJ may strike and not consider any pleading or document that fails to comply with the requirements of this section.

## **PREHEARING PROCEDURES**

### **§ 4.104 Prehearing conferences.**

(a) *Purpose.* The ALJ may conduct one or more prehearing conferences to facilitate the efficient, fair, and timely resolution of a proceeding.



(b) *Notice and timing.* At the discretion of the ALJ, prehearing conferences may be scheduled at any appropriate time during the proceeding by issuing an order directing the parties, or their representatives, to appear at a specified date and time. A prehearing conference may occur by telephone, videoconference, or other appropriate means.

(c) *Matters for consideration.* An ALJ may conduct one or more prehearing conferences to consider scheduling, case management, and other matters including, but not limited to:

- (1) Simplifying or narrowing the issues;
- (2) Consolidating proceedings;
- (3) Discussing the utility of settlement or alternative dispute resolution procedures;
- (4) Ascertaining the appropriateness and timing of discovery, including the resolution of any discovery disputes;
- (5) Determining the appropriateness and timing of any prehearing motions, including motions for summary judgment and other dispositive motions;
- (6) Evaluating the possibility of obtaining agreements or stipulations related to facts or documents;
- (7) Scheduling a hearing and establishing appropriate hearing procedures;
- (8) Identifying witnesses and exhibits and scheduling the timing for prehearing disclosures;
- (9) Addressing issues associated with the admission of evidence;
- (10) Resolving specific procedural disputes and adopting procedures to manage any potentially difficult or complex issues;
- (11) Establishing appropriate case-management deadlines; and
- (12) Discussing any other matters that may aid in the disposition of the proceeding.

(d) *Final prehearing conference.* Prior to the commencement of any hearing, the ALJ may conduct a final prehearing conference to formulate a hearing plan and to facilitate the admission of evidence and the presentation of witnesses.

(e) *Request to schedule prehearing conference.* A party may request that the ALJ schedule a prehearing conference by filing a written motion that demonstrates a reasonable justification for the scheduling request.

(f) *Post-conference orders.* After a prehearing conference, the ALJ will issue an order documenting the actions agreed on and the rulings made by the ALJ during the prehearing conference. The post-conference order will control the subsequent course of the proceeding, unless modified by the ALJ in a written order.

(g) *Consequences of noncompliance.* In accordance with § 4.121, an ALJ may sanction a person or entity that fails to appear for a prehearing conference, fails to participate in good faith, or fails to comply with the terms of a post-conference order.

#### **§ 4.105 Prehearing motions.**

(a) *Overview.* A party may apply for an order requesting relief by presenting a motion to the ALJ. A motion made prior to a hearing must be presented in writing, unless otherwise authorized by the ALJ. Motions must conform to the general requirements of this section as well as any provisions in this subpart applicable to the specific type of motion, except that motions for summary judgment are governed by § 4.111.

(b) *Motion.* A motion must be filed and served in accordance with §§ 4.102 and 4.103 and must comply with the following:

(1) *Timing.* A motion may be filed any time after the commencement of a proceeding unless a different deadline has been prescribed by a provision of this subpart or in an order issued by the ALJ.

(2) *Page limits.* A motion may not exceed 15 pages unless the ALJ orders otherwise.

(3) *Content.* A motion must clearly and concisely state:

(i) The purpose of the motion and the relief sought;

(ii) The factual basis for the relief sought; and

(iii) The legal arguments and reasons supporting the motion, including citations to any applicable legal authority.

(c) *Response.* A response brief must be filed and served in accordance with §§ 4.102 and 4.103 and must comply with the following:

(1) *Timing.* A response brief must be filed within 14 days after filing of the motion unless a different response period is prescribed by a provision in this subpart or an order issued by the ALJ.

(2) *Page limits.* A response may not exceed 15 pages unless the ALJ orders otherwise.

(3) *Content.* A response must clearly and concisely state:

(i) Whether the party opposes or supports the relief sought in the motion;

(ii) The factual basis for the response; and

(iii) The legal arguments and reasons supporting the response, including citations to any applicable legal authority.

(d) *Reply.* No reply or further briefing related to the motion will be accepted unless authorized by ALJ.

(e) *Supporting documentary materials.* Exhibits, attachments, affidavits, declarations, or other documentary materials supporting a motion or response must be directly referenced in the motion or response using pinpoint citations that identify the specific page(s) or paragraph number(s) where the supporting text is located. Supporting documentary materials must be submitted with the motion or response unless the supporting materials have already been filed with DCHD.

(f) *Procedural motions.* The ALJ may rule on a motion requesting procedural relief without waiting for a response. Types of motions seeking procedural relief include, but are not limited to, requests to modify a deadline, reschedule an action, allow additional briefing, or permit the filing of an overlength brief.

(g) *Summary denial.* An ALJ may summarily deny a motion without waiting for a response when the motion is frivolous, is repetitive, or would cause undue delay.

#### **§ 4.106 Extension of time.**

(a) *Scope.* A party may request an extension of time for filing a document, other than a notice of appeal or a document initiating the proceeding, by filing and serving a written motion.

(b) *Timing.* A motion for an extension of time must be filed no later than the day before the document is due, absent a showing of compelling circumstances.

(c) *Good cause.* A motion for an extension of time must demonstrate good cause.

(d) *Duty to confer.* Prior to filing a motion for an extension of time, the moving party must make a reasonable effort to contact each party to determine whether an agreement can be reached regarding the requested extension. In the motion, the moving party must state:

(1) Whether any other party agrees to all, or part, of the relief requested;

(2) Whether any other party objects to all, or part, of the relief requested; and

(3) Any steps taken to contact a party it was unable to reach.

(e) *Inaction*. If the ALJ does not act on the motion before the document is due, the document must be filed no later than 7 calendar days after the original due date, unless the ALJ orders otherwise.

#### **§ 4.107 Consolidation and severance.**

(a) *Consolidation*. The ALJ may consolidate two or more proceedings when they involve common factual or legal issues. Proceedings may be consolidated on the motion of a party or at the initiative of the ALJ.

(b) *Severance*. Once consolidated, proceedings may be severed by the ALJ on the motion of a party or at the initiative of the ALJ. When determining whether to sever, the ALJ may consider any relevant factors, including any impacts on the efficient, just, and timely resolution of the proceedings.

#### **§ 4.108 Intervention and amicus curiae.**

(a) *Intervention*.

(1) *Motion to intervene*. Any person or entity that wants to participate in a proceeding as an intervenor must file a written motion and must serve a copy of the motion on all parties to the proceeding.

(2) *Who may request intervention*. A person or entity may seek intervention if:

(i) The person or entity had a legal right to initiate the proceeding; or

(ii) The person or entity has an interest that could be adversely affected by the outcome of the proceeding.

(3) *Contents of motion*. A motion to intervene must contain:

(i) The factual and legal basis supporting the motion to intervene, including citations to any applicable legal authority; and

(ii) A statement indicating when the person or entity requesting intervention learned of the proceeding.

(4) *Ruling on motion.* The ALJ may:

(i) Grant the motion;

(ii) Grant the motion but limit participation by the person or entity; or

(iii) Deny the motion if:

(A) The movant fails to meet the requirements of this section; or

(B) The ALJ determines that granting the motion would materially prejudice the existing parties or unduly delay adjudication of the proceeding.

(5) *Party status.* A person or entity granted full or limited intervenor status is a party to the proceeding. If the ALJ denies the motion to intervene, the ALJ may allow the person or entity to file a brief as *amicus curiae*.

(b) *Amicus curiae.*

(1) *How to request amicus curiae status.* Any person or entity that wants to file a brief in the proceeding as *amicus curiae* must file a written motion. The motion must describe the interest of the person or entity in the proceeding and explain how an *amicus* brief will contribute to the resolution of the issues. The motion must be served on all parties to the proceeding.

(2) *Ruling on motion.* The ALJ has the discretion to grant or deny the motion and may consider any relevant factors, including whether an *amicus* brief would contribute to the resolution of the issues or cause undue delay.

(3) *Party status.* A person or entity granted amicus curiae status is not a party to the proceeding.

(4) *Amicus brief.* A person or entity granted amicus curiae status must serve its brief on all parties to the proceeding.

**§ 4.109 Notice of appearance; substitution of attorneys; and attorney withdrawal.**

(a) *Notice of Appearance.* To ensure proper service of pleadings, notices, orders, and decisions, an attorney or other representative must file and serve a notice of appearance and promptly notify DCHD and all other parties to the proceeding of any changes to legal representation.

(b) *Attorney substitution.*

(1) *Form and content.* A party may substitute attorneys by filing and serving a notice of substitution that includes the pertinent contact information for the new attorney.

(2) *Effectiveness.* The notice of substitution is effective upon filing.

(c) *Attorney withdrawal.*

(1) *Form and content.* Except as provided in paragraph (b) of this section, an attorney may request to withdraw as the representative for a party by filing a written motion. The motion must be served on all parties to the proceeding as well as the attorney's client(s) and must contain:

(i) Pertinent contact information for the attorney's client(s);

(ii) A statement explaining why the withdrawal will not unfairly prejudice the attorney's client(s); and

(iii) A statement that the attorney has taken appropriate steps to protect the interests of the client(s) such as providing reasonable notice, allowing adequate time for the employment of another attorney, and surrendering files related to the proceeding.

(2) *Effectiveness.* A withdrawal is not effective until the ALJ rules on the motion, which may be conditioned or denied by the ALJ to avoid prejudice to the attorney's client(s) and other parties.

#### **§ 4.110 Voluntary withdrawal and stipulated dismissal.**

(a) *Voluntary withdrawal.* At any time, a party that initiated a proceeding may request a voluntary withdrawal by filing and serving a motion to dismiss that confirms the party's intention to voluntarily withdraw from the proceeding. A party's voluntary withdrawal is effective when the ALJ issues an order of dismissal.

(b) *Stipulated dismissal.* When all parties to a proceeding agree and stipulate to the dismissal of a proceeding, they may file and serve a joint motion to dismiss. The stipulated dismissal is effective when the ALJ issues an order dismissing the proceeding.

#### **§ 4.111 Summary judgment.**

(a) *Overview.* The summary judgment procedure is a method for resolving proceedings in which there is no genuine dispute as to any material fact. If the ALJ determines that no genuine dispute exists as to any material fact and the movant is entitled to a decision as a matter of law, the ALJ will issue a written order resolving the matter and will not conduct an evidentiary hearing.

(b) *Guidance.* Although the Federal Rules of Civil Procedure do not apply to proceedings before DCHD, corresponding provisions contained in the Federal summary judgment rule set



forth at Rule 56—and Federal case law interpreting Rule 56—may serve as guidance in administrative adjudications when not in conflict with this section.

(c) *Motion.* A motion for summary judgment must be filed and served in accordance with §§ 4.102 and 4.103 and must comply with the following:

(1) *Timing.* A motion for summary judgment must be filed by the deadline established in a written order issued by the ALJ.

(2) *Page limits.* A motion for summary judgment may not exceed 30 pages unless the ALJ orders otherwise.

(3) *Scope.* A party may move for summary judgment as to all of the issues in the proceeding or may request a partial summary judgment as to some of the issues.

(4) *Standard.* The moving party must demonstrate that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.

(5) *Content.* A summary judgment motion must include:

(i) A clear and concise statement identifying each issue on which summary judgment is sought;

(ii) A statement of the material facts for which the moving party asserts there is no genuine dispute, which must be supported by documentary evidence; and

(iii) A discussion of the legal arguments and reasons supporting the motion for summary judgment, including citations to applicable legal authority.

(d) *Response.* A response to a motion for summary judgment must be filed and served in accordance with §§ 4.102 and 4.103 and must comply with the following:

(1) *Timing.* Unless the ALJ orders otherwise, any other party to the proceeding may file a response to the summary judgment motion within 28 days after the filing of the summary

judgment motion. A response may be accompanied by a cross-motion for summary judgment requesting full or partial relief.

(2) *Response to cross-motion.* If a party files a cross-motion for summary judgment, any other party to the proceeding may file a response within 28 days after the filing of the cross-motion unless a different response period is ordered by the ALJ.

(3) *Page limits.* Responses may not exceed 30 pages unless the ALJ orders otherwise. If a party elects to combine a response and cross-motion in a single document, then the combined document may not exceed 50 pages unless the ALJ orders otherwise.

(4) *Content.* A response must include:

(i) A clear and concise statement indicating whether the party opposes or supports the motion for summary judgment with respect to each issue identified in the motion for summary judgment;

(ii) A statement of any material facts relied on in the response, which must be supported by documentary evidence, and if the party opposes summary judgment on one or more issues, the response must specifically identify any genuinely disputed material facts or the basis for any assertion that a fact cannot be established; and

(iii) A discussion of the legal arguments and reasons for opposing or supporting the summary judgment motion, including citations to applicable legal authority.

(e) *Reply.* No reply or further briefing related to the summary judgment motion will be accepted unless authorized by the ALJ.

(f) *Declaration or affidavit.* A declaration or affidavit used to support or oppose a motion for summary judgment must be made on personal knowledge, cite facts that would be admissible in evidence, and show that the declarant or affiant is competent to testify on the matters stated.

(g) *Supporting materials.* Any assertions of fact in a motion or response must be supported by documentary evidence and must reference any exhibits, attachments, affidavits, declarations, or other materials using pinpoint citations that identify the specific page(s) or paragraph number(s) where the supporting text is located. Documentary evidence must be submitted with the motion or response unless the supporting materials have already been filed with DCHD.

(h) *Consideration by ALJ.*

(1) To facilitate consideration of any summary judgment motion, the ALJ may direct the parties to confer and attempt to agree on joint stipulations of fact.

(2) The ALJ need only consider the materials cited by the parties, but the ALJ may consider other materials that are part of the record of the proceeding.

(3) The ALJ may take official notice of a factual matter under 43 CFR 4.24(b) in the same manner as a Federal district court may take judicial notice.

(4) If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, the ALJ may:

(i) Provide an opportunity to properly support or address the fact;

(ii) Consider the fact undisputed for purposes of the motion;

(iii) Grant summary judgment if the motions and supporting materials, including the facts considered undisputed, show that the moving party is entitled to a summary judgment order; or

(iv) Issue any other appropriate order.

(5) If a nonmoving party establishes by declaration or affidavit that the party cannot, for good cause shown, present facts essential to justify its opposition, the ALJ may:

- (i) Defer consideration of the motion;
  - (ii) Deny the motion;
  - (iii) Allow time for the nonmoving party to obtain evidence by discovery or other methods; or
  - (iv) Issue any other appropriate order.
- (i) *Order.* The ALJ will issue a written order granting or denying a motion for summary judgment, in whole or in part. A motion for summary judgment may only be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

## **DISCOVERY**

### **§ 4.112 Discovery generally.**

(a) *Overview.* Discovery is a prehearing process that allows a party to obtain relevant facts and information from another party during a proceeding.

(b) *Guidance.* Although the Federal Rules of Civil Procedure do not apply to proceedings before DCHD, corresponding Federal discovery provisions in portions of Rules 26 through 37—and Federal case law interpreting Rules 26 through 37—may serve as guidance in administrative adjudications when not in conflict with the discovery rules in this subpart.

(c) *Scope.* As authorized by an ALJ, a party may engage in discovery regarding any nonprivileged matter that is relevant to the issues in the proceeding and proportional to the needs of the case. Relevant information need not be admissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(d) *Methods of discovery.* During a prehearing conference, or on the motion of a party, the ALJ may authorize discovery by one or more of the following methods:

- (1) Written interrogatories (§ 4.113);
- (2) Requests for production (§ 4.114);
- (3) Requests for admission (§ 4.115); or
- (4) Depositions (§ 4.116).

(e) *Signatures.* Discovery requests must be signed by the party's representative or the party, if unrepresented. Answers and responses to discovery requests must be signed by the person providing the answers or responses on behalf of the party. Objections must be signed by the party's representative or the party, if unrepresented. A signature certifies that to the best of that person's knowledge, information, and belief formed after a reasonable inquiry that:

- (1) The answer or response is complete and accurate at the time it is signed; and
- (2) The request, answer, response, or objection is:
  - (i) Consistent with any applicable regulations or ALJ orders;
  - (ii) Nonfrivolous;
  - (iii) Not made for any improper purpose such as delay or harassment; and
  - (iv) Not unreasonable or unduly burdensome.

(f) *Limitations.* At the discretion of the ALJ, or on the motion of a party, the ALJ may limit the frequency or extent of discovery authorized in §§ 4.113 through 4.116 by:

- (1) Not allowing the requested discovery;
- (2) Limiting the number of interrogatories, requests for production, or depositions or restricting the time, place, or length of any deposition;
- (3) Imposing specific limits or parameters on the production of electronically stored information when not reasonably accessible because of undue burden or cost;
- (4) Allowing only specific methods of discovery;

(5) Finding that certain matters may not be inquired into or that discovery will be limited in scope to certain matters; and

(6) Issuing protective orders.

(g) *Protective orders.* A protective order may be issued so that confidential, privileged, or sensitive information will not be revealed or only disclosed in a specified manner. The ALJ may issue a protective order based on a motion filed by one party or a joint motion by all parties to the proceeding. A motion for a protective order filed by one party must contain a certification that the movant conferred, or attempted to confer, with the other parties in good faith. Any responses to a motion for protective order must be filed within 14 days after filing of the motion, unless the ALJ specifies a different response period.

(h) *Cooperation.* The parties are encouraged to cooperate in good faith and reach agreements, where possible, regarding the discovery process, the exchange of information, and the resolution of any discovery disputes.

#### **§ 4.113 Interrogatories.**

(a) *Generally.* When authorized by the ALJ, a party may conduct discovery by serving written interrogatories on any other party. Unless the parties agree or the ALJ orders otherwise, a party may not serve more than 20 written interrogatories on each party. For purposes of the 20-interrogatory limitation, each discrete subpart of an interrogatory counts as a separate interrogatory.

(b) *Answers and objections.* Unless a longer or shorter time period is agreed to by the parties or ordered by the ALJ, answers and objections must be served within 28 days of service of the interrogatories. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in whole or in part, in which event the reasons for the objection must be

stated with specificity in place of the answer. Answers and objections must be signed in accordance with § 4.112(e). Answers must be signed by the person providing the answer, and objections must be signed by the party's representative or the party, if unrepresented.

**§ 4.114 Requests for production.**

(a) *Generally.* When authorized by the ALJ, a party may conduct discovery by serving a written request on any other party to:

(1) Produce, or permit the requesting party to arrange for the inspection and copying of, any specified documents or electronically stored information in the responding party's possession, custody, or control;

(2) Permit the requesting party, or someone acting on the requesting party's behalf, to inspect, copy, test, or sample any tangible things in the responding party's possession, custody, or control; or

(3) Permit the requesting party, or someone acting on the requesting party's behalf, to enter onto designated land or property in the possession or control of the responding party for the purpose of inspecting, measuring, surveying, photographing, examining, testing, or sampling.

(b) *Content of request.* As applicable, each request must set forth with particularity:

(1) The item or category of items to be produced, copied, or inspected;

(2) A reasonable time, place, and manner for any inspection and related acts; and

(3) The form in which electronically stored information is to be produced.

(c) *Responses and objections.* Unless a longer or shorter time period is agreed to by the parties or ordered by the ALJ, responses and objections must be served within 28 days of receipt of the request. The response must state, with respect to each item, whether the production or inspection will be permitted as requested or whether there are any objections. If the responding

party makes any objections, the reasons must be stated with specificity. Responses and objections must be signed in accordance with § 4.112(e). Responses must be signed by the person providing the response, and objections must be signed by the party's representative or the party, if unrepresented.

**§ 4.115 Requests for admission.**

(a) *Generally.* When authorized by the ALJ, a party may conduct discovery by serving a written request on any other party to admit the truth of any relevant factual matters or the authenticity of any specified documents. Unless the parties agree or the ALJ orders otherwise, a party may not serve more than 20 written requests for admission. For purposes of this 20-request limitation, each discrete subpart of a request counts as a separate request.

(b) *Content of request.* Each matter for which an admission is requested must be set forth separately. A request to admit the authenticity of a document must be accompanied by a copy of the document unless it has been otherwise furnished or made available for inspection and copying.

(c) *Answers and objections.* The party to whom the request is directed must answer or object to each matter within 28 days of being served, unless a longer or shorter time period is agreed to by the parties or ordered by the ALJ. Answers and objections must be signed in accordance with § 4.112(e). Answers must be signed by the person providing the answers, and objections must be signed by the party's representative or the party, if unrepresented. A responding party must specifically answer or object to each matter as follows:

- (1) Admit the matter, in whole or in part;
- (2) Deny the matter, in whole or in part;



(3) State in detail why the responding party cannot truthfully admit or deny the matter, and if the denial is based on a lack of knowledge or information, demonstrate that the party has made a reasonable inquiry and that the information known, or readily obtainable, is insufficient to admit or deny; or

(4) State the grounds for any objections with specificity.

(d) *Effect of not answering.* A matter is deemed admitted unless a written answer or objection is served on the requesting party within 28 days of service of the request, except that a longer time period may be agreed to by the parties or ordered by the ALJ.

(e) *Withdrawal.* A matter admitted under this section is conclusively established unless the ALJ permits, on motion, the admission to be withdrawn or amended or determines that the admission is contrary to law.

(f) *Effect of admission.* An admission under this section cannot be used against the party in any other proceeding.

#### **§ 4.116 Depositions.**

(a) *Generally.* When authorized by the ALJ, a party may take the deposition of any person by oral examination. Parties are encouraged to schedule and conduct depositions by agreement whenever possible.

(b) *Notice of deposition.* The party scheduling a deposition must give reasonable notice in writing to every party to the proceeding and to the person being examined. The notice must include:

- (1) The name, address, and other contact information for the person to be examined;
- (2) The time and place of the deposition, and if conducted by videoconference or other suitable technology, the information necessary to access and attend the deposition remotely;

(3) The subject matter upon which the person will be examined;

(4) The name or descriptive title of the officer before whom the deposition will be taken along with the method of recording and transcribing the deposition;

(5) If a subpoena for document production is issued under § 4.120 to a nonparty deponent, the materials designated for production as set forth in the subpoena; and

(6) If the deposition is being taken for the purpose of preserving testimony for hearing, a statement to that effect.

(c) *Deposition of organization, business entity, government agency, or other entity.*

When the deposition of an organization, business entity, government agency, or other entity is sought, the organization, business entity, government agency, or other entity must designate one or more officers, directors, or agents to testify on its behalf.

(d) *Procedure for deposition.* Depositions must be conducted, transcribed, and certified in accordance with the following procedures unless the ALJ authorizes an alternative procedure or imposes other requirements:

(1) The deposition must be taken before an officer authorized to administer oaths by Federal law or the law of the place where the examination is held;

(2) The party providing notification of the deposition must arrange and pay the expenses associated with securing the necessary facilities, personnel, and transcript;

(3) The deposition must be under oath or affirmation;

(4) The deponent may be examined and cross-examined and the questions and answers, together with all objections made, must be transcribed by the officer before whom the deposition is taken;

(5) Documents and other tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and appended or attached to the written deposition transcript;

(6) When the testimony is fully transcribed and reduced to writing, the deposition transcript must be submitted to the deponent for examination, identification of any corrections, and signature, unless the deponent has waived the right to review and sign; and

(7) The officer must certify the deposition transcript and, if the deposition is not signed by the deponent, must certify the reasons for the failure to sign.

(e) *Procedure for preservation deposition.* A party may depose a witness for the purpose of preserving testimony for hearing if:

(1) The ALJ authorizes the preservation deposition based on a written motion or an oral request made during a prehearing conference;

(2) The requesting party demonstrates that one of the following criteria has been met:

(i) The witness will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) The witness is unwilling or unlikely to attend the hearing and the party is unable to compel the attendance of the witness by subpoena; and

(3) The requesting party complies with any requirements imposed by the ALJ related to transcription, recording, or other deposition procedures.

#### **§ 4.117 Supplementation or correction.**

(a) *Requirement.* A party who responded to an interrogatory, request for production, or request for admission with an answer or response that was complete when made must supplement or correct a prior response in a timely manner if the party learns that the answer or

response is materially incomplete or incorrect and if the additional or corrective information has not been otherwise made known to the other parties during the discovery process or in writing.

(b) *Order*. At any time, an ALJ may issue an order directing the supplementation of an answer or response.

#### **§ 4.118 Motion to compel.**

(a) *Motion*. Any party may file a motion with the ALJ requesting an order compelling disclosure or discovery. A motion must include:

- (1) A copy of the discovery request;
- (2) A copy of the response or objection or, if a copy is unavailable, a description of the response or objection;
- (3) A concise statement of the facts and law supporting the motion to compel, including citations to any applicable legal authority; and
- (4) A statement that the moving party has, prior to the filing of the motion, in good faith conferred or attempted to confer with the person, entity, or representative failing to make a disclosure or allow discovery.

(b) *Response*. A response to a motion to compel must be filed within 14 days of the filing of the motion unless a longer or shorter time period is ordered by the ALJ and must contain a concise statement of the facts and law supporting the response, including citations to any applicable legal authority.

(c) *Order*. The ALJ may issue an order granting or denying the motion, in whole or in part, and may issue any other appropriate order, including, but not limited to, a protective order or an order imposing curative measures. Curative measures include, but are not limited to, orders

extending the discovery period, authorizing additional discovery, or directing a party to conduct an additional search of its records.

**§ 4.119 Sanctions for failure to comply with a discovery order.**

(a) *Failure to comply.* If a party fails to comply with an order compelling discovery, the ALJ may issue such orders as are just, including but not limited to, an order imposing appropriate sanctions under this section.

(b) *Notice.* Appropriate sanctions may be imposed after notice and an opportunity to respond. The notice and opportunity to respond may be in any form directed by the ALJ and may be limited to an oral response during a prehearing conference or hearing.

(c) *Types of Sanctions.* After considering the relevant circumstances and the nature of the violation, the ALJ may impose appropriate sanctions, including but not limited to, the following:

(1) Inferring that the admission, testimony, or other evidence would have been adverse to the party;

(2) Directing that designated facts be taken as established or admitted for purposes of the proceeding in accordance with the claim of the party obtaining the order;

(3) Prohibiting the party withholding discovery from supporting or opposing a designated claim or defense or from introducing designated matters into evidence;

(4) Striking pleadings in whole or in part;

(5) Ordering that the party withholding discovery has waived any objection to the introduction and use of secondary evidence to show what the withheld discovery would have shown; and

(6) Entering a decision or order adjudicating the proceeding, in whole or in part, against the party withholding discovery in violation of a discovery order.

## **OTHER PROCEDURES**

### **§ 4.120 Subpoenas.**

(a) *Purpose.* Subpoenas may be issued to the extent authorized by law to require the attendance of a person, the giving of testimony, or the production of documents or other relevant materials.

(b) *Contents of application.* A party may request the issuance of a subpoena by written application. The application must:

(1) Describe the testimony sought or the materials to be produced with specificity;

(2) Identify the name, address, and contact information for the person or entity to be subpoenaed;

(3) Specify the time, date, location, and method for obtaining the testimony or other material sought; and

(4) Demonstrate that the requested subpoena is reasonable in scope and relevant to the proceeding.

(c) *Issuance.* The ALJ may issue a subpoena on a form that contains the caption for the proceeding, specifies the name and address of the person or entity from whom the testimony or material is sought, and orders one or more of the following:

(1) If the subpoena requires the person to testify in person at a hearing or deposition, then the subpoena will order the person to appear at a specified date, time, and place;

(2) If the subpoena requires the person to testify at a hearing or deposition using videoconferencing or other suitable technology, then the subpoena will order the person to appear at a specified date and time and will contain the information necessary to testify remotely;

or

(3) If the subpoena requires the production of designated documents, electronically stored information, or other tangible materials by a nonparty, then the subpoena will order production by a specified date and will designate whether the production must occur in person, by mail, delivery service, or other electronic means.

(d) *Service.* A party must serve a copy of the subpoena as follows:

(1) *In person.* A subpoena may be served by any person who is not a party to the proceeding and is 18 years of age or older by hand-delivering a copy of the subpoena to the person named in the subpoena; or

(2) *By registered or certified mail.* A subpoena may be served by registered or certified mail, with a return receipt requested, to the last known residential address or place of business of the person or entity named in the subpoena.

(e) *Certificate of service.* The person serving the subpoena must:

(1) Prepare a certificate of service setting forth the date, time, and manner of service, or the reasons for any failure of service; and

(2) 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. That party will then be responsible for filing the certificate of service with the ALJ and serving it on all other parties to the proceeding.

(f) *Witness fees.* Witnesses subpoenaed by any party must be paid the same fees and mileage expenses that are paid to witnesses in the United States district courts under 28 U.S.C. 1821. The witness fee will be paid by the party who requested the appearance. Any witness who appears without being subpoenaed is entitled to the same fees and mileage expenses as if that person had been subpoenaed, except that witness fees do not apply to Government employees who are called as witnesses by the Government.

(g) *Geographic limits.* A witness may be required to attend a hearing or deposition at a place not more than 100 miles from where the person resides, is employed, or regularly transacts business in person unless another geographic limit applies by statute to the proceeding. No geographic limit applies to testimony conducted using videoconferencing or other suitable technology that is available to all participants in the proceeding and that allows a witness to testify remotely.

(h) *Motion to quash or modify.* A party or person to whom a subpoena is directed may file a written motion to quash or modify the subpoena within 10 days of service. A motion to quash or modify the subpoena will stay the effect of the subpoena pending the ALJ's decision on the motion.

(i) *Enforcement.* If a person fails or refuses to comply with a subpoena, the ALJ may apply to the U.S. Department of Justice to initiate a judicial enforcement proceeding or may authorize the party to seek judicial enforcement in the appropriate United States district court.

#### **§ 4.121 Sanctions.**

(a) *Authority of ALJ.* The ALJ is vested with the general authority to regulate the course of the proceedings. The ALJ may impose appropriate sanctions on a person or entity for:

- (1) Noncompliance with an ALJ order;
- (2) Violation of the regulations in this subpart;
- (3) A failure to prosecute or defend in a timely manner; or
- (4) Other misconduct that prejudices another party or interferes with the efficient, orderly, and fair conduct of the proceeding.



(b) *Notice.* Appropriate sanctions may be imposed after notice and an opportunity to respond. The notice and opportunity to respond may be in any form directed by the ALJ and may be limited to an oral response during a prehearing conference or hearing.

(c) *Types of sanctions.* After considering the relevant circumstances and the nature of the violation, failure, or misconduct, the ALJ may impose appropriate sanctions, including the following:

- (1) Deeming a party's objection waived;
- (2) Striking all, or part, of a pleading;
- (3) Precluding a party from making a late filing or conditioning a late filing on terms that the ALJ deems fair and equitable;
- (4) Denying a motion;
- (5) Excluding evidence or witnesses;
- (6) Expelling a person or entity from the hearing;
- (7) Issuing an order or decision against a party;
- (8) Dismissing a claim or defense;
- (9) Dismissing a proceeding; and
- (10) Taking any other action authorized by law.

#### **§ 4.122 Interlocutory appeal.**

(a) *Overview.* An interlocutory appeal is a challenge brought before an Appeals Board of a non-final order issued by an ALJ prior to the conclusion of the proceeding. Permission must be obtained before an interlocutory appeal can be filed with an Appeals Board and will only be authorized in limited circumstances.

(b) *General procedures.* Permission to file an interlocutory appeal is a two-step process, requiring a party to:

(1) File an application requesting the ALJ to certify an ALJ order, in whole or in part, for interlocutory appeal; and

(2) Petitioning the Appeals Board for permission to file an interlocutory appeal of the ALJ's order, in whole or in part.

(c) *Standards for ALJ certification.* The ALJ will certify an order for interlocutory appeal only when the ALJ determines that:

(1) The order involves a controlling question of law about which there are substantial grounds for difference of opinion; and

(2) An immediate appeal will materially advance the completion of the proceeding.

(d) *Timing and content of application.* An application requesting certification must be filed and served within 14 days of the date of the ALJ's order. The application must:

(1) Identify the order, or portion of the order, for which review is sought;

(2) Clearly and concisely state the grounds for appeal; and

(3) Demonstrate that the standards for certification in paragraph (c) of this section are met.

(e) *Responses.* Any party that opposes the application for certification may file and serve a response within 14 days of the filing of the application.

(f) *ALJ certification.* Based on a review of the application and any responses filed, the ALJ may:

(1) Certify the order, or portion of the order, for interlocutory appeal; or

(2) Deny the application.

(g) *Petition to Appeals Board.* Within 14 days of the ALJ's ruling on the application for certification, the requesting party may petition the Appeals Board for permission to file an interlocutory appeal. The petition must include:

- (1) A copy of the ALJ's order for which review is sought;
- (2) Copies of all filings made in support of or in opposition to the application for certification before the ALJ;
- (3) A copy of the ALJ's certification for interlocutory appeal or the order denying the application for certification; and
- (4) If the ALJ denied the application for certification, a clear and concise statement of reasons explaining why the ALJ's denial was an abuse of discretion.

(h) *Permission from Appeals Board.* The Appeals Board will grant or deny permission to file an interlocutory appeal in accordance with § 4.28 or § 4.414 of this part.

(i) *Suspension of proceeding.* Neither the certification of an order for interlocutory appeal nor an interlocutory appeal will operate to suspend the proceeding before the ALJ unless so ordered by the ALJ or Appeals Board.

#### **§ 4.123 Alternative Dispute Resolution.**

(a) *Purpose.* Alternative Dispute Resolution (ADR) refers to the various processes and techniques used for resolving disputes without the necessity of further litigation or a hearing.

(b) *Process.* Participation in an ADR process is entirely voluntary. A party cannot be forced to agree to a resolution of the dispute by participating in an ADR process, and if the parties do not agree to participate or cannot reach agreement through the ADR process, the proceeding will be adjudicated by the ALJ.

(c) *Availability.* At any time during the pendency of a proceeding, a party may file a request to use an ADR process or the ALJ may notify the parties that the matter has been identified as a candidate for ADR. The ALJ may also issue a notice describing the ADR processes used by DCHD and directing the parties to communicate in writing, or verbally during a prehearing status conference, whether they are willing to participate in an ADR process. The written ADR procedures used by DCHD can be made available to the parties on request.

## **HEARING PROCESS AND PROCEDURE**

### **§ 4.124 Hearing scheduling.**

(a) *Hearing location and date.* The ALJ, in coordination with the parties and consistent with any applicable statutory requirements, will schedule the hearing and determine the hearing location and dates. In making this determination, the ALJ may consider other relevant factors such as the convenience of the parties and witnesses, the availability of suitable hearing space, and the need for any special accommodations.

(b) *Videoconferencing and other technology.* In appropriate circumstances as determined by the ALJ, a hearing may be conducted, in whole or in part, using videoconferencing or other suitable technology.

(c) *Notice of hearing.* In advance of the hearing, a written notice containing the hearing location and hearing dates will be issued to all parties to the proceeding. If a hearing will be conducted, in whole or in part, using videoconferencing or other technology, the hearing notice will contain instructions and guidance for participating in the hearing.

### **§ 4.125 Hearing postponements.**

(a) *Good cause required.* Postponement of a scheduled hearing generally will not be approved, except upon a showing of good cause and reasonable diligence in preparing for the hearing.

(b) *Timing of motion.* A party must file a request for a postponement at least 21 days prior to the date of the hearing absent compelling circumstances. The ALJ will not grant a request for postponement made less than 10 days in advance of the hearing unless all parties agree to the postponement or the party requesting a postponement demonstrates that an emergency occurred which could not have been anticipated and which justifies the granting of a postponement.

(c) *Form and content of motion.* The motion for a postponement must state in detail the reasons why a postponement is necessary. The moving party must also make a reasonable effort to contact each party to determine whether an agreement can be reached regarding the requested postponement. In the motion, the moving party must state:

- (1) Whether any other party agrees to the postponement;
- (2) Whether any other party objects to the postponement; and
- (3) Any steps taken to contact a party it was unable to reach.

(d) *Limitation on postponements.* A party generally will not be granted more than one hearing postponement, unless that party can show compelling circumstances that are beyond the party's control. In determining whether to grant more than one postponement to a party, the ALJ may consider the interests of justice and the relative prejudice to the parties.

#### **§ 4.126 Hearing procedures generally.**

(a) *Overview.* A hearing is an opportunity for a party to present its case or defense by any reasonable method. Parties may submit oral, documentary, or demonstrative evidence as well as

rebuttal evidence and may conduct such cross-examination as may be required for a full and true disclosure of the facts. During the hearing, a verbatim transcript will be prepared in accordance with § 4.128 that includes the oral arguments, testimony, and exhibits received into evidence. The hearing record, together with any motions, documents filed, and rulings made by the ALJ during the hearing and prehearing process, may inform the ALJ's decision in the matter.

(b) *Hearing procedures.* The ALJ has the authority to conduct the hearing in an orderly and judicial manner, including the authority to:

- (1) Subpoena witnesses for hearing pursuant to § 4.120;
- (2) Administer oaths and affirmations;
- (3) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;
- (4) Call and examine witnesses;
- (5) Provide for the sequestration of witnesses;
- (6) Receive, rule on, exclude, or limit evidence;
- (7) Take official notice of a factual matter under § 4.24(b) of this part in the same manner as a Federal district court may take judicial notice;
- (8) Issue protective orders and impose other measures to protect information or documents that are confidential, privileged, or otherwise sensitive;
- (9) Continue or recess the hearing, in whole or in part, for a reasonable period of time;
- (10) Direct that written motions or briefs be provided addressing issues raised during the hearing;
- (11) Rule on any oral or written motions;
- (12) Impose appropriate sanctions; and

(13) Exercise any other authority necessary to conduct the hearing in an orderly and judicial manner.

(c) *Presentation at hearing.* The ALJ will determine the order of presentation for witnesses and evidence at hearing based on the applicable legal standards as well as considerations of fairness and judicial efficiency. Each party is responsible for presenting its case or defense at the hearing to ensure the adequacy of the hearing record, subject to any limitations imposed by law, regulation, or order.

(d) *Post-Hearing briefs.* The ALJ may prescribe the format, timing, and content of any post-hearing briefs at the conclusion of the hearing or in a subsequent written order.

(e) *Conclusion of hearing.* Once the hearing concludes, errors in the transcript may be corrected in accordance with § 4.128, but no additional evidence will be received unless the ALJ directs otherwise. If the ALJ finds good cause to reopen the hearing and allow additional evidence to be received, all parties will have an opportunity to offer responsive evidence and, if necessary, a new hearing may be scheduled.

(f) *Waiver of hearing.* The ALJ may determine that a party has waived its right to a hearing if, after notice, the party fails to appear at the hearing without good cause. Waiver of a right to a hearing does not mean that the ALJ will rule against the party failing to appear, but it does mean that the party's opportunity to present evidence and examine witnesses has been waived.

#### **§ 4.127 Evidence.**

(a) *Admissibility and exclusion of evidence.* The ALJ has the authority to admit or exclude evidence. The Federal Rules of Evidence, while not directly applicable to hearings

conducted under this subpart, may be used as guidance by the ALJ. The ALJ will exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Oral testimony.* All oral testimony must be under oath or affirmation. Witnesses will be subject to cross-examination by any other party, and the ALJ may question any witness during the hearing.

(c) *Objections.* Any objections to the admission of evidence or testimony must concisely state the grounds for the objection. Oral rulings on objections will be made on the record and included in the transcript of the hearing. When the ALJ sustains an objection to the admission of evidence, the affected party may preserve the issue for appeal by making an offer of proof on the record showing what the party expected to establish by the testimony or evidence. Any adverse party may then make an offer of proof in rebuttal on the record.

(d) *Stipulations.* The parties may stipulate to any relevant factual matters. When received into evidence, stipulations will be binding on the parties with respect to the matters stipulated. Oral stipulations may be made on the record at hearing and written stipulations may be received into evidence as exhibits. The parties are encouraged to agree to stipulations of fact whenever possible.

(e) *Depositions.* A deposition will not become part of the hearing record unless it has been received into evidence, in whole or in part, as an exhibit by the ALJ.

(1) *Requirements.* A party may only use a deposition against a party who:

- (i) Was present or represented at the taking of the deposition; or
- (ii) Had reasonable notice of the taking of the deposition.

(2) *Exclusion.* The ALJ 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 the hearing.

(3) *Completeness.* If a party offers only part of a deposition in evidence, another party to the proceeding may request that the party be required to include any other part of the deposition that ought in fairness be considered with the part introduced.

(4) *Written and video depositions.* A deposition admitted into evidence, in whole or in part, must include a certified written transcript, but the ALJ may, in appropriate circumstances, permit relevant portions of a video deposition to be played at hearing and transcribed into the hearing record by the reporter.

#### **§ 4.128 Transcripts and reporting.**

(a) *Transcript and reporter's fees.* A hearing conducted pursuant to this subpart will be transcribed verbatim. The procedures for obtaining a transcript and paying the associated fees are as follows:

(1) DCHD will secure the services of a reporter to prepare a transcript and will pay the reporter's fees to provide an original transcript to DCHD.

(2) Each party is responsible for obtaining and paying for its copy of the transcript consistent with any statutory or regulatory provisions governing the proceeding.

(3) The government agency, bureau, or office participating in the hearing as a party will be responsible for reimbursing DCHD for reporting fees.

(b) *Official transcript.* The official transcript, along with any exhibits, must be duly certified by the reporter and submitted to the ALJ for filing as part of the proceeding along with any corrections made pursuant to paragraph (c) of this section.

(c) *Corrections.*

(1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 10 days of receipt of the transcript unless the ALJ orders otherwise.

(2) If no party files a timely motion, the ALJ will presume that the transcript is correct and complete, except for obvious typographical errors.

(3) As soon as feasible after the conclusion of the hearing and after consideration of any motions proposing correction, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

**§ 4.129 Decision.**

(a) *Basis for decision.* Following a hearing, the ALJ will issue a written decision that identifies and describes the basis for the decision unless the applicable statute or regulation allows for an oral ruling.

(b) *Decision.* The decision issued by the ALJ will be final for the Department, unless a notice of appeal, petition for review, or petition for reconsideration is timely filed or the applicable statute, regulation, or order of referral requires the ALJ to issue:

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

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

**RECONSIDERATION, APPEAL, AND REVIEW**

**§ 4.130 Reconsideration.**

(a) *Procedural requirements.* Any party may petition for reconsideration of a dispositive order or decision within 14 days after the date of issuance. A petition for reconsideration must be made in writing and served on all parties to the proceeding in accordance with § 4.102. A petition for reconsideration may not exceed 15 pages unless otherwise authorized by the ALJ.

(b) *Standards.* A petition for reconsideration must state with specificity the relief sought and must demonstrate that extraordinary circumstances warrant reconsideration. Extraordinary circumstances may include:

(1) An error or misstatement of material fact or law that resulted in an erroneous order or decision or that would require a different outcome;

(2) A failure to cite and address a binding statute, regulation, or decision, including a recent judicial decision, that would require a different outcome; or

(3) The existence of evidence not available to the ALJ when the order or decision issued that would require a different outcome. To satisfy this requirement, the petitioner must:

(i) Proffer the evidence along with the petition for reconsideration, and

(ii) Provide a detailed explanation showing why the petitioner, in the exercise of reasonable diligence, did not submit the evidence prior to issuance of the order or decision.

(c) *Responses.* No responses may be filed to a petition for reconsideration, unless authorized by the ALJ.

(d) *Review by ALJ.* The ALJ will review the petition for reconsideration and notify the parties within 10 days whether the petition for reconsideration will be accepted for further analysis. If the ALJ does not take any action on the petition for reconsideration within 10 days, then the petition for reconsideration is deemed denied.

(e) *Status while a petition is pending.* Filing a petition for reconsideration will not stay the effectiveness of the dispositive order or decision and will not toll any deadlines to seek appeal or review of the order or decision, unless the ALJ accepts the petition for reconsideration for further analysis. If the ALJ accepts the petition for reconsideration for further analysis, then

the effectiveness of the dispositive order or decision will automatically be stayed and all applicable deadlines tolled until the ALJ issues a decision on reconsideration.

(f) *Appeal or review.* A decision on reconsideration issued by the ALJ will be final for purposes of appeal and review under § 4.131. A notice issued by the ALJ declining to accept the petition for further analysis, or a failure by the ALJ to take action on the petition within 10 days, is not subject to appeal or review. If a party files a notice of appeal or requests review of the dispositive order or decision before the petition for reconsideration is resolved, then the ALJ will no longer have jurisdiction over the petition for reconsideration and the matter will be forwarded to the appropriate appellate or reviewing authority.

(g) *Petition not required for exhaustion.* Filing a petition for reconsideration is not required to exhaust administrative remedies.

#### **§ 4.131 Appeal and review.**

Any party seeking to appeal or otherwise obtain review of a final order or decision of the ALJ must comply with the statutory or regulatory provisions applicable to the specific type of proceeding involved.

### **SPECIFIC RULES APPLICABLE TO CERTAIN TYPES OF PROCEEDINGS BEFORE THE DEPARTMENTAL CASES HEARINGS DIVISION**

#### **SPECIFIC RULES APPLICABLE TO REFERRALS FOR FACT-FINDING HEARINGS**

#### **§ 4.150 Procedures for hearing referrals.**

(a) *Overview.* A proceeding may be referred to an ALJ for an evidentiary hearing by an Appeals Board or other Departmental entity when it appears that specific issues of material fact require a hearing for resolution.

(b) *Applicable rules.* In a proceeding referred to an ALJ for fact-finding, the general procedural rules for practice before DCHD at §§ 4.100 through 4.131 of this subpart govern practice and procedure in addition to the rules applicable to referrals for fact-finding hearings set forth in this section and § 4.151 of this subpart.

(c) *Authority of the ALJ.* The ALJ has the authority to conduct the proceeding and the hearing in an orderly and judicial manner, subject to any limitations or restrictions prescribed in the referral issued by the Appeals Board or other Departmental entity making the referral.

(d) *Issues and evidence.* Unless otherwise directed by the Appeals Board or other Departmental entity making the referral, the ALJ may consider other relevant issues or evidence identified after referral of the matter to DCHD.

#### **§ 4.151 Resolution of hearing referrals.**

(a) *Types of action.* At the conclusion of the proceeding, the ALJ will issue one of the following as specified in the referral issued by the Appeals Board or other Departmental entity making the referral:

- (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.

(b) *Transmittal of record.* If the ALJ issues proposed findings of fact or a recommended decision, the ALJ will transmit the entire record of the proceeding, including the hearing transcript, to the Appeals Board or other Departmental entity making the referral.

(c) *Exceptions and comments.* The parties will have 30 days from service of any proposed findings of fact or a recommended decision to file exceptions or comments with the Appeals Board or other Departmental entity making the referral.

(d) *Final decision.* If the ALJ issues a final decision that may be appealed to an Appeals Board or other Departmental entity, the ALJ will advise the parties at the conclusion of the decision of their right to file an appeal.

#### **SPECIFIC RULES APPLICABLE TO CONTEST PROCEEDINGS**

##### **§ 4.160 Private contests; initiation of a private contest.**

Any person or entity who claims title to or an interest in land adverse to any other person or entity 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 that claim invalidated for any reason not shown by BLM's records. Such a proceeding will constitute a private contest and will be governed by the regulations at §§ 4.160 through 4.169 of this subpart.

##### **§ 4.161 Private contests; protests.**

Where the elements of a contest are not present, any objection raised by a person or entity to any action proposed to be taken in any proceeding before BLM will be deemed to be a protest and appropriate action will be taken based on the circumstances.

##### **§ 4.162 Private contests; complaint.**

(a) *Filing a complaint.* Any person or entity desiring to initiate a private contest must file a complaint in the proper BLM State Office as identified at 43 CFR 1821.10 and in accordance with the OHA Standing Orders on Contact Information found on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

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

- (1) The name and address of each interested party;
- (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 describing with particularity the facts constituting the grounds for contest;
- (5) A statement of the law under which the contestant claims or intends to acquire title to, or an interest in, the land and the facts showing that the contestant is qualified to do so;
- (6) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith;
- (7) A request for relief that the adverse interest be invalidated;
- (8) The BLM State Office where the complaint is filed and the mailing or electronic address to which documents must be sent for service on the contestant; and
- (9) A notice that unless the contestee files an answer to the complaint in the appropriate BLM State Office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed.

(c) *Amendment of complaint.* Except insofar as the BLM State Office, ALJ, Director, Appeals 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 ALJ permits the complaint to be amended after due notice to the other parties and an opportunity to object.

(d) *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 must be attached to the complaint.

(e) *Filing fee.* Each complaint must be accompanied by a filing fee of \$20 and a deposit of \$200 toward the reporter's fees. Any complaint which is not accompanied by the required fee and deposit will not be accepted for filing.

(f) *Waiver of issues.* Any issue not raised by a private contestant in accordance with the provisions of paragraph (b) or (c) of this section, which was known or could have been known by the exercise of reasonable diligence, will be deemed waived.

#### **§ 4.163 Private contests; service.**

(a) *Service generally.* The complaint must be served upon every contestee in the manner provided in § 4.102(b), except that non-electronic service must be made by personal delivery, registered mail, or certified mail and must include a return receipt. The complaint must be served not later than 30 days after filing the complaint, and proof of service must be filed in the BLM State Office where the contest is pending, unless service is made by publication, in which case, service must be in accordance with the provisions in paragraph (c) 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 served is a minor, then service of the complaint must be made on the minor's parent or guardian, or if neither exists, the adult having care or control over the minor. If the person to be served has been legally adjudged incompetent, then service of the complaint must be made on that person's legal guardian, or if no legal guardian exists, the person having care or control over the incompetent person.



(b) *Summary dismissal and waiver of defect in service.* If a complaint when filed does not meet all the requirements of § 4.162(b) and (d), or if the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the BLM State Office. 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.

(c) *Service by publication.*

(1) *When service may be made by publication.* When the contestant has made a diligent search and inquiry to locate the contestee, but the contestee cannot be located, the contestant may proceed with service by publication after first filing an affidavit with the BLM State Office that includes:

(i) A statement that the contestee could not be located after a diligent search and inquiry along with a detailed description of the efforts made to locate the contestee, which must occur not more than 15 days prior to the filing of the statement;

(ii) The last known address of the contestee; and

(iii) The affidavits or declarations of two individuals who live in the vicinity of the land at issue who either provide the last known address of the contestee or state that they have no knowledge of the contestee's whereabouts.

(2) *Contents of published notice.* The published notice must give the names of the parties to the contest, a legal description of the land at issue, the substance of the charges contained in the complaint, the address of the BLM State Office where the contest is pending, and a statement that upon the failure to file an answer in the BLM State 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 must also contain a statement of the dates of publication.

(d) *Publication, mailing, and posting of notice.*

(1) Notice by publication must be made by publishing the notice at least once a week for 5 successive weeks in a newspaper of general circulation in the county in which the land at issue is located.

(2) Within 15 days after the first publication of a notice, the contestant must send a copy of the notice and the complaint by registered or certified mail, return receipt requested, to the contestee at the contestee's last known address. The return receipts must be filed in the BLM State Office where the contest is pending.

(3) A copy of the notice as published must be posted in the BLM State Office where the contest is pending and also in a conspicuous place upon the land at issue. Such postings must be made within 15 days after the first publication of notice.

(e) *Proof of Service.*

(1) Proof of publication of the notice must be made by filing a copy of the notice as published along with an affidavit or declaration of a representative from the newspaper publishing the notice with the BLM State Office where the contest is pending.

(2) Proof of posting of the notice must be by affidavit or declaration of the person who posted the notice on the land and by the certificate of an authorized officer of BLM as to posting in the State Office.

(3) Proof of the mailing of notice must be by affidavit or declaration of the person who mailed the notice and must contain a copy of the return receipt.

**§ 4.164 Private contests; answer to complaint.**

(a) *Deadline and contents of answer.* Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file an answer in the BLM State Office where the contest is pending together with proof of service of the answer upon the contestant. The answer must contain the mailing or electronic address to which all notices or other documents must be sent for service upon the contestee.

(b) *Contents of answer.* The answer must specifically respond to each of the allegations in the complaint.

(c) *Admissions and amendments.* Any allegation not denied by the answer will be considered admitted at hearing, unless the ALJ permits the answer to be amended after due notice to the parties and an opportunity to object.

(d) *Failure to answer.* If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the BLM State Office will decide the case without a hearing.

(e) *Referral.* If an answer is filed, the BLM State Office will refer the matter to DCHD upon determining that the elements of a private contest have been established.

**§ 4.165 Government contests; initiation of a Government contest.**

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

**§ 4.166 Government contests; complaint and service.**

(a) *Complaint.* The proceedings in Government contests are governed by §§ 4.160 through 4.164 of this subpart with the following exceptions:

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

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

(3) No filing fee or deposit toward the reporter's fee is required of the Government contestant.

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

(5) The statements required by § 4.162(b)(5) and (6) need not be included in the Government contest complaint.

(6) No posting of the notice of publication on the land at issue will be required of the Government contestant.

(7) The provisions of § 4.162(f) do not apply.

(b) *Service.*

(1) Where service is by publication, the affidavits and declarations required by § 4.163(c)(1) need not be filed. The Government contestant must file a statement with the BLM State Office demonstrating that the contestee could not be located after a diligent search and inquiry, the last known address of the contestee, and a description of the efforts and inquiries made to locate the party sought to be served. The diligent search must occur not more than 15 days prior to the filing of the statement.

(2) In lieu of the requirements of § 4.163(d)(2), the Government contestant must, as part of the diligent search before 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 known address of record. The return receipts must be filed in the BLM State Office where the contest is pending.

(3) The affidavit or declaration required by § 4.163(e)(3) need not be filed.

#### **§ 4.167 Government contests; answer to complaint.**

(a) *Deadline and contents of answer.* Within 30 days after service of the Government contest complaint or after the last publication of the notice, the contestee must file an answer in the BLM State Office where the contest is pending together with proof of service of the answer upon the Government contestant. The answer must contain or be accompanied by the mailing or electronic address to which all notices or other documents must be sent for service upon the contestee.

(b) *Contents of answer.* The answer must specifically respond to each of the allegations in the complaint.

(c) *Admissions and amendments.* Any allegation not denied by the answer will be considered admitted at hearing, unless the ALJ permits the answer to be amended after due notice to the parties and an opportunity to object.

(d) *Failure to answer.* If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the BLM State Office will decide the case without a hearing.

(e) *Referral.* If an answer is filed, the BLM State Office will refer the matter to DCHD.

#### **§ 4.168 Proceedings before Administrative Law Judge.**

(a) *Applicable rules.* In contest proceedings before the ALJ, the general procedural rules for practice before DCHD at §§ 4.100 through 4.131 of this subpart govern practice and

procedure in addition to the specific rules applicable to contest proceedings at §§ 4.160 through 4.169 of this subpart.

(b) *Authority of the ALJ.* The ALJ has the authority to conduct the proceeding in an orderly and judicial manner and to issue a written decision or order that will be final for the Department, unless appealed to the IBLA.

(c) *Reporter fees.*

(1) The Government agency, bureau, or office initiating the contest proceeding will be responsible for reimbursing DCHD for all reporter's fees in a Government contest proceeding regardless of which party is ultimately successful.

(2) In the case of a private contest, each party will be required to reimburse DCHD for reporter's fees covering that portion of the party's direct evidence and cross-examination of witnesses within 60 days following the hearing. If the ultimate decision is adverse to the contestant, then the contestant must also pay all the reporter's fees otherwise payable by the contestee.

(3) Reporter's fees will be calculated based on the rates established pursuant to the reporting contract.

#### **§ 4.169 Appeal.**

Any party, including the Government, adversely affected by the decision of the ALJ may appeal to the IBLA as provided in § 4.403 and the rules set forth in subparts A, B, and E of this part. No further hearing will be allowed in connection with the appeal to the IBLA, but the IBLA, after considering the evidence, may remand any case for further hearing if it considers such action necessary to develop the facts.

**SPECIFIC RULES APPLICABLE TO GRAZING PROCEEDINGS (INSIDE AND OUTSIDE OF GRAZING DISTRICTS)**

**§ 4.170 Appealing a grazing decision.**

(a) *Eligibility to file appeal.* Any applicant, permittee, lessee, or other person or entity whose interest is adversely affected by a BLM grazing decision may appeal the decision by filing a notice of appeal with DCHD in accordance with §§ 4.102 and 4.103.

(b) *Deadline and location for filing appeal.* The notice of appeal must be filed with DCHD within 30 days after service of the grazing decision or within 30 days after a proposed grazing decision becomes final as provided in 43 CFR 4160.3(a).

(c) *Service of appeal.* A copy of the notice of appeal must be served in accordance with § 4.102, the OHA Standing Orders on Electronic Transmission, and the OHA Standing Orders on Contact Information on the following:

- (1) Each person or entity named in the BLM grazing decision;
- (2) The appropriate official of the Office of the Solicitor; and
- (3) The BLM office that issued the decision.

(d) *Contents of appeal.* A notice of appeal must include the following:

- (1) A copy of the decision or proposed decision being appealed;
- (2) A statement of standing showing that the person or entity seeking to appeal is adversely affected by the decision;
- (3) A statement of timeliness providing the date, and any corroborating documentation, showing when the person or entity filing the notice of appeal received a copy of the decision and showing that the appeal has been timely filed in accordance with paragraph (b) of this section; and

(4) A statement that clearly and concisely states the reasons why the appellant believes the BLM grazing decision is incorrect. The statement must contain specific factual allegations related to the BLM grazing decision being appealed and a summary of the applicable legal arguments.

(e) *Waiver and amendment.* Any ground for appeal not included in the notice of appeal is waived, unless the ALJ grants permission to amend the notice of appeal based on a motion demonstrating good cause.

(f) *Failure to appeal.* A person or entity who, after receiving proper notice, does not timely file a notice of appeal from a BLM grazing decision may not later challenge the matters resolved in the grazing decision.

(g) *Effect of appeal.* Filing an appeal does not by itself stay the effect of a BLM grazing decision. To request a stay of the effect of the decision pending appeal, a person or entity must also comply with § 4.171.

#### **§ 4.171 Petitions for stay.**

(a) *Standards and procedures for obtaining a stay.* An appellant under § 4.170 may petition for a stay of a BLM grazing decision by filing the petition for a stay with DCHD concurrently with the notice of appeal. Filings must be made in accordance with §§ 4.102 and 4.103. Except as otherwise provided by statute or other pertinent regulation, the following requirements apply:

(1) *Stay criteria.* The appellant must demonstrate that issuance of a stay is warranted based on the following three criteria:



(i) *Irreparable harm.* The appellant will likely be irreparably harmed by implementation of the grazing decision pending resolution of the appeal, and the harm will be avoided by granting the stay;

(ii) *Balance of harms.* The irreparable harm to the appellant absent a stay exceeds the harm to the United States or other parties from a stay being granted; and

(iii) *Likelihood of success.* The appellant is likely to succeed on the merits.

(2) *Burden of proof.* The person or entity seeking a stay bears the burden of demonstrating that a stay should be granted, in whole or in part, under all three criteria set forth in paragraph (a)(1) of this section.

(3) *Service.* The petition for a stay, along with the notice of appeal, must be served in accordance with § 4.102, the OHA Standing Orders on Electronic Transmission, and the OHA Standing Orders on Contact Information on the following:

- (i) Each person or entity named in the BLM grazing decision;
- (ii) The appropriate official of the Office of the Solicitor; and
- (iii) The BLM office that issued the decision.

(b) *Response to petition for a stay.* If a petition for a stay has been filed, then:

(1) Any BLM response to the petition for a stay must be filed, along with any other documents that BLM wishes the ALJ to consider when adjudicating the petition for a stay, no later than 14 days after receiving a copy of the notice of appeal and petition for a stay. BLM must also serve a copy of its response on all other parties to the appeal in accordance with § 4.102, the OHA Standing Orders on Electronic Transmission, and the OHA Standing Orders on Contact Information.

(2) Any other person or entity who wishes to respond to the petition for a stay may file a motion to intervene in the appeal under § 4.108, together with a response to the petition for a stay, no later than 14 days after being served with a copy of the notice of appeal and petition for a stay. A copy of the motion to intervene and response must be served on all other parties to the appeal in accordance with § 4.102, the OHA Standing Orders on Electronic Transmission, and the OHA Standing Orders on Contact Information on the following:

- (i) Each party to the proceeding;
- (ii) The appropriate official of the Office of the Solicitor; and
- (iii) The BLM office that issued the decision.

(3) The failure to file a response will not be construed as an admission that the petition for a stay should be granted.

(c) *Replies.* No replies or further briefing related to the petition for a stay will be accepted unless authorized by the ALJ.

(d) *Effect of consent or lack of opposition.* The ALJ may summarily grant a petition for a stay, in whole or in part, without considering the criteria in paragraph (a)(1) if all parties consent to the stay or file responses to the petition affirmatively stating no opposition to the stay.

(e) *Deadline for ruling.* The ALJ will grant or deny a petition for a stay, in whole or in part, within 45 days of the expiration of the time for filing a notice of appeal.

#### **§ 4.172 BLM document filing requirements and initial disclosures.**

(a) *BLM document filing requirements.* Within 14 days of receiving the notice of appeal, BLM must file and serve a copy of the following documents in accordance with § 4.102:

- (1) The final grazing decision;
- (2) The proposed grazing decision;

- (3) Any proof of service for the decision being appealed;
- (4) Any protests of the proposed decision;
- (5) Any relevant National Environmental Policy Act (NEPA) documents;
- (6) Any relevant rangeland health determinations;
- (7) Any relevant resource management plans;
- (8) The application, permit, lease, or other documents evidencing authorized use;
- (9) Any relevant notices regarding unauthorized use; and
- (10) Any other key documents directly cited in the final grazing decision.

(b) *BLM initial disclosures.* At any appropriate time during the proceeding, the ALJ may direct BLM to serve a copy of its record for the grazing decision on all parties to the proceeding in addition to, or in lieu of, the discovery procedures set forth in the general procedural rules for practice before DCHD at §§ 4.112 through 4.119 of this subpart.

(1) Unless otherwise directed by the ALJ, BLM's record for the grazing decision must contain a copy of any nonprivileged, discoverable materials that the deciding official considered when taking the action at issue in the proceeding.

(2) BLM's initial disclosures are considered discovery materials and should not be filed with DCHD unless otherwise directed by the ALJ.

#### **§ 4.173 Adjudication of grazing appeal.**

(a) *Applicable rules.* In grazing proceedings before the ALJ, the general procedural rules for practice before DCHD at §§ 4.100 through 4.131 of this subpart govern practice and procedure in addition to the rules applicable to grazing proceedings at §§ 4.170 through 4.175 of this subpart.

(b) *Authority of ALJ.* The ALJ has the authority to conduct the proceeding in an orderly and judicial manner.

(c) *Decision or order.* The ALJ has the authority to issue a written decision or order that will be final for the Department unless timely appealed under § 4.175.

(1) *Basis for decision.* The ALJ will issue a written decision that identifies and describes the basis for the decision.

(2) *Substantial compliance standard.* No grazing decision will be set aside on appeal if it is reasonable and represents substantial compliance with the provisions of part 4100 of this title.

**§ 4.174 Effect of decision pending appeal; exhaustion and finality.**

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

(1) A BLM grazing decision will not be effective during the time in which a person or entity adversely affected by the grazing decision may file an appeal under § 4.170.

(2) A BLM grazing decision made immediately effective on issuance or on a date established by the grazing decision will remain in effect unless the ALJ grants a stay.

(3) A BLM grazing decision will become effective on the day after expiration of the time during which a person or entity adversely affected may file a notice of appeal unless a petition for a stay is filed concurrently with a timely notice of appeal.

(4) A BLM grazing decision, or that portion of a BLM grazing decision, for which a stay is sought but not granted will become effective immediately after the ALJ denies or partially denies the petition for a stay or fails to act on the petition within the time specified in § 4.171(e).

(b) *Exhaustion and finality of grazing decision.* To exhaust administrative remedies, a petition for a stay must be filed concurrently with a timely notice of appeal of the BLM grazing

decision unless BLM has made the decision immediately effective. The BLM grazing decision will not be considered final and subject to judicial review under 5 U.S.C. 704 unless it has been made effective pending a resolution of the appeal in the manner provided by paragraphs (a)(2) or (a)(4) of this section.

**§ 4.175 Appeal and review.**

(a) *Appeal to the Interior Board of Land Appeals.*

(1) *Appeal of stay petition order.* Any person or entity adversely affected by the ALJ's order granting or denying a petition for a stay may file an appeal with the IBLA in accordance with § 4.403. Unless the IBLA orders otherwise, an appeal of the stay petition order under this section:

(i) Will not suspend the effectiveness of the ALJ's stay petition order; and

(ii) Will not suspend further proceedings before the ALJ.

(2) *Appeal of decision or order on the merits.* Any person or entity adversely affected by the ALJ's decision or order on the merits may file an appeal with the IBLA in accordance with § 4.403.

(b) *Judicial Review.* A BLM grazing decision may only be challenged in Federal court under 5 U.S.C. 704 if administrative remedies have been exhausted and the decision has become final and effective in accordance with § 4.174(b).

**Subpart D—Rules Applicable to Appeals Before the Interior Board of Indian Appeals**

5. Revise the heading of subpart D to read as set forth above.

6. Amend § 4.200 by revising the table in paragraph (a) to read as follows:

**§ 4.200 How to use this subpart.**

(a) \* \* \*

For provisions relating to . . .	Consult . . .
(1) Appeals to the Board of Indian Appeals generally	§§ 4.200, 4.201, and 4.310 through 4.318.
(2) Appeals to the Board of Indian Appeals from orders 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 the Bureau of Indian Affairs	§§ 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	Subpart H of this part.

\* \* \* \* \*

7. Amend § 4.201 by:

- a. Adding introductory text;
- b. Removing the definition of *Administrative law judge (ALJ)*;
- c. Adding, in alphabetical order, a definition for *Adversely affected*;
- d. Revising paragraph (2) of the definition of *Agency*;
- e. Adding, in alphabetical order, definition for *Appellant*;
- f. Removing the definitions of *BIA*, *Decision or order (or decision and order)*, *Formal probate proceeding*; and *Indian probate judge (IPJ)*;
- g. Revising the definition of *Interested party*;
- h. Removing the definition of *Judge*;
- i. Adding, in alphabetical order, a definition for *Probate judge*; and
- j. Removing the definition of *Secretary*.

The revisions read as follows:

**§ 4.201 Definitions.**

In addition to the definitions in subpart A of this part, the following definitions apply to this subpart:

*Adversely affected* means that a person or entity has a legally protected interest that was or is likely to be injured by the action, decision, or order on appeal.

*Agency* \* \* \*

(2) Any office of a Tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 5321 or 5363.

*Appellant* means a person or entity appealing an action, decision, or order to the Board.

\* \* \* \* \*

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

\* \* \* \* \*

*Interested party* means a person or entity adversely affected by the action, decision, or order on appeal, or whose interest would be adversely affected if that action, decision, or order were modified, reversed, or set aside. In an appeal from an order of a probate judge, the term

“interested party” is limited to:

- (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.

\* \* \* \* \*

*Probate judge* means an ALJ or IPJ in the Probate Hearings Division.

\* \* \* \* \*

8. Revise the undesignated center heading before § 4.310 to read, “General Rules for Practice Before the Interior Board of Indian Appeals”.

9. Amend § 4.310 by:

- a. Removing paragraph (f);
- b. Revising the section heading;
- c. Redesignating paragraphs (a) through (e) as paragraphs (c) through (g);
- d. Adding new paragraphs (a) and (b); and
- e. Revising newly redesignated paragraphs (c) and (d).

The additions and revisions read as follows:

**§ 4.310 Documents; filing, service, computing time, and extensions.**

(a) *Filing with the Board Generally.* A document required or permitted to be filed with the Board must be delivered to the Board as specified in this subpart and in the OHA Standing Orders on Contact Information and the OHA Standing Orders on Electronic Transmission found on the Department of the Interior OHA website, at <https://www.doi.gov/oha>.

(b) *Methods of Filing.*

(1) *Electronic.* A document may be filed electronically with the Board under the terms specified in the OHA Standing Orders on Electronic Transmission. Any Federal, state, or local agency and any attorney representing a person or entity must file electronically, unless otherwise



specified in the OHA Standing Orders on Electronic Transmission or the Board has allowed non-electronic filing for good cause.

(2) *Non-electronic*. A document filed by mail, commercial courier, or hand delivery must be delivered to the Board at the address specified in the OHA Standing Orders on Contact Information.

(c) *Timeliness and Effective Date of Filing*. When the Board is determining timeliness, the effective date for filing a notice of appeal or other document with the Board depends on the method of filing.

(1) *Electronic*. For documents filed by electronic transmission under the terms specified in the OHA Standing Orders on Electronic Transmission, the effective date of filing is the date of transmission to the Board. A document filed electronically will be considered timely filed if it is transmitted to the Board by 11:59 p.m. Eastern Time on the last day of the period prescribed for filing.

(2) *Mail*. For documents sent by United States mail or a foreign government's mail system, the effective date of filing is the date of mailing to the Board.

(i) If the envelope bears a legible postmark dated on or before the last day of the period prescribed for filing, the document will be considered timely filed although it is received after the prescribed deadline.

(ii) If the envelope bears a legible postmark dated after the last day of the period prescribed for filing the document, the document will not be considered timely filed, regardless of when the document is deposited in the mail.

(iii) If the envelope bears an illegible postmark, the person or entity who is required to file the document has the burden of proving the date of mailing to the Board.

(3) *Commercial courier or hand delivery.* For documents delivered by commercial courier or hand delivery, the effective date of filing is the date of receipt in the Board's office during its regular business hours by a person authorized to receive the filing. A document delivered by commercial courier or hand delivery that is received after the Board's regular business hours is considered filed on the next business day.

(d) *Serving Notices of Appeal and Other Documents.* Any party filing a notice of appeal or other document with the Board must concurrently serve complete copies of the document, including any attachments, on all interested parties in the proceeding, except as provided at 43 CFR 4.31. Service must be made by electronic transmission, mailing, delivery by commercial courier, or delivery by hand. Service may be made electronically on the Office of the Solicitor and Department of the Interior bureaus and offices under the terms specified in the OHA Standing Orders on Electronic Transmission. Service may be made electronically on all other persons or entities, through means they have consented to in writing, under the terms specified in the OHA Standing Orders on Electronic Transmission. All documents filed with the Board must include a certification that service was made as required by this section.

\* \* \* \* \*

10. Amend § 4.312 by designating the text as paragraph (a), and adding paragraphs (b) through (d) to read as follows:

**§ 4.312 Board decisions.**

\* \* \* \* \*

(b) The Board may issue an order affirming, without opinion, a decision or order of an administrative law judge, Indian probate judge, or BIA official if the Board determines that: the result reached was correct; any errors in the decision or order under review were harmless or

nonmaterial; and either the issues on appeal are squarely controlled by existing Board or Federal court precedent and do not involve the application of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion by the Board. An order affirming without opinion under this paragraph will cite the Board's delegated authority and this paragraph; and state, without further explanation or reasoning, that the result of the decision or order under review is affirmed without opinion. Such an order approves the result reached but does not necessarily imply approval of all the reasoning of the decision or order under review.

(c) Nothing in paragraph (a) or (b) of this section limits the Board's authority to summarily dismiss an appeal or to summarily adopt, modify, reverse, or set aside a decision or order under review.

(d) If the Board does not issue a decision in a case within 36 months after the notice of appeal is received by the Board and the decision or order of an administrative law judge, Indian probate judge, or BIA official being appealed is not in effect, the appellant may move for the Board to issue an order dismissing the case without an opinion by the Board on the merits and making the decision or order being appealed final for the Department. In consolidated appeals, the 36-month period will begin after the last notice of appeal is received by the Board. If each appellant in a case, including any consolidated appeals, submits or joins a written motion for dismissal under this paragraph, the Board will issue an order dismissing the case without an opinion by the Board. The Board's order, issued under authority of this paragraph, will make the decision or order being appealed final for the Department. The date of the Board's order is the date of finality of the decision or order being appealed for the purpose of judicial review.

11. Amend § 4.314 by:

- a. Revising the section heading;
- b. Redesignating paragraphs (a) through (c) as paragraphs (b) through (d);
- c. Adding a new paragraph (a);
- d. Revising newly redesignated paragraph (b).

The revisions and addition read as follows:

**§ 4.314 Effect of decision pending appeal and exhaustion of administrative remedies.**

(a) Except as otherwise provided by applicable statute or regulation, the provisions of 43 CFR 4.21 and this section govern the effect of a decision pending appeal and exhaustion of administrative remedies.

(b) A decision of an administrative law judge, Indian probate judge, or BIA official will not be effective during the time in which an interested party may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the Board's decision on appeal, unless by order of the Board the decision, or any part of it, is made immediately effective.

\* \* \* \* \*

12. Amend § 4.315 by adding paragraph (d) to read as follows:

**§ 4.315 Reconsideration of a Board decision.**

\* \* \* \* \*

(d) A petition for reconsideration based solely on an argument that the case should not have been affirmed without opinion under § 4.312(b) is not permitted.

13. Amend § 4.317 by revising paragraph (a) to read as follows:

**§ 4.317 Standards of conduct.**

(a) *Inquiries about cases.* Except for ex parte communications that are prohibited under 43 CFR 4.27, all inquiries by a party to a matter pending before the Board should be directed to the Board’s clerk, and all inquiries by a non-party to a matter pending before the Board should be directed to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

\* \* \* \* \*

14. Amend § 4.318 by revising the first sentence to read as follows:

**§ 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 or reopening, or regarding added or omitted property or purchase of interests in an estate, or before the BIA official on review. \* \* \*

15. Revise the undesignated center heading before § 4.320 to read, “Specific Rules for Appeals in Probate Matters”.

16. Amend § 4.320 by:

- a. Revising the section heading;
- b. Revising the introductory text and paragraph (d); and
- c. Adding paragraph (e).

The revisions and addition read as follows:

**§ 4.320 Who may appeal a probate judge’s order?**

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

\* \* \* \* \*

- (d) Regarding added or omitted property; or
- (e) Determining that a person for whom a probate proceeding is sought is not deceased.

17. Revise § 4.321, including the section heading, to read as follows:

**§ 4.321 How do I appeal a probate judge’s order?**

(a) A person wishing to appeal an order within the scope of § 4.320 must file a written notice of appeal within 30 days after the probate judge has sent the 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 at 43 CFR 1.3, and must be filed with the Board of Indian Appeals by electronic transmission, mail, commercial courier, or hand delivery, in accordance with § 4.310(b).

18. Amend § 4.323 by:

- a. Revising paragraphs (a) and (b); and
- b. Removing paragraph (d).

The revisions read as follows:

**§ 4.323 Who receives service of the notice of appeal?**

(a) The appellant must file the original notice of appeal with the Board.

(b) A copy of the notice of appeal must be served on the probate judge whose order is being appealed, as well as on every other interested party, in accordance with § 4.310(d).

\* \* \* \* \*

19. Amend § 4.324 by:

- a. Revising paragraph (a) introductory text and paragraph (b);
- b. In paragraph (c)(4), removing “§ 4.310(f)” and adding in its place “§ 4.310(b)”; and

c. Revising paragraph (f) introductory text and paragraphs (f)(2) and (3).

The revisions read as follows:

**§ 4.324 How is the record on appeal prepared?**

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

\* \* \* \* \*

(b) If a transcript of the hearing was not prepared, the probate 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.

\* \* \* \* \*

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

\* \*

(2) An appeal from an order under 43 CFR 30.253 regarding added or omitted property;  
or

(3) An appeal from an order under 43 CFR 30.124 determining that a person for whom a probate proceeding is sought is not deceased.

**§ 4.325 How will the appeal be docketed?**

20. Amend § 4.325, by adding the word “probate” before the word “judge” in the first sentence.

21. Revise the undesignated center heading before § 4.330 to read, “Specific Rules for Appeals from Administrative Actions Not Relating to Probate Proceedings”.

22. Amend § 4.330 by revising paragraphs (a) and (b)(3) to read as follows:

**§ 4.330 Scope.**

(a) 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 I; 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) \* \* \*

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Office of Natural Resources Revenue or any predecessor or successor organization, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Office of Natural Resources Revenue or any predecessor or successor organization, are appealable to the Interior Board of Land Appeals in accordance with subpart E of this part).

\* \* \* \* \*

23. Amend § 4.331 by revising the introductory text to read as follows:

**§ 4.331 Who may appeal.**

Any interested party adversely 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—

\* \* \* \* \*

24. Amend § 4.332 by revising paragraph (a) introductory text and paragraph (b) to read as follows:



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

(a) A notice of appeal must 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 by electronic transmission, mail, commercial courier, or hand delivery, in accordance with § 4.310(b). The notice of appeal must be filed within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal must simultaneously be sent to the Assistant Secretary—Indian Affairs and the Associate Solicitor, Division of Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board must certify that a copy has been sent to the Assistant Secretary—Indian Affairs and to the Associate Solicitor, Division of Indian Affairs. A notice of appeal not timely filed will be dismissed for lack of jurisdiction. A notice of appeal must include: \* \* \*

\* \* \* \* \*

(b) In accordance with 25 CFR 2.508, within 40 days from the Board’s receipt of a notice of appeal, the Assistant Secretary—Indian Affairs may decide to review the appeal. If within that time the Board receives proper notice from the Assistant Secretary—Indian Affairs that a decision has been made to review the appeal, any documents concerning the case filed with the Board will be transmitted to the Assistant Secretary—Indian Affairs.\* \* \* \* \*

25. Revise § 4.333 to read as follows:

**§ 4.333 Service of notice of appeal.**

On or before the date of filing of the notice of appeal the appellant must 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, upon the Assistant Secretary—Indian Affairs, and upon

the Associate Solicitor, Division of Indian Affairs. The notice of appeal filed with the Board must certify that service was made as required by this section and must 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.

26. Revise § 4.336, including the section heading, to read as follows:

**§ 4.336 Docketing and objections to the administrative record.**

(a) An appeal will be assigned a docket number by the Board 40 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. If, prior to the time that the Board would ordinarily assign a docket number, the Board receives notice that the Assistant Secretary—Indian Affairs has decided not to assume jurisdiction over the appeal, the Board will assign a docket number to the appeal upon receipt of that notice. A notice of docketing will be sent to all interested parties as shown by the record on appeal upon receipt of the administrative record and assignment of a docket number. The docketing notice will specify the time within which briefs must be filed, cite the procedural regulations governing the appeal, and include a copy of the Table of Contents furnished by the deciding official if it was not previously sent to the interested parties.

(b) Any objection to the administrative record as constituted must be filed with the Board within 15 days of the objecting party's receipt of the Table of Contents.

**§§ 4.350–4.357 [Removed]**

27. Remove §§ 4.350 through 4.357.

28. Revise subpart E to read as follows:

## **Subpart E – Rules Applicable to Appeals Before the Interior Board of Land Appeals**

Sec.

4.400 Scope of rules.

4.401 Definitions.

4.402 Who may appeal; decisions not subject to appeal.

4.403 How to appeal.

4.404 Effect of appeal.

4.405 Effect of decision pending appeal; petitions for stay.

4.406 Record on appeal.

4.407 Filing, service, deadline computations, and issuance.

4.408 Document formatting requirements.

4.409 Motions.

4.410 Briefs.

4.411 Sanctions.

4.412 Affirming without opinion.

4.413 Scope of review, burden to show error, and standards of review.

4.414 Interlocutory appeals of ALJ orders.

4.415 Petition for reconsideration.

4.416 Appeals of wildfire management decisions.

4.417 Coordination with judicial review.

4.418 Precedential effect of decisions and orders.

#### **§ 4.400 Scope of rules.**

The regulations in this subpart set forth rules applicable to appeals before the Interior Board of Land Appeals. General rules in subparts A and B of this part are applicable to the proceedings before the Board unless they are inconsistent with these rules. Wherever there is any conflict between the general rules in subpart B and the rules in this subpart, the rules in this subpart will govern. In addition, the OHA Standing Orders apply to appeals before the Board and are available on the Department of the Interior OHA website, at <https://www.doi.gov/oha>.

#### **§ 4.401 Definitions.**

In addition to the definitions in subpart A of this part, the following definitions apply to this subpart:

*Administrative law judge (ALJ)* means an administrative law judge appointed to the Departmental Cases Hearings Division.

*Adversely affected* means that a person or entity has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest. A legally cognizable interest may include, but is not limited to, a property or economic interest in the affected lands or resources, or the cultural, recreational, or aesthetic use and enjoyment of the affected lands or resources.

*Appealable decision* is a final bureau or office decision as described at § 4.1(b)(4) of this part that authorizes, denies, prohibits, or requires some action that adversely affects a person or entity having or seeking some right, title, or interest in lands or resources.

*Appellant* means a person or entity appealing a decision to the Board.

*Board* means the Interior Board of Land Appeals in OHA.

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

*Party to the case* is a person or entity that 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.

**§ 4.402 Who may appeal; decisions not subject to appeal.**

(a) *Standing.* Any person or entity that is a party to the case and is adversely affected by an appealable decision of a bureau or office or an ALJ has the right to appeal to the Board, except as provided in paragraph (b) of this section.

(b) *Decisions not subject to appeal.* An appeal cannot be filed:

(1) Where a statute or regulation provides a different review process or makes a decision final for the Department; or

(2) Where a decision has been made or approved by the Secretary, Deputy Secretary, or an Assistant Secretary unless otherwise provided by statute or regulation.

(c) *Land selections under the Alaska Native Claims Settlement Act.* For appealable 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 an appropriate regional corporation has a right to appeal to the Board.

#### **§ 4.403 How to appeal.**

(a) *What to file with the notice of appeal.* A person or entity that wishes to appeal to the Board must file a notice that the person or entity wishes to appeal. When a person or entity files a notice of appeal, they must also file the following documents:

(1) A copy of the decision being appealed;

(2) A statement of facts showing that the person or entity seeking to appeal is a party to the case who is adversely affected by the decision and thereby meets the standing requirements set forth at § 4.402; and

(3) A statement and any corroborating documentation providing the date when the person or entity filing the appeal received notice of the decision to show that the appeal has been timely filed in accordance with paragraph (c) of this section.

(b) *Where to file and serve the notice of appeal.* Except as otherwise provided by statute or regulation:

(1) The notice of appeal must be filed with the Board as specified in § 4.407(a); and

(2) The notice of appeal must be concurrently served as specified at § 4.407(b).

(c) *When to file and serve the notice of appeal.*

(1) Except as otherwise provided by statute or regulation, a person or entity must file the notice of appeal no later than 30 days after the date of receiving notice of the decision.

(2) Notwithstanding the provisions of other regulations, a person or entity receives notice of a decision at the earliest of the following dates:

(i) The date of delivery by mail or delivery service as indicated on a U.S. Postal Service or delivery service tracking report or, if no tracking report exists, then, absent contrary evidence,

7 days after the date of the postmark on the envelope containing the decision as long as the envelope was properly addressed and had proper postage prepaid;

(ii) The date the bureau or office electronically transmits the decision, , or a notice that the decision is available on a public website, to the person or entity at an electronic address provided by the person or entity, and the bureau or office does not receive electronic notification that the transmission was unsuccessful;

(iii) The date the bureau or office notifies the public in an online news release that the decision is available on a public website;

(iv) The date of the decision's publication in the *Federal Register*; or

(v) If none of these dates apply, the date the person or entity receives actual notice of the decision.

(3) Filing is accomplished as provided at § 4.407.

(4) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed with the Board after the last day for filing a timely notice of appeal, then the notice of appeal will not be considered, and the Board will dismiss the appeal for lack of jurisdiction.

#### **§ 4.404 Effect of appeal.**

Once an appeal has been filed, the issuing bureau or office cannot modify, rescind, or supersede the decision on appeal without first seeking a remand of the decision from the Board. If the decision is stayed during the appeal, the bureau or office may only make decisions related to the subject of the decision on appeal if those decisions are functionally independent of the decision on appeal.

**§ 4.405 Effect of decision pending appeal; petitions for stay.**

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

(1) A decision will not be effective during the time in which a person or entity adversely affected may file a notice of appeal; however, when the public interest requires or to protect trust resources, the Board may provide that a decision, or any part of a decision, will be effective immediately.

(2) A decision will become effective on the day after the expiration of the time during which a person or entity adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed at the same time as a timely notice of appeal.

(3) A decision, or that portion of a decision, for which a stay is sought but not granted will become effective immediately after the Board denies or partially denies the petition for a stay or fails to act on the petition within the time specified in paragraph (b)(8) of this section.

(b) *Petitions for Stay.*

(1) *Who may file a petition for a stay.* Only an appellant who properly files an appeal may petition to stay the effect of a decision during an appeal.

(2) *When to file a petition for stay.* An appellant must file a petition for stay at the same time the appellant files a notice of appeal.

(3) *Filing and service.* An appellant seeking a stay must file a petition for a stay with the Board and serve the petition on the bureau or office that made the decision being appealed, the proper Office of the Solicitor, and each party named in the decision. Filing and service must be made as specified in § 4.407 of this subpart.

(4) *Stay criteria.* Except as otherwise provided by law, an appellant seeking a stay must demonstrate that issuance of a stay is warranted based upon the following criteria:



(i) *Irreparable harm.* The appellant will likely be irreparably harmed by implementation of the decision pending resolution of the appeal, and the harm will be avoided by granting the stay;

(ii) *Balance of harms.* The irreparable harm to the appellant absent a stay exceeds the harm to the United States and other parties from a stay being granted; and

(iii) *Likelihood of success.* The appellant is likely to succeed on the merits.

(5) *Burden of proof.* An appellant seeking a stay has the burden to demonstrate that a stay should be granted in whole or in part, under all three criteria set forth at paragraph (b)(4) of this section.

(6) *Responses to a petition for a stay.* Any party may file a response to a petition for a stay within 14 days after service; failure to file a response will not be construed as an admission that the Board should grant the petition.

(7) *Replies.* No replies to a response will be accepted.

(8) *Ruling on a petition for stay.* The Board will grant or deny a petition for a stay, in whole or in part, within 45 days of the expiration of the time for filing a notice of appeal. The Board will deny any petition for a stay that is not filed at the same time the appellant filed its notice of appeal. If the Board fails to act on a petition for a stay within 45 days of the expiration of the time for filing a notice of appeal, the petition will be deemed denied.

(9) *Effect of consent or lack of opposition.* The Board may summarily grant a petition for a stay, in whole or in part, without considering the criteria listed in paragraph (b)(4) of this section if all parties consent to the stay or file responses to the petition affirmatively stating no opposition to the petition.

#### **§ 4.406 Record on appeal.**

(a) *Filing the record.* The bureau or office must promptly file the record with the Board and concurrently serve a copy of the record on all parties to the appeal no later than 60 days after being served with the notice of appeal unless the bureau or office seeks and the Board grants a different filing deadline.

(b) *Contents.* All documents and materials that the deciding officer directly or indirectly considered in reaching a final decision must be included in the record.

(c) *Format.* Unless otherwise ordered by the Board upon motion by the bureau or office, the record must be formatted as follows:

- (1) The record must be in digital or electronic form;
- (2) The record must include an index of all documents;
- (3) The pages of each document must be sequentially numbered; and
- (4) If possible, the text of all documents must be electronically searchable.

(d) *Completion of record.* The bureau or office may file and serve documents inadvertently omitted from the record either by stipulation of the parties or by order of the Board upon motion.

#### **§ 4.407 Filing, service, deadline computations, and issuance.**

(a) *Filing.*

(1) *Generally.* A document filed with the Board must be delivered to the Board as specified in this subpart and the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information found on the Department of the Interior OHA website, at <https://www.doi.gov/oha>.

(2) *Methods of filing.*

(i) Electronic. A document may be filed electronically under the terms specified in the OHA Standing Orders on Electronic Transmission. Any Federal, state, or local agency and any attorney representing a person or entity must file electronically, unless otherwise specified in the OHA Standing Orders on Electronic Transmission or when the Board has allowed non-electronic filing for good cause.

(ii) Non-electronic. Any document filed non-electronically must be delivered to the Board at the address specified in the OHA Standing Orders on Contact Information.

(3) Timeliness.

(i) Electronic. A document that is filed electronically is deemed timely filed if it is filed by 11:59 p.m. Eastern Time on the date the document is due, under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) Non-electronic. A document that is not filed electronically is deemed timely filed if, on or before the last day for filing, it is mailed to the Board by first-class United States mail, or other class of mail that is at least as expeditious, postage prepaid; or it is dispatched to a third-party commercial courier for delivery to the Board within 3 days. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the carrier delivering the document for filing. A document not received within 7 days of the filing deadline is presumed untimely, but the presumption may be overcome by the documentation establishing the date of mailing or dispatch.

(b) *Service.*

(1) Generally. Any person or entity who files a document in an appeal must also serve the document under the terms specified in this section and in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information.

(2) Person or entity to serve. A person or entity that files any document under this subpart must serve a copy of it concurrently as follows:

(i) For a notice of appeal, on the office of the officer who made the decision; each person or entity named in the decision; the appropriate official of the Office of the Solicitor as set forth at paragraph (b)(2)(iii) of this section; and if the decision involved a mining claim on national forest land, then on all parties who participated in the proceeding below.

(ii) For all other documents, on the appropriate official of the Office of the Solicitor as set forth at paragraph (b)(2)(iii) of this section and on each party to the appeal (including intervenors).

(iii) Parties must serve the Office of the Solicitor as provided in the OHA Standing Orders on Contact Information until a particular attorney of the Office of the Solicitor files and serves a document in the appeal, after which that attorney must be served.

(3) Service on represented parties. Service on a party known to be represented by an attorney or other designated representative must be made on the representative.

(4) Service address. Every person or entity who files a document in connection with an appeal must provide the physical or electronic address that the person or entity intends to use for service in the appeal. A person or entity seeking to receive service by electronic mail must consent to electronic service as required at paragraph (b)(6)(i) of this section. If a person or entity has not consented to electronic service, then anyone serving a document on that person or entity must use the mailing address in the person's or entity's most recent filing or, if there has not been any filing, the mailing address of the person or entity as provided by the bureau or office where the appeal originated.

(5) Address changes. A party whose mailing or email address changes while an appeal is pending must promptly file and serve a written notice of the change. The notice must specify the appeal or appeals to which the notice applies using the applicable docket number or docket numbers when available.

(6) Manner of service. A document may be served electronically or non-electronically as follows:

(i) *Electronic*. Service may be made electronically on the Office of the Solicitor and the bureau or office whose decision is being appealed under the terms specified in the OHA Standing Orders on Electronic Transmission. Service may be made electronically on all other persons or entities who have consented to electronic service in writing under the terms specified in the OHA Standing Orders on Electronic Transmission.

(ii) *Non-electronic*. Service may be made non-electronically by United States mail or commercial courier for delivery within 3 days.

(7) Certificate of service. At the conclusion of any document that a party must serve under this subpart, the party or the party's representative must sign a written statement that:

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

(ii) Specifies the date and manner of service.

(8) Completion of service.

(i) *Electronic*. Service by electronic means is complete on sending or as otherwise directed by the OHA Standing Orders on Electronic Transmission, unless the party making service is notified that the document was not received by the party served.

(ii) *Non-electronic*. Service by mail or by commercial courier is complete on mailing or delivery to the carrier. The date of mailing or delivery must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the carrier delivering the document.

(c) *Computing deadlines*. When a party may or must act within a specified time period after being served, and the document is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire.

(d) *Issuance*. The Board will issue notices, orders, and decisions to the party's electronic mail address unless the party requests otherwise. If an electronic mail address is not provided by the party in a document filed in the appeal or in a document filed in the proceedings below, then the Board will issue notices, orders, and decisions by U.S. mail, personal delivery, or commercial courier using the party's record address as provided under § 4.22(b) or, if not provided, the party's last known mailing address.

#### **§ 4.408 Document formatting requirements.**

(a) *Documents subject to formatting requirements*. The formatting requirements of this section apply to any notice, motion, brief, or other document filed in an appeal subject to this subpart, whether filed electronically or in paper form. These formatting requirements do not apply to an exhibit, an attachment, or the administrative record.

(b) *General requirements*. Each motion, brief, or other document must be filed separately. In addition, all documents must:

(1) Be captioned with a docket number and a concise title that clearly conveys what is being filed;

- (2) Use 12-point font size or larger throughout the document;
- (3) Be double-spaced except for the case caption, headings, long quotations, and footnotes, which may be single-spaced;
- (4) Have margins of at least 1 inch on all four sides;
- (5) Have pages that are numbered sequentially;
- (6) Be signed by the party or the party's representative;
- (7) Be 8½ by 11 inches in size if filed in paper form, with print on just one side of the page and the document stapled or bound in the upper left-hand corner; and
- (8) Be in electronic text-searchable portable document format (PDF) if filed electronically, maintaining original document formatting unless specified differently in the OHA Standing Orders on Electronic Transmission.

(c) *Document elements excluded from page computations.* Documents subject to page limitations may exclude from the number computation any cover page, table of contents, table of citations, signature blocks, certificates of service, indices, attachments, and exhibits.

(d) *Consequences of non-compliance.* The Board may decide not to consider any document that does not comply with the requirements in paragraphs (b) and (c) of this section.

#### **§ 4.409 Motions.**

- (a) *In General.*
  - (1) Form and Content. Any motion filed with the Board must be in writing and state with particularity the relief sought and provide the reasons for the motion.
  - (2) Duty to Confer.
    - (i) Except as provided in paragraph (a)(2)(ii) of this section, before filing a motion, the moving party must make reasonable efforts to contact each party to determine whether

agreement can be reached on the relief sought in the motion. The moving party must state in its motion:

(A) Whether any party it reached agrees to all or part of the motion; and

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

(ii) The duty to confer does not apply to a motion by an appellant to withdraw or voluntarily dismiss an appeal or an adversarial motion (for example, a motion to dismiss for lack of jurisdiction).

(3) Responses. Except as provided in paragraph (b)(4) of this section or a Board order, any party has 14 days after service of the motion to file a response.

(4) Replies. A party has 7 days from service of the response to file a reply. The reply may not exceed 10 pages and is limited to new issues or arguments raised in the response.

(b) *Extensions of Time.*

(1) Except as otherwise provided in this subpart, a party may seek additional time by filing with the Board a motion for an extension of time.

(2) A motion for an extension must be filed no later than the day before the date the document is due, absent extenuating circumstances.

(3) The party must support its motion for an extension of time by showing there is good cause to grant it.

(4) If a party opposes the motion for an extension of time, the party must file its response within 3 business days after service of the motion to file a response.

(5) A Board order granting or denying a motion for an extension will state when the document must be filed. If the Board does not act on a motion before the document is due, the



document must be filed no later than 7 days after the original due date, unless the Board orders otherwise.

(c) *Intervention.*

(1) How to intervene. A person or entity that wishes to intervene must file a motion to intervene within 60 days after the person or entity knew or should have known that the decision had been appealed. The person or entity filing a motion to intervene must serve the motion on all parties to the appeal.

(2) Who may file a motion to intervene. A person or entity may seek to intervene if they had a right to appeal the decision under these rules or would be adversely affected if the Board reversed, vacated, set aside, or modified the decision.

(3) Contents of a motion to intervene. The motion must identify how the proposed intervenor meets the eligibility requirements set forth at paragraph (c)(2) of this section and when the proposed intervenor learned of the appeal.

(4) The Board's action on a motion to intervene. The Board may grant the motion to intervene; grant the motion to intervene but limit the person's or entity's participation in the appeal; or deny the motion to intervene if the proposed intervenor fails to meet the requirements of this paragraph (c) or if the Board determines that granting the motion would prejudice the existing parties or unduly delay adjudication of the appeal. If the intervenor had a right to appeal the decision, the Board will limit participation to the issues raised by the other parties to the appeal, along with any additional limitations deemed necessary to avoid prejudice or undue delay. If the Board denies the motion to intervene, the Board may allow the person or entity to file a brief as *amicus curiae*. A person or entity granted full or limited intervenor status is a party to the appeal.

(d) *Amicus Curiae*.

(1) A person or entity may file a motion to file a brief as an amicus curiae. The motion must state the person's or entity's interest in the appeal and how their brief will contribute to resolving the issues on appeal.

(2) The Board may grant or deny the motion in its discretion.

(3) A person or entity seeking to participate as amicus curiae must serve its motion, and its brief if the motion is granted, on all parties to the appeal.

(4) A person or entity granted amicus curiae status is not a party to the appeal.

(e) *Consolidation*. The Board, either on a party's motion or at the Board's initiative, may consolidate two or more appeals when they involve common factual or legal issues.

(f) *Suspension of Consideration of Appeal*. Any party may file a motion to suspend consideration of a pending appeal. If granted, the Board will toll any remaining filing deadlines until a date specified in a Board notice or order. The Board may require the parties to file periodic status reports. The Board may lift the suspension and place an appeal in an active status upon motion by either party or at the Board's initiative.

(g) *Evidentiary Hearing before an ALJ*.

(1) Any party may file a motion that the Board refer an appeal to an ALJ for a hearing.

The motion must state:

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

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

(iii) What witnesses need to be examined; and

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

(2) In response to a motion for hearing or on its own initiative, the Board may order a hearing before an ALJ if there are:

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

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

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

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

(ii) Request the ALJ to issue:

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

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

(C) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.403.

(4) The hearing will be conducted under the general rules in subpart C of this part.

Unless the Board orders otherwise, the ALJ may consider other relevant issues and evidence identified after referral of the case for a hearing.

(h) *Attorney Substitution and Withdrawal.*

(1) Attorney substitution.

(i) *Form and content.* A party may substitute attorneys by filing and serving a notice of substitution that includes the pertinent contact information for the new attorney.

(ii) *Effective date.* The notice of substitution is effective upon filing.

(2) Attorney withdrawal.

(i) *Form and content.* An attorney may request to withdraw from representing a party to an appeal without providing a substitute by filing a written motion to withdraw. The attorney must serve the motion on all parties and the attorney's client(s). The motion must contain the following:

(A) Pertinent contact information for the attorney's client(s);

(B) A statement explaining why the withdrawal will not unfairly prejudice the attorney's client(s); and

(C) A statement that the attorney has taken appropriate steps to protect the interests of the client(s) such as providing reasonable notice, allowing adequate time for the employment of another attorney, and surrendering files related to the appeal.

(ii) *Effective date.* A withdrawal is not effective unless the Board grants the motion to withdraw. The Board may condition or deny withdrawal to avoid prejudice to the client(s) and other parties.

#### **§ 4.410 Briefs.**

(a) *Applicability.* Unless otherwise ordered by the Board, the provisions of this section govern the briefing of an appeal. A party is required to seek and obtain the Board's leave to exceed the page limits, extend the time periods, file a brief not expressly provided for in this section, or otherwise depart from the requirements of this section.

(b) *Statement of reasons.*

(1) An appellant must file a statement of reasons supporting an appeal with the Board no later than 30 days after the record on appeal is filed with the Board.

(2) The statement of reasons may not exceed 30 pages, excluding exhibits, declarations, or other attachments.

(3) The statement of reasons must set forth with specificity all legal or factual errors alleged to have been made in the decision being appealed. However, where the bureau or office provided an opportunity for participation in its decision-making process, a party may raise on appeal only those issues:

(i) Raised to the bureau or office by anyone who participated in the decision-making process; or

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

(4) All arguments in support of the appeal must be set forth in the statement of reasons.

An appellant may not incorporate by reference arguments made in other documents.

(c) *Answer.*

(1) The bureau or office may file one answer responding to a statement of reasons within 60 days after service of the statement of reasons or, if an intervenor files a brief in support of an appellant, 60 days after service of an intervenor's brief filed under paragraph (d)(1) of this section.

(2) The answer may not exceed 30 pages, excluding exhibits, declarations, or other attachments.

(3) Failure to file an answer will not result in a default.

(d) *Intervenor brief.* Unless otherwise ordered by the Board, the following requirements apply to an intervenor brief:

(1) An intervenor in support of an appellant may file a brief within 14 days after service of the statement of reasons.

(2) An intervenor in support of the bureau or office may file a brief within 14 days after service of the answer.

(3) An intervenor's brief may not exceed 20 pages, excluding exhibits, declarations, or other attachments.

(e) *Reply brief.*

(1) An appellant may file one reply brief responding to an answer within 21 days after service of the answer or, if an intervenor files a brief in support of the bureau or office, within 14 days of service of an intervenor's brief filed under paragraph (d)(2) of this section.

(2) The reply brief is limited to addressing new issues raised in the answer or intervenor's brief(s).

(3) The reply brief may not exceed 20 pages, excluding exhibits, declarations, or other attachments.

(f) *Sur-reply.* No sur-reply may be filed unless a party first files a motion demonstrating a compelling reason to file a sur-reply and the Board grants the motion.

(g) *Attachments.* A party may attach exhibits, declarations, or other documents with a brief. The Board will consider the attachments to the extent the Board finds them reliable and relevant to the issues on appeal.

(h) *Notices of supplemental authority.* If pertinent and significant authorities come to a party's attention after the party's brief has been filed, a party may promptly advise the Board by filing a notice (with service on all parties) setting forth the citations to the authorities. The notice must state the reasons for providing the supplemental authorities and may not exceed three pages. Any response to the notice must be filed and served within 7 days and may not exceed three pages.

#### **§ 4.411 Sanctions.**

The Board may impose appropriate sanctions on any person or entity that violates the regulations of this part, an order of the Board, or any other statute or regulation that governs the appeal.

(a) The sanction may include, after notice and opportunity for the person or entity to respond, dismissal of all or part of an appeal, denial of a motion, refusal to consider a filing, or the exclusion of evidence from consideration.

(b) Absent extenuating circumstances, the Board will dismiss an appeal if the appellant has failed to provide financial security when required by regulation or order; violated the regulations of this part repeatedly; or caused prejudice to another party because of a violation of an order or applicable regulation.

#### **§ 4.412 Affirming without opinion.**

(a) *Failure to file a statement of reasons.* The Board may affirm without opinion a decision on appeal if the appellant has not filed a statement of reasons for the appeal within the time required in § 4.410(b) and has not otherwise included the reasons for appeal in its filings with the Board.

(b) *Previous level of administrative review.* Where the bureau or office has provided a level of administrative review before the appeal to the Board, or the appeal is from a decision of an ALJ, the Board may affirm without opinion the decision on appeal if the Board determines:

- (1) The result reached was correct;
- (2) Any errors in the decision were harmless or nonmaterial; and
- (3) The issues on appeal are squarely controlled by existing Board or Federal court precedent and do not involve the application of precedent to a novel factual situation, or the

factual and legal issues raised on appeal are not so substantial that the appeal warrants the issuance of a written opinion by the Board.

(c) *Order affirming without opinion.* When the Board affirms without opinion a decision on appeal, it will issue an order citing this section, affirming the decision on appeal, and expressly adopting the decision on appeal. The Board's order will be the final decision for the Department.

**§ 4.413 Scope of review, burden to show error, and standards of review.**

(a) *Scope of review.* The Board has authority to review decisions on appeal as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary. The Board may at any time before issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. The Board may affirm, modify, vacate, set aside, or reverse any decision properly brought before it for review, and may remand the matter as may be just under the circumstances.

(b) *Burden to show error.* The party appealing a decision of a bureau, office, or ALJ has the burden to show that an error was made.

(c) *Standards of review.* Generally, the Board will exercise its review authority as follows:

(1) The Board will review the decision on appeal for error by applying the standards of review set forth in the Administrative Procedure Act, 5 U.S.C. 706(2).

(2) The Board will review questions of law de novo.

(3) The Board will not overturn a bureau or office decision on the basis of a harmless error.



**§ 4.414 Interlocutory appeals of ALJ orders.**

(a) *General procedures.* Permission to file an interlocutory appeal is a two-step process, requiring a party to do both of the following:

(1) File an application in accordance with § 4.122(d) asking the ALJ to certify an ALJ order, in whole or in part, for interlocutory appeal; and

(2) Within 14 days of the ALJ's ruling on the application for certification, petition the Board in accordance with § 4.122(g) for permission to file an interlocutory appeal of the ALJ's order, in whole or in part.

(b) *Permission from the Board.* The Board will grant permission to file an interlocutory appeal under the following circumstances:

(1) The ALJ grants certification, and the Board agrees that the ALJ's interlocutory ruling involves a controlling question of law about which there are substantial grounds for a difference of opinion and that an immediate appeal will materially advance the completion of the proceeding; or

(2) The ALJ denies certification, and the Board determines that the ALJ abused their discretion in doing so.

**§ 4.415 Petition for reconsideration.**

(a) *Procedural requirements.* Any party may petition for reconsideration of a dispositive order or decision within 60 days after the date of the order or decision. The deadline to file a petition for reconsideration cannot be extended. The petition may include a request to stay the effectiveness of the order or decision. The petition may not exceed 15 pages. The Board will not accept a petition for reconsideration of a Board order affirming without opinion the decision on appeal under § 4.412.

(b) *Substantive requirements.* The Board will grant the petition only in extraordinary circumstances where sufficient reason exists and will deny a petition that merely repeats arguments made in the original appeal. The petitioner must establish that one of the following reasons exists:

(1) The Board misstated a material fact, resulting in an erroneous decision. The Board's findings concerning disputed material facts do not constitute a misstatement warranting reconsideration.

(2) Evidence exists that was not before the Board at the time it issued the final decision and that demonstrates error in the decision. The petitioner must submit the evidence with the petition and explain why the evidence was not provided to the Board during the course of the appeal.

(3) The Board's decision fails to cite and address a binding statute, regulation, or decision that would require a different outcome in the decision. Disagreement with the Board's interpretation or application of the law cited in the decision does not warrant reconsideration.

(c) *Responses.* Any other party to the original appeal may file a response to a petition for reconsideration within 21 days after service of the petition. The response may not exceed 15 pages.

(d) *Status of decision while petition is pending.* A petition for reconsideration will not stay the effectiveness or affect the finality of the Board's order or decision unless so ordered by the Board for good cause. If the Board stays the effectiveness of the order or decision, then finality is deferred until the Board rules on the petition.

(e) *Petition Not Required for Exhaustion.* A party does not need to file a petition for reconsideration to exhaust its administrative remedies.

#### **§ 4.416 Appeals of wildfire management decisions.**

The Board must decide an appeal of a BLM decision under 43 CFR 4190.1 and 5003.1(b) within 180 days after the notice of appeal was filed. The Board may issue an expedited briefing schedule to meet this deadline. If the Board does not rule on the appeal within 180 days after the notice of appeal was filed, BLM's decision will be deemed final for the Department.

#### **§ 4.417 Coordination with judicial review.**

Upon motion or on its own initiative after notice to the parties, the Board may suspend consideration or dismiss an appeal when the decision on appeal has been challenged in Federal court.

#### **§ 4.418 Precedential effect of decisions and orders.**

The Board may dispose of an appeal by an order or a decision. Dispositive orders resolve an appeal and are binding on the parties, but they are not precedential, and the Board is not obligated to follow or distinguish them in orders or decisions issued in other appeals. Non-precedential orders may be cited for the purpose of establishing res judicata, estoppel, or the law of the case. Decisions are precedential. Unless superseded or overruled, decisions may be cited as binding precedent in other appeals.

29. Revise subpart G, including the subpart heading, to read as follows:

#### **Subpart G—Rules Applicable to Proceedings before the Director**

Sec.

4.700 Scope

4.701 Who may appeal; who may request a hearing.

4.702 Appeals procedures.

4.703 Hearings procedures.

4.704 Reconsideration.

4.705 Department of the Interior employee matters.

Authority: 5 U.S.C. 301

**§ 4.700 Scope.** Subpart A provides the authority and jurisdiction of the OHA Director, including the appointment or delegation of other OHA officials to an Ad Hoc Board of Appeals or as a hearing official. The general rules contained in Subpart B apply to all matters before the OHA Director unless they are inconsistent with the rules in this subpart or other procedural rules applicable to specific types of proceedings.

**§ 4.701 Who may appeal; who may request a hearing.**

(a) *Appeals.* Any party may appeal a decision of a Departmental official when the applicable regulations or Departmental policy allow a right of appeal to the head of the Department. If the matter does not fall within the jurisdiction of a standing unit, the party must direct their appeal to the OHA Director.

(b) *Hearing requests.* Any party may request a hearing to contest a decision of a Departmental official when the applicable regulations or Departmental policy allow a right to request a hearing. If the matter does not fall within the jurisdiction of a Hearings Division, the party must direct their hearing request to the OHA Director.

**§ 4.702 Appeals procedures.**

(a) *Appointment of an Ad Hoc Board of Appeals.* The Director may appoint an Ad Hoc Board of Appeals to consider and decide a properly filed notice of appeal. The parties will be notified when an Ad Hoc Board has been appointed.

(b) *Action on appeals.* The Director or appointed Ad Hoc Board will review the record and take one of the following actions:

(1) Decide the appeal upon the Appeal file submitted according to paragraph (d) of this section or other written record before the Director or Ad Hoc Board;

(2) Refer the entire matter or specified portions for a hearing pursuant to paragraph (g) of this section; or

(3) Make other disposition of the case.

(c) *Notice of appeal.* The appellant must file a written notice of appeal to the Director within 30 days after receipt of the decision they seek to appeal. The notice must identify the decision being appealed, give a concise but complete statement of the relevant facts, and specify the relief sought. The appellant must serve a copy of the notice of appeal and any written arguments or briefs on each person or entity whose interest is affected and on the Departmental official whose decision is being appealed. The appellant must otherwise follow the provisions of § 4.32 of this part regarding filing and service.

(d) *Transmittal of appeal file.* Within 10 days after receipt of a copy of the notice of appeal, the Departmental official whose decision is being appealed must transmit 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.

(e) *Briefing.* If the parties wish to file briefs, they must comply with the following requirements:

(1) An appellant has 30 days from the date of filing of their notice of appeal within which to file an opening brief.

(2) An opposing party will have 30 days from the date of receipt of an appellant's brief in which to file an answer brief.

(3) An appellant or opposing party who wishes to file additional or rebuttal briefs must first obtain permission from the Director or the Ad Hoc Appeals Board presiding over the appeal.

(f) *Oral argument.* Upon request and for good cause, the Director or appointed Ad Hoc Board may grant an opportunity for and conduct an oral argument. Oral arguments may be recorded, and parties may request the recording or a transcript thereof. The requesting party is responsible for any fees and expenses pursuant to § 4.23 of this part and any applicable Standing Orders available on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

(g) *Referrals for hearing.* The Director or appointed Ad Hoc Board may refer an appeal to an ALJ or other presiding officer for a hearing pursuant to § 4.702.

#### **§ 4.703 Hearings procedures.**

(a) *Appointment of hearing official.* The Director may appoint a presiding officer to consider a hearing referral or a properly filed hearing request and conduct a hearing. The appointed presiding officer will be an ALJ for any matter where a formal hearing is required under the Administrative Procedure Act, 5 U.S.C. 554, or other statute. For all other hearings, the Director may appoint an ALJ or other presiding officer.

(b) *Action on hearing requests.* The Director or presiding officer will review the record and take one of the following actions:

- (1) Conduct a hearing on the basis of the record pursuant to paragraph (d) of this section;
- (2) Schedule and conduct a hearing and any necessary prehearing procedures as appropriate and necessary to resolve the matter; or,
- (3) Make other disposition of the case.

(c) *General procedures.* All hearings may be governed as appropriate and practicable by subpart C of this part, except where specific rules or other hearing procedures are provided by law or regulation.

(d) *Hearings based on the record.* The Director or presiding officer may conduct a hearing on the basis of the written record if permitted by the regulation giving rise to the hearing right, and when the Director or presiding officer determines that the written record is sufficient to resolve the factual disputes raised in the hearing request.

(e) *Administrative Wage Garnishment Hearings.* Administrative Wage Garnishment hearings are governed by 31 CFR 285.11, and any applicable OHA Standing Orders.

(f) *National Indian Gaming Commission appeals.* In those matters where the National Indian Gaming Commission (NIGC) requests that the Director provide a presiding official under 25 CFR 584.6, the Director will appoint an OHA official to conduct a hearing and issue a recommended decision.

#### **§ 4.704 Reconsideration.**

Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances and upon a finding of sufficient reasons by the Director or a presiding officer appointed by them. Requests for reconsideration must specify the purported error and must be filed within 15 days of the date of the decision, or the specific deadline provided in the regulations relating to the particular type of proceeding. The filing of a request for reconsideration will not stay the effectiveness of a decision unless ordered by the Director or appointed Ad Hoc Board or presiding officer or otherwise provided by statute or regulation. A request for reconsideration need not be filed to exhaust administrative remedies unless otherwise provided by statute or regulation.

**§ 4.705 Department of the Interior employee matters.**

The Director may appoint an Ad Hoc Board or presiding officer to conduct proceedings in matters where the Departmental Manual or other Department policy grants a right of direct or appellate review to current or former Department of the Interior employees or their survivors. Rules on practice and procedure applying to employee matters may be published in OHA Standing Orders.

30. Add subpart H to read as follows:

**Subpart H— Specific Rules Applicable to White Earth Reservation Land Settlement Act Proceedings**

GENERAL PROVISIONS

Sec.

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4.745 What happens if an objection to the preliminary decision is filed?

#### FINAL DECISION AND LODGING OF RECORD

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#### RECONSIDERATION OF FINAL DECISION

4.760 How can a final decision be challenged?

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4.762 Does any distribution of the estate occur while a petition for reconsideration is pending?

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#### FINALITY AND APPEAL OF FINAL DECISION AND ORDERS

4.780 When will the final decision and orders upon reconsideration, reopening, or remand become final?

4.781 Which presiding officer decisions or orders may be appealed and who may appeal them?

4.782 What happens if a petition for reconsideration and a notice of appeal are timely filed?

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4.784 What are the requirements for serving the notice of appeal and statement of reasons?

4.785 When will the determination process record be forwarded to the Board?

4.786 What actions may the Board take to resolve a timely appeal?

4.787 What happens to the record after disposition?

#### PROCEDURES AFTER BOARD REMAND

4.790 What happens if the Board remands the case to the presiding officer?

4.791 What will the order upon remand contain?

4.792 What happens to the record after the presiding officer issues an order upon remand?

Authority: Public Law 99–264 (100 Stat. 61), amended by Public L. 100–153 (101 Stat. 886), Public Law 100–212 (101 Stat. 1443), Public Law 101–301 (104 Stat. 210), and Public Law 103–263 (103 Stat. 707).

#### GENERAL PROVISIONS

##### **§ 4.710 What is this subpart's authority and scope?**

This subpart contains the rules and procedures that apply to the process for determining the heirs of any person who dies 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), Public Law 100–212 (101 Stat. 1443), Public Law 101–301 (104 Stat. 210), and Public Law 103–263 (103 Stat. 707). See subparts A and B of this part for the authority and jurisdiction of presiding officers and the Board of Indian Appeals, Office of Hearings and Appeals, and the rules generally applicable to proceedings before them. See §§ 4.310 through 4.318 for general rules applicable to proceedings before the Board of Indian Appeals.

**§ 4.711 To what extent do other regulations and OHA Standing Orders apply?**

(a) *Subparts A and B.* The general rules contained in subparts A and B of this part apply to the determination process unless they are inconsistent with the rules in this subpart or the rules in those subparts provide otherwise.

(b) *43 CFR part 30.* Although the rules in 43 CFR part 30 do not apply to the determination process, the rules in subparts H and J of 43 CFR part 30 and in 43 CFR 30.124 may serve as guidance unless they are inconsistent with the rules in this subpart.

(c) *43 CFR 4.310–4.318.* The general rules in §§ 4.310 through 4.318 of this part apply to appeals to the Interior Board of Indian Appeals under this subpart unless they are inconsistent with the rules in this subpart.

(d) *OHA Standing Orders.* The OHA Standing Order on WELSA Proceedings issued by the OHA Director applies to the determination process. OHA Standing Orders are available on the Department of the Interior OHA website, at <https://www.doi.gov/oha>.

**§ 4.712 What definitions apply to this subpart?**

In addition to the definitions in subpart A of this part, the following definitions apply to this subpart:

*Act* means the White Earth Reservation Land Settlement Act of 1985, as amended.

*Board* means OHA's Board of Indian Appeals.

*Compensation* means a monetary sum, as determined by the Project Director pursuant to section 8(c) of the Act.

*Decedent* means a person who died entitled to receive compensation under the Act.

*Determination process* means the legal process established in this subpart for determining distribution of a decedent's estate.

*Estate* means the compensation due a decedent under the Act.

*Final decision* means a written document issued by the presiding officer under § 4.744 or § 4.745(a) that finally determines a decedent's heirs and each heir's share of the estate and directs distribution of the estate.

*Heir* means any individual eligible to receive a share of the estate pursuant to the Minnesota inheritance laws of intestate succession in effect on March 26, 1986.

*Party (parties) in interest* means any potential or actual heir of a decedent, or of any subsequently deceased potential or actual heir of a decedent.

*Preliminary decision* means a written non-final document issued by the presiding officer under § 4.732(c) that preliminarily determines a decedent's heirs and each heir's share of the estate.

*Presiding officer* means a judge, attorney advisor, or other appropriate official to whom the OHA Director has delegated the authority for making heirship determinations as provided for in this subpart.

*Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, another Bureau of Indian Affairs official with delegated authority to serve as the Federal officer in charge of the White Earth Reservation Land Settlement Project, or a person in charge

of that project pursuant to authority derived from a contract executed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5321–5332.

**§ 4.713 What law governs the determination of heirs?**

As directed by the Act, the presiding officer will determine a decedent’s heirs under the Minnesota inheritance laws of intestate succession in effect on March 26, 1986, even though the decedent may have died with a valid will.

**§ 4.714 What authority does the presiding officer have during the determination process?**

The presiding officer has the authority to conduct the determination process in an orderly and judicial manner, including the authority to:

- (a) Determine the manner, location, and time of any hearing conducted under this subpart, and otherwise administer the case;
- (b) Determine whether an individual is deemed deceased by reason of extended unexplained absence or other pertinent circumstance;
- (c) Accept or reject any full or partial renunciation of interest;
- (d) Determine the heirs of a decedent and each heir’s share of the estate;
- (e) Order the distribution of the estate to a decedent’s heirs and determine and reserve the share to which any potential heir who is missing but not found to be deceased is entitled;
- (f) Issue subpoenas for the appearance of persons, the testimony of witnesses, and the production of documents at hearings or depositions on the judge's own initiative or if requested by the Project Director or a party in interest and approved by the presiding officer;
- (g) Administer oaths and affirmations;
- (h) Issue discovery orders including those:

- (1) Ordering the taking of depositions and determining the scope and use of deposition testimony;
- (2) Ordering the production of documents and determining the scope and use of the documents; or
- (3) Ruling on matters involving interrogatories and any other requests for discovery;
  - (i) Grant or deny stays, waivers, and extensions;
  - (j) Rule on motions, requests, and objections;
  - (k) Rule on the admissibility of evidence;
  - (l) Permit the cross-examination of witnesses;
  - (m) Appoint a guardian ad litem for any party in interest who is a minor or found by the presiding officer not to be competent to represent their own interests in accordance with § 4.715;
  - (n) Ask the Project Director to file additional evidence;
  - (o) Dismiss a case and return the case file to the Project Director if the presiding officer determines that the evidence provided by the Project Director under §§ 4.730(a) and 4.731 is incomplete;
  - (p) Regulate the course of any hearing and the conduct of witnesses, parties in interest, attorneys, and attendees at a hearing; and
  - (q) Take any action necessary to preserve the estate.

**§ 4.715 How may minors or other legal incompetents be represented?**

Minors and other legal incompetents who are parties in interest may be represented by legally appointed guardians, or by guardians ad litem appointed by the presiding officer.

## **FILING AND ISSUANCE**

### **§ 4.720 Where and how must documents be filed with the presiding officer?**

(a) *General.* A document required or permitted to be filed with the presiding officer must be delivered to the presiding officer as specified in this subpart and the OHA Standing Order on WELSA Proceedings.

(b) *Methods of Filing.*

(1) *Electronic.* A document may be filed electronically under the terms specified in the OHA Standing Order on WELSA Proceedings. The Project Director, or any attorney representing a person or entity, must file electronically, unless otherwise specified in the OHA Standing Order on WELSA Proceedings or when the presiding officer has allowed non-electronic filing for good cause.

(2) *Non-electronic.* Any document filed non-electronically must be delivered to the presiding officer at the address specified in the OHA Standing Order on WELSA Proceedings.

### **§ 4.721 When is a filing with the presiding officer timely?**

(a) *Electronic.* A document filed electronically is deemed timely if filed by 11:59 p.m. Central Time on the date the document is due under the terms specified in the OHA Standing Order on WELSA Proceedings.

(b) *Non-electronic.* A document not filed electronically is deemed timely if, on or before the last day for filing, it is sent by first-class United States mail, or other class of mail that is at least as expeditious, postage prepaid; or it is dispatched to a commercial courier for delivery within 3 days. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the company delivering the document for filing. A document not received within 7 business days of the filing deadline is

presumed untimely, but the presumption may be overcome by the documentation establishing the date of mailing or dispatch.

**§ 4.722 To whom will a presiding officer issue a notice, order, or decision?**

The presiding officer will issue a notice, order, or decision to each party in interest and the Project Director.

**§ 4.723 By what means may the presiding officer issue a notice, order, or decision?**

(a) *Electronic.* A presiding officer's notice, order, or decision may be issued electronically under the terms specified in the OHA Standing Order on WELSA Proceedings.

(b) *Non-electronic.* A presiding officer's notice, order, or decision may be issued non-electronically by U.S. mail or commercial courier to the Project Director or a party in interest using their record address as provided under § 4.22(b) or, if not provided, their last known mailing address.

**§ 4.724 How will issuance of a presiding officer's notice, order, or decision be documented?**

A presiding officer's notice, order, or decision must include the date on which it is issued, the names of the persons to whom it is issued, and the method of issuance.

**COMMENCEMENT OF DETERMINATION PROCESS**

**§ 4.730 How does the Project Director commence the determination process?**

(a) The Project Director will commence the process of determining the heirs of a decedent by filing with the presiding officer the evidence described in § 4.731.

(b) The Project Director will not commence a determination process if a court of Minnesota has already made a determination of a decedent's heirs recognized as effective under section 5(a) of the Act.



**§ 4.731 What evidence must the Project Director file with the presiding officer?**

The Project Director must file with the presiding officer sufficient evidence to enable the presiding officer to determine a decedent's heirs under the Act. That evidence must include:

(a)(1) A copy of the decedent's death certificate if one exists; or

(2) 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; or

(3) If there is no death certificate and no other form of official written evidence, then a secondary form 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;

(b) A document containing information for heirship finding and family history, including:

(1) The facts and alleged facts of:

(i) The decedent's marriages, separations, and divorces; and

(ii) Whether the relationships of decedent's potential heirs and other known parties in interest arose by marriage, blood, or adoption;

(2) The names and last known addresses of decedent's potential heirs and other known parties in interest; and

(3) Other relevant information regarding the parties in interest, including dates of births and deaths;

(c) A certification by the Project Director or their designee that the information required in paragraph (b)(2) of this section was filed after having made a reasonable and diligent search;

(d) A copy of each document evidencing the information required in paragraphs (b)(1) and (3) of this section, such as marriage licenses and certificates, divorce and adoption decrees, birth and death certificates, and affidavits or adjudications of paternity;

(e) Known and relevant determinations of heirs of relatives of the decedent, including those recognized as effective under section 5(a) of the Act and those rendered by courts of Minnesota or other States, by tribal courts, or by tribunals authorized by the laws of other countries; and

(f) 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 the compensation containing:

- (1) Its real property origins and the succession of the compensation to the decedent; and
- (2) All of the intervening heirs under the Act, their fractional shares, and the amount of compensation attributed to each of them.

**§ 4.732 What will the presiding officer do after receiving the evidence filed by the Project Director?**

(a) After the presiding officer receives and reviews the evidence filed by the Project Director, the presiding officer will determine whether there are any apparent issues of fact to be resolved.

(b) To resolve any issues of fact, the presiding officer may do one or more of the following:

- (1) Request information from the Project Director, parties in interest, or other persons or entities;
- (2) Schedule and hold a prehearing conference;
- (3) Schedule and hold a hearing; or

(4) Take any other action authorized by this subpart.

(c) If the presiding officer does not hold a hearing, they will issue a preliminary decision determining the decedent's heirs.

(d) If the presiding officer does hold a hearing, they may issue a final decision determining the decedent's heirs without first issuing a preliminary decision.

## **PRELIMINARY DECISION—CONTENT, NOTIFICATION, OBJECTIONS**

### **§ 4.740 What will a preliminary decision include?**

If the presiding officer issues a preliminary decision, the decision will include each heir's name, birth date, relationship to the decedent, and share of the estate, or a statement that the decedent died without heirs.

### **§ 4.741 How will notification of the preliminary decision be provided?**

(a) The presiding officer will issue a notice of preliminary decision on the same day they issue a preliminary decision. The notice will inform the Project Director and parties in interest of their right to file with the presiding officer an objection to the preliminary decision, with or without a request for hearing, within 40 days of the date of issuance of the notice.

(b) The Project Director:

(1) Will ensure that the notice is posted at the following entities, whose addresses are specified in the OHA Standing Order on WELSA Proceedings:

(i) The White Earth Band; and

(ii) Minnesota Agency, Bureau of Indian Affairs; and

(2) Has the discretion to identify additional appropriate locations where the notice will be posted and the addresses of those locations will be specified in the OHA Standing Order on WELSA Proceedings.

(c) The postings of the notice must occur within 7 days of the Project Director's receipt of the notice.

**§ 4.742 What evidence of posting of the notice of preliminary decision must be filed with the presiding officer?**

(a) The Project Director will prepare a signed certificate of transmission stating when the notice of the preliminary decision was transmitted for posting, and to which locations it will be posted.

(b) Each person at these locations who posts the notice must:

(1) Prepare and sign a posting certificate stating the date and place of posting; and

(2) Transmit the certificate to the Project Director.

(c) The Project Director must file with the presiding officer the Project Director's certificate and each posting certificate transmitted to the Project Director under paragraph (b) of this section.

**§ 4.743 What are the filing requirements for objecting to a preliminary decision and requesting a hearing?**

(a) The Project Director or any party in interest may file with the presiding officer a written objection to a preliminary decision within 40 days after the date of issuance of the notice of preliminary decision.

(b) The objection must allege an error of fact or law in the preliminary decision and state specifically and concisely the grounds on which the objection is based.

(c) The objection may include a request for hearing, which must set forth any disputed issues of fact.

**§ 4.744 What happens if no timely objection to the preliminary decision is filed?**

If no written objection to a preliminary decision is timely filed in accordance with § 4.743(a), the presiding officer will issue a final decision.

**§ 4.745 What happens if an objection to the preliminary decision is filed?**

(a) *General.* If a written objection to a preliminary decision is filed with the presiding officer before the final decision is issued, they may take any action listed in § 4.732(b) to resolve any issues of fact and will issue a final decision that includes a resolution of the objection.

(b) *Denial without opportunity to respond.* The presiding officer may deny the objection without providing the Project Director and the parties in interest with an opportunity to respond to the objection, if the objection:

- (1) Is not timely filed;
- (2) Alleges mere disagreement with the preliminary decision; or
- (3) Otherwise fails to assert proper grounds for objecting, as determined by the presiding officer.

(c) *Consideration after opportunity to respond.* If the presiding officer does not deny the objection under paragraph (b) of this section, the presiding officer will:

- (1) Issue a notice allowing the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the objection;
- (2) Issue with the notice, a copy of the objection and all papers filed by the objector; and
- (3) Consider, with or without a hearing, the issues raised in the objection, including any request for hearing, and in any written responses to the objection.

**FINAL DECISION AND LODGING OF RECORD**

**§ 4.750 What must the final decision determining decedent's heirs contain?**

(a) The final decision must contain:

(1) Each heir's name, birth date, relationship to the decedent, and share of the estate, or a statement that the decedent died without heirs, and this information may be incorporated into the final decision from the preliminary decision if no timely objection to the preliminary decision was filed or if otherwise appropriate; and

(2) A notice that any party in interest who is adversely affected by the final decision, as well as the Project Director, have a right to file a petition for reconsideration with the presiding officer or an appeal with the Board within 30 days of the date of issuance of the final decision.

(b) If an objection to the preliminary decision is filed before the final decision is issued, the final decision must also resolve the objection and set forth the reasons for the resolution.

**§ 4.751 What happens to the determination process record and what must it include?**

(a) After issuance of the final decision and any order upon reconsideration, the presiding officer must lodge the original record of the determination process with the Project Director.

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

(1) A copy of the posted notice of preliminary decision, the Project Director's certificate of transmission of the notice for posting, and the posting certificates;

(2) A copy of each notice, order, or decision issued to the parties in interest or Project Director;

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

(4) Information for heirship finding and family history, and information supplementary thereto; and

(5) Any other material or documents deemed relevant by the presiding officer.

## **RECONSIDERATION OF FINAL DECISION**

### **§ 4.760 How can a final decision be challenged?**

A party in interest adversely affected by a final decision, or the Project Director, may file either a petition for reconsideration with the presiding officer or an appeal with the Board under § 4.783, but not both.

### **§ 4.761 What are the requirements for filing a petition for reconsideration?**

(a) *Deadline to file.* A petition for reconsideration must be filed with the presiding officer within 30 days after the date of issuance of the final decision.

(b) *Petition content.*

(1) A petition for reconsideration must allege a substantive error of fact or law in the final decision and must state specifically and concisely the grounds on which the petition is based.

(2) If the petition is based on evidence newly discovered after, or evidence that was unavailable before, issuance of the final decision, the petition must:

(i) Be accompanied by documentation of that evidence, including, but not limited to, one or more affidavits of a witness stating fully the content of the new evidence; and

(ii) State the reasons for failure to discover and present that evidence before that date.

### **§ 4.762 Does any distribution of the estate occur while a petition for reconsideration is pending?**

The Project Director must not initiate distribution of any portion of the estate while the petition for reconsideration is pending. If the petition is filed by a party in interest and not the Project Director, the presiding officer will issue a notice of receipt of the petition to the Project Director as soon as practicable.

**§ 4.763 How will the presiding officer decide a petition for reconsideration?**

(a) *General.* The presiding officer may take any action listed in § 4.732(b) to resolve any issues of fact and will issue an order upon reconsideration resolving the petition.

(b) *Denial without opportunity to respond.* The presiding officer may deny the petition without providing the Project Director and the parties in interest with an opportunity to respond to the petition, if the petition:

- (1) Is not timely filed;
- (2) Is based on newly discovered evidence and fails to meet the requirements of § 4.761(b)(2);
- (3) Is based solely on issues raised for the first time on reconsideration;
- (4) Alleges mere disagreement with the final decision; or
- (5) Otherwise fails to assert proper grounds for reconsideration, as determined by the presiding officer.

(c) *Consideration after opportunity to respond.* If the presiding officer does not deny the petition under paragraph (b) of this section, the presiding officer will:

- (1) Issue a notice allowing the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the petition;
- (2) Issue with the notice, a copy of the petition and all papers filed by the petitioner; and
- (3) Consider, with or without a hearing, the issues raised in the petition and in any written responses to the petition.

**§ 4.764 What will the order upon reconsideration contain?**

In the order upon reconsideration, the presiding officer may deny the petition in accordance with § 4.763(b) or affirm, modify, or vacate the final decision; and must:



(a) Set forth the reasons for doing so; and

(b) Include a notice stating that any party in interest who is adversely affected by the order upon reconsideration, as well as the Project Director, have the right to appeal the order to the Board within 30 days of the date of issuance of the order.

#### **§ 4.765 How can an order upon reconsideration be challenged?**

(a) An order upon reconsideration may be appealed to the Board as provided in § 4.783 of this subpart.

(b) No person or entity may file successive petitions for reconsideration in the same case.

#### **REOPENING OF CLOSED CASE AND CORRECTION OF ERRORS**

#### **§ 4.770 What are the methods and standards for reopening a closed case?**

(a) *General.* The presiding officer may reopen a closed case to correct an error of fact or law in a final decision, including any modifications.

(b) *Methods.*

(1) A party in interest adversely affected by a final decision, or the Project Director, may seek correction of an error of fact or law by filing a petition for reopening with the presiding officer.

(2) The presiding officer may reopen a case on their own initiative if they become aware of sufficient evidence to justify correction of an error.

(c) *Standards.* The presiding officer may reopen a closed case:

(1) If the error is discovered more than 30 days after the date of issuance of the final decision; and

(2) If the petition for reopening is filed or the presiding officer reopens the case on their own initiative:

(i) Within 3 years or less of the date of issuance of the final decision; or

(ii) More than 3 years after the date of issuance of the final decision if the presiding officer finds that the need to correct the error outweighs the interests of the public and heirs in the finality of the final decision.

**§ 4.771 When must a petition for reopening be filed?**

(a) The Project Director may file a petition at any time. All other petitioners must file their petition within one year after the petitioner discovers the alleged error.

(b) If the petitioner files their petition for reopening before the deadline for filing a petition for reconsideration under § 4.761(a), it will be treated as a petition for reconsideration.

**§ 4.772 What must be included in a petition for reopening?**

(a) A petition for reopening must:

(1) State specifically and concisely the grounds on which the petition is based and the relief requested; and

(2) Append all relevant documentary evidence, including any sworn affidavits, supporting the allegations and relief requested in the petition.

(b) A petition filed by a party in interest must also:

(1) State in the petition the date the petitioner discovered the alleged error; and

(2) Append all relevant documentary evidence, including any sworn affidavits, concerning when and how the petitioner discovered the alleged error.

(c) A petition filed more than 3 years after the date of issuance of the final decision must also show that the need to correct the error outweighs the interests of the public and heirs in the finality of the final decision, which may be shown by addressing the following factors in the petition, as applicable:

- (1) The nature of the error;
- (2) The passage of time;
- (3) Whether the petitioner exercised due diligence in pursuing their rights;
- (4) Whether the petitioner's ancestor exercised due diligence in pursuing their rights and whether a failure to exercise should be imputed to the petitioner;
- (5) The availability of witnesses and documents;
- (6) The general interest in administrative finality;
- (7) The number of other estates that would be affected by the reopening, if known; and
- (8) Whether the property that was in the estate is still available for redistribution if the case is reopened, if known.

**§ 4.773 What is not appropriate for a petition for reopening?**

In a petition for reopening, the petitioner may not:

- (a) Raise issues or objections that were previously addressed in an order issued in the case;
- (b) Submit evidence that was available or discoverable at the time the final decision was issued, or available during any period of reconsideration of the final decision. The requirements at § 4.761(b)(2) concerning presentation of new evidence upon reconsideration also apply to the presentation of new evidence on reopening; or
- (c) Raise issues or objections when the petitioner had the opportunity to raise them earlier because the petitioner received proper notice of the preliminary decision or hearing, if any. This paragraph does not apply to the Project Director.

**§ 4.774 How will the presiding officer decide a petition for reopening?**

(a) *General.* The presiding officer may take any action listed in § 4.732(b) to resolve any issues of fact and will issue an order upon reopening resolving the petition.

(b) *Denial without opportunity to respond.* The presiding officer may deny the petition without providing the Project Director and the parties in interest with an opportunity to respond to the petition, if the petition:

- (1) Does not meet the standards set forth at § 4.770(c);
- (2) Alleges mere disagreement with a final decision;
- (3) Raises issues that were previously addressed in an order issued in the case;
- (4) Raises only issues or objections for the first time on reopening and the petitioner is a party in interest who received proper notice of the preliminary decision or of any hearing;
- (5) Is based on newly discovered evidence and fails to meet the requirements of § 4.761(b)(2); or
- (6) Otherwise fails to assert proper grounds for reopening, as determined by the presiding officer.

(c) *Consideration after opportunity to respond.* If the presiding officer does not deny the petition under paragraph (b) of this section, the presiding officer will:

- (1) Issue a notice allowing the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the petition;
- (2) Issue with the notice, a copy of the petition and all papers filed by the petitioner;
- (3) Suspend further distribution of the estate during the reopening proceedings, if appropriate, by order to the Project Director; and
- (4) Consider, with or without a hearing, the issues raised in the petition.

**§ 4.775 How will the presiding officer decide a case reopened on their own initiative?**

When a presiding officer reopens a case on their own initiative to correct an error in a final decision, they will:

(a) Issue a notice which must:

(1) Identify the error and explain how the presiding officer intends to modify the final decision to correct the error; and

(2) Allow the Project Director and the parties in interest a reasonable, specified time in which to file a written response to the notice;

(b) Suspend further distribution of the estate during the reopening proceedings, if appropriate, by order to the Project Director; and

(c) Consider, with or without a hearing, the issues raised by any timely written response to the notice and issue an order upon reopening.

**§ 4.776 What will the order upon reopening contain?**

In the order upon reopening, the presiding officer may deny the petition for reopening, if any, in accordance with § 4.774(b) or affirm, modify, or vacate the final decision; and must:

(a) Set forth the reasons for doing so; and

(b) Include a notice stating that any party in interest who is adversely affected by the order upon reopening, as well as the Project Director, have the right to appeal the order to the Board within 30 days of the date of issuance of the order.

**§ 4.777 What happens to the record after the presiding officer issues an order upon reopening?**

After the presiding officer issues an order upon reopening, they must submit the record made on reopening to the Project Director.

**§ 4.778 What are non-substantive errors in an order or decision and how may they be corrected?**

(a) If, after issuance of an order or decision, it appears that the order or decision contains non-substantive errors, the presiding officer may issue a correction order to the Project Director and the parties in interest correcting them. Errors are non-substantive if they are merely typographical, clerical, or their correction would not change the distribution of a decedent's property.

(b) The presiding officer may issue a correction order on their own initiative. The Project Director and the parties in interest may also file a request for a correction order at any time.

(c) The correction order is not subject to appeal to the Board.

**FINALITY AND APPEAL OF FINAL DECISION AND ORDERS**

**§ 4.780 When will the final decision and orders upon reconsideration, reopening, or remand become final?**

(a) A final decision will become final on the expiration of the 30 days allowed for filing a notice of appeal with the Board under § 4.783(a) or a petition for reconsideration with the presiding officer under § 4.761(a) unless a notice of appeal or a petition for reconsideration is timely filed.

(b) Each of the following orders will become final on the expiration of the 30 days allowed for filing a notice of appeal with the Board under § 4.783(a) unless a notice of appeal is timely filed:

- (1) An order upon reconsideration issued under § 4.763(a);
- (2) An order upon reopening issued under § 4.774(a) or § 4.775(c); and
- (3) An order upon remand issued under § 4.790(b).

**§ 4.781 Which presiding officer decisions or orders may be appealed and who may appeal them?**

Any of the following decisions or orders of the presiding officer may be appealed to the Board by the Project Director and by any party in interest who is adversely affected by that decision or order:

- (a) A final decision;
- (b) An order upon reconsideration issued under § 4.763(a);
- (c) An order upon reopening issued under § 4.774(a) or § 4.775(c); or
- (d) An order upon remand issued under § 4.790(b).

**§ 4.782 What happens if a petition for reconsideration and a notice of appeal are timely filed?**

If a petition for reconsideration is timely filed with the presiding officer and a notice of appeal is timely filed with the Board, the Board will dismiss the appeal without prejudice and the presiding officer will issue an order upon reconsideration.

**§ 4.783 When and how may a presiding officer's decision or order be appealed?**

- (a) *When.*

(1) A person wishing to appeal a presiding officer's decision or order listed in § 4.781 must file a written notice of appeal with the Board in accordance with § 4.310 within 30 days of the date of issuance of the decision or order. The Board will dismiss any appeal not filed by this deadline.

(2) Within 30 days after filing the notice of appeal, the appellant must also file with the Board, in accordance with § 4.310, a statement of reasons why the presiding officer's decision or order is in error.

(b) *How.* Both the notice of appeal and statement of reasons must be signed by the appellant, the appellant's attorney, or other qualified representative as provided in 43 CFR 1.3 of this subtitle, and must be filed with the Board by electronic transmission, mail, commercial courier, or hand delivery, in accordance with § 4.310(b).

**§ 4.784 What are the requirements for serving the notice of appeal and statement of reasons?**

(a) The appellant must serve a copy of the notice of appeal and the statement of reasons on the Project Director and on the presiding officer whose decision or order is being appealed in accordance with the methods identified in § 4.310(d).

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

**§ 4.785 When will the determination process record be forwarded to the Board?**

The Project Director will ensure that the determination process record is expeditiously forwarded to the Board.

**§ 4.786 What actions may the Board take to resolve a timely appeal?**

(a) If the Board finds that the appellant has set forth sufficient reasons for questioning the presiding officer's decision or order, the Board will issue an order giving all parties in interest an opportunity to respond, following which a decision will be issued.

(b) If the Board finds that the appellant has not set forth sufficient reasons for questioning the presiding officer's decision or order, the Board may issue a decision on the appeal without further briefing.

(c) The Board may issue a decision affirming, reversing, modifying, or vacating the presiding officer's decision or order. If the Board vacates the presiding officer's decision or



order, the case will be remanded to the appropriate presiding officer for reconsideration, hearing, or both.

**§ 4.787 What happens to the record after disposition?**

The record filed with the Board under § 4.785 and all documents added during the appeal proceeding, including the Board's decision, must be forwarded to:

(a) The presiding officer after the Board makes a decision remanding the case to the presiding officer, or

(b) The Project Director if the Board makes a decision other than a remand.

**PROCEDURES AFTER BOARD REMAND**

**§ 4.790 What happens if the Board remands the case to the presiding officer?**

If the Board issues a decision remanding a case to the presiding officer, the presiding officer:

(a) May, subject to any directions or restrictions in the Board's decision and § 4.315, do one or more of the following to resolve any issues of fact or law:

(1) Request information from the Project Director and the parties in interest or other persons or entities;

(2) Schedule and hold a prehearing conference;

(3) Schedule and hold a hearing; or

(4) Take any other action authorized by this subpart; and

(b) Will issue an order upon remand determining the issues of fact or law.

**§ 4.791 What will the order upon remand contain?**

In the order upon remand, the presiding officer will resolve the issues of fact or law and must:

(a) Set forth the reasons for doing so; and

(b) Include a notice stating that any party in interest who is adversely affected by the order upon remand, as well as the Project Director have the right to appeal the order to the Board within 30 days of the date of issuance of the order.

**§ 4.792 What happens to the record after the presiding officer issues an order upon remand?**

After the presiding officer issues an order upon remand, they must submit the record made upon remand to the Project Director.

**Subpart I – Specific Rules Applicable to Proceedings Under Part 17 – Nondiscrimination of Federally Assisted Programs**

31. Revise the heading of subpart I to read as set forth above.

**§ 4.801 [Amended]**

32. Amend § 4.801 by removing the word “him” and adding in its place the word “them”, and by removing the word “his” and adding in its place the word “their”.

**§ 4.804 [Amended]**

33. Amend § 4.804, the first sentence, by removing the word “him” and adding in its place the word “them”.

**§ 4.805 [Amended]**

34. Amend § 4.805, the first sentence, by removing the word “him” and adding in its place the word “them”.

**§ 4.807 [Amended]**

35. Amend § 4.807 by:

a. In the introductory text, at the beginning of the second sentence, by removing the word “His” and adding in its place the words “The administrative law judge’s”;

b. In paragraph (d), by removing the word “him” and adding in its place the word “them”;

c. In paragraph (f), by removing the word “his” and adding in its place the words “the administrative law judge’s”; and

d. In paragraph (h), by removing the word “him” and adding in its place the words “the administrative law judge”.

**§ 4.809 [Amended]**

36. Amend § 4.809 by:

a. In paragraph (c)(2), removing the word “his” and adding in its place the word “petitioner’s”;

b. In paragraph (d):

i. In the second sentence, removing the word “He” and adding in its place the words “The administrative law judge”;

ii. In the third sentence, removing the word “he” and adding in its place the words “the administrative law judge”;

iii. In the fourth sentence, removing the word “his” and adding in its place the word “their”; and

iv. In the fifth sentence, removing the word “he” and adding in its place the words “the administrative law judge”.

37. Amend § 4.811 by:

a. In paragraph (b):

i. In the first sentence, removing the word “he” and adding in its place the words “the administrative law judge”; and

ii. In the second sentence, removing the word “his” and adding in its place the word “the”;

b. Revising the second and third sentences of paragraph (d) and the second sentence of paragraph (e), to read as follows:

**§ 4.811 Determination and participation of amici.**

\* \* \* \* \*

(d) \* \* \* An amicus curiae 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. The amicus curiae’s brief or written statement must be filed and served on each party within the time limits applicable to the party whose position the amicus curiae supports; or if the amicus curiae does not support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(e) \* \* \* The administrative law judge has discretion to grant any such request if the administrative law judge believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties without expanding the issues.

**§ 4.813 [Amended]**

38. In § 4.813, amend paragraph (b), the first sentence, by removing the word “his” and adding in its place the word “their”.

**§ 4.814 [Amended]**

39. Amend § 4.814 by removing the word “his” and adding in its place the word “their”.

**§ 4.816 [Amended]**

40. Amend § 4.816, the second sentence, by removing the word “he” and adding in its place the words “the applicant recipient”.

41. Amend § 4.819 by revising the first sentence to read as follows:

**§ 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 their 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 the respondent’s original answer. \* \*

42. Revise § 4.821 to read as follows:

**§ 4.821 Motions.**

(a) Motions and petitions must state the relief sought, the basis for relief and the authority relied upon. If made before or after the hearing itself, these matters must 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.

(b) 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.

**§ 4.823 [Amended]**

43. Amend § 4.823, the first sentence, by removing the word “his” and adding in its place the word “their”.

**§ 4.825 [Amended]**

44. In § 4.825, amend paragraph (b) by removing the word “he” and adding in its place the words “the party to whom the request is directed”.

**§ 4.827 [Amended]**

45. Amend § 4.827 by:

a. In paragraph (b)(1), removing the word “him” and adding in its place the words “the party”, and removing the words “he belongs” and adding in its place the words “they belong”; and

b. In paragraph (d), the third sentence, removing the word “his” and adding in its place the word “their”.

**§ 4.828 [Amended]**

46. In § 4.828, amend paragraph (a)(3) by removing the word “he” and adding in its place the words “the witness”.

**§ 4.830 [Amended]**

47. Amend § 4.830, in paragraph (a), the first sentence, by removing the word “his” and adding in its place the word “their”

**§ 4.831 [Amended]**

48. Amend § 4.831 by:

a. In paragraph (b)(2), removing the word “him” and adding in its place the words “the administrative law judge”; and

b. In paragraph (c)(1), removing the word “his” and adding in its place the word “their”.

**§ 4.832 [Amended]**

49. In § 4.832, amend paragraph (a) by removing the word “him” and adding in its place the words “the disobedient party”.

**§ 4.833 [Amended]**

50. Amend § 4.833, in paragraph (b)(6), by removing the word “his” and adding in its place the words “the administrative law judge’s”.

**§ 4.834 [Amended]**

51. Amend § 4.834, in paragraph (c), by removing the word “his” in both places it occurs and adding in its place the word “their”.

52. Amend § 4.839 by revising the second sentence to read as follows:

**§ 4.839 Exceptions.**

\* \* \* It is sufficient that a party, at the time the ruling of the administrative law judge is sought, makes known the action which the party desires the administrative law judge to take, or the party’s objection to an action taken, and the party’s ground therefor.

**§ 4.843 [Amended]**

53. Amend § 4.843, the first sentence, by removing the word “his” and adding in its place the word “their” and by removing the word “him” and adding in its place the words “the administrative law judge”.

54. Amend § 4.844 by revising the second and third sentences to read as follows:

**§ 4.844 Notification of right to file exceptions.**

\* \* \* An administrative law judge will, in any initial decision, specifically inform the applicant or recipient of the 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 the Director reviews the decision of an administrative law judge, the Director will give the applicant or recipient a notice of certification or notice of review that specifically informs the applicant or recipient that, within a stated period, which will not be

less than 30 days after service of the notice, the applicant or recipient may file briefs or other written statements of contentions.

**§ 4.845 [Amended]**

55. Amend § 4.845, the first sentence, by removing the words “upon him”.

**Subpart J – Specific Rules Applicable to Appeals Concerning Federal Oil and Gas**

**Royalties**

56. Revise the heading of subpart J to read as set forth above.

57. Add a new § 4.900 to read as follows:

**§ 4.900 Scope of rules.**

The regulations in this subpart set forth specific rules applicable to appeals before the Interior Board of Land Appeals concerning Federal oil and gas royalties. See subpart A for the authority, jurisdiction, and membership of the Interior Board of Land Appeals. For general rules applicable to appeals before the Board of Land Appeals as well as the other components of OHA, see subpart B. For rules applicable only to appeals before the Board of Land Appeals, see subpart E. Rules in subpart E are applicable to these appeals unless the rules in subpart E of this part are inconsistent with the rules in this subpart J. For purposes of appeals concerning Federal oil and gas royalties, wherever there is any conflict between the rules in subpart E and the rules in this subpart, the rules in this subpart will govern.

58. Amend § 4.903 by adding, in alphabetical order, a definition for *Administrative proceeding* to read as follows:

**§ 4.903 What definitions apply to this subpart?**

\* \* \* \* \*



*Administrative proceeding* means any process in which an order is issued by ONRR or a delegated State and is subject to appeal or has been appealed either to the ONRR Director or IBLA under 30 CFR 1290.105.

\* \* \* \* \*

59. Revise § 4.904 to read as follows:

**§ 4.904 When does my administrative proceeding commence and end?**

For purposes of the period in which the Department must issue a final decision in your administrative proceeding under § 4.906:

(a) Your administrative proceeding commences on the date you receive ONRR's order.

(b) Your administrative proceeding ends on the same day of the 33rd calendar month after your administrative proceeding 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 administrative proceeding commenced does not have the same day of the month as the day of the month your administrative proceeding commenced, then the initial 33-month period ends on the last day of the 33rd calendar month.

60. Revise § 4.905 to read as follows:

**§ 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, holiday, or shutdown), the due date is the next day the relevant office is open for business.

61. Revise § 4.906 to read as follows:

**§ 4.906 What if the Department does not issue a decision by the date my administrative proceeding 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 administrative proceeding ends under § 4.904(b), then the Secretary will be deemed to have decided the appeal in accordance with 30 U.S.C. 1724(h)(2).

(b)(1) If your administrative proceeding ends before the ONRR Director issues a decision in your appeal, then the Secretary will be deemed to have decided the appeal in accordance with 30 U.S.C. 1724(h)(2).

(2) 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 administrative proceeding 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 your administrative proceeding ends while your appeal is pending before the IBLA, the appeal is automatically dismissed as of the expiration of the 33-month period. The dismissal will be reflected in an IBLA notice, and your receipt of this notice begins the period in which a judicial proceeding challenging the final agency action must be brought under 30 U.S.C. 1724(j).

(e) 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.

62. Revise § 4.909 to read as follows:

**§ 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 file a written motion for an extension of time as specified in § 4.407 of this part before the required filing date.

(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 motion 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 motion for an extension of time.

(f) You must serve your motion on all parties to the appeal as specified at § 4.407 of this part.

**Subpart K – Specific Rules Applicable to Hearings Concerning the Acknowledgment of American Indian Tribes**

63. Revise the heading of subpart K to read as set forth above.

64. Revise § 4.1012 to read as follows:

**§ 4.1012 Where and how must documents be filed?**

(a) *Generally.* Any documents relating to a case under this subpart must be delivered for filing to DCHD under the terms specified in the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information found on the Department of the Interior OHA website, at <https://www.doi.gov/oha>.

(b) *Methods of Filing.*

(1) *Electronic.* A document may be filed electronically under the terms specified in the OHA Standing Orders on Electronic Transmission. A person or entity represented by an attorney must file electronically, unless otherwise specified in the OHA Standing Orders on Electronic Transmission or when the ALJ has allowed non-electronic filing for good cause.

(2) *Non-electronic.* A document not filed electronically must be delivered for filing to DCHD at the address specified in the OHA Standing Orders on Contact Information.

(c) *Timeliness.*

(1) *Electronic.* A document filed electronically is deemed timely if filed by 11:59 p.m. Mountain Time on the date the document is due under the terms specified in the OHA Standing Orders on Electronic Transmission.

(2) *Non-electronic.* A document not filed electronically is deemed timely if, on or before the last day for filing, it is sent by express mail or dispatched to a third-party commercial courier for delivery on the next business day. The date of mailing or dispatch must be documented by a postmark date, acceptance scan, receipt, or similar written acknowledgement from the carrier delivering the document for filing. A document not received within 2 business days of the filing

deadline is presumed untimely, but the presumption may be overcome by the documentation establishing the date of mailing or dispatch.

(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 an opportunity to correct.

65. Revise § 4.1013 to read as follows:

**§ 4.1013 How must documents be served?**

(a) *Generally.* Any document filed in a case under this subpart must be served concurrently on each party to the proceeding under the terms specified in this section and in accordance with the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information.

(b) *Service on Represented Parties.* Service on a party known to be represented by an attorney, or another designated representative, must be made on the representative. Parties must serve the appropriate office of the Office of the Solicitor as provided in the OHA Standing Orders on Contact Information until a particular attorney of the Office of the Solicitor files and serves a notice of appearance in the proceeding, after which that attorney must be served.

(c) *Service Address.* Every person or entity who files a document in connection with the proceeding must provide the mailing or electronic address that the person or entity intends to use for service in the proceeding. A person or entity seeking to receive service electronically must consent to electronic service as required by paragraph (e)(1) of this section. If a person or entity has not consented to electronic service, then anyone serving a document on that person or entity must use the mailing address in the person's or entity's most recent filing or, if there has not been any filing, the mailing address of the person or entity as provided by OFA.

(d) *Address Changes.* A party whose mailing or electronic address changes during the proceeding must promptly file and serve a written notice of the change and must specify the applicable docket number or docket numbers when available.

(e) *Manner of Service.* A document must be served electronically or non-electronically as follows:

(1) *Electronic.* Service may be made electronically on the Office of the Solicitor as specified in the OHA Standing Orders on Electronic Transmission. Service may be made electronically on all other persons or entities who have consented to electronic service under the terms specified in the OHA Standing Orders on Electronic Transmission.

(2) *Non-electronic.* Service may be made non-electronically by personal delivery, express mail, or third-party commercial courier for delivery on the next business day.

(f) *Certificate of Service.* At the conclusion of any document that a party must serve under this subpart, the party or the party's representative must sign a written statement that:

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

(2) Specifies the date and manner of service.

(g) *Completion of Service.*

(1) *Electronic.* Service by electronic means is complete on sending or as otherwise provided by the OHA Standing Orders on Electronic Transmission, unless the party making service is notified that the document was not received by the party served.

(2) *Non-electronic.* Service by express mail or by commercial courier for delivery on the next business day is complete on mailing or dispatch to the carrier. The date of mailing or

dispatch must be documented by a postmark date, acceptance scan, receipt, or other similar written acknowledgement from the carrier delivering the document.

(h) *Issuance.* An ALJ may issue notices, orders, recommended decisions, or other documents electronically or non-electronically as follows:

(1) *Electronic.* A notice, order, recommended decision, or other document will be issued electronically to the electronic service address provided by the person or entity, and service is complete on sending or as otherwise specified by the OHA Standing Orders on Electronic Transmission.

(2) *Non-electronic.* If an electronic service address has not been provided, then

(i) A notice, order, or other document will be issued by first-class United States mail or third-party commercial courier to the mailing address provided by the person or entity or, if not provided, to the last known address, and service is complete on mailing or dispatch; and

(ii) A recommended decision will be sent by certified United States mail to the mailing address provided by the person or entity or, if not provided, to the last known mailing address, and service is complete when received. If a recommended decision sent by certified mail is not claimed by the recipient or is returned as undeliverable, then service will be made by first-class United States mail, and service is deemed complete when mailed.

#### **§ 4.1017 [Amended]**

66. In § 4.1017, amend paragraph (a) by removing the citation “§ 4.27(b)” and adding in its place the citation ““§ 4.27””.

### **Subpart L – Specific Rules Applicable to Hearings and Appeals Concerning Surface Coal Mining**

67. Revise the heading of subpart L to read as set forth above.

68. Revise § 4.1100 to read as follows:

**§ 4.1100 Scope and Definitions.**

(a) *Scope.* This subpart contains the rules applicable to hearings and appeals concerning surface coal mining. Subpart A contains the authority, jurisdiction, and membership of the Departmental Cases Hearings Division (DCHD) and the Interior Board of Land Appeals (Board) within the Office of Hearings and Appeals (OHA). Subpart B contains the general rules applicable to proceedings before DCHD and the Board as well as other components of OHA. For additional rules specific to proceedings before DCHD and the Board, see subparts C and E respectively.

(b) *Definitions.* In addition to the definitions in subpart A, the following definitions apply to this subpart:

(1) *Act* means the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 *et seq.*, 30 U.S.C. 1201 *et seq.*

(2) *Administrative law judge* or *ALJ* means an administrative law judge appointed to the Departmental Cases Hearings Division (DCHD) in the Office of Hearings and Appeals.

(3) *Board* means the Interior Board of Land Appeals in the Office of Hearings and Appeals.

69. Amend § 4.1101 by revising paragraph (a) introductory text to read as follows:

**§ 4.1101 Jurisdiction of the Board.**

(a) The jurisdiction of the Board includes the authority to exercise the final decision making power of the Secretary under the act pertaining to—

\* \* \* \* \*



70. Revise § 4.1107 to read as follows:

**§ 4.1107 Filing of documents.**

(a) Proceedings before an administrative law judge (ALJ).

(1) Any initial pleadings or other documents in a proceeding to be conducted or being conducted by an ALJ under these rules must be filed with DCHD as specified in § 4.102 of this part as well as the OHA Standing Orders on Electronic Transmission and the OHA Standing Orders on Contact Information available on the Department of the Interior OHA website at <https://www.doi.gov/oha>.

(2) The effective filing date for documents filed with DCHD will be determined as specified in § 4.102(a) of this part. The person or entity filing the document has the burden of establishing the filing date.

(b) Proceedings before the Board.

(1) Any notice of appeal, petition for review, or other documents in a proceeding to be conducted or being conducted by the Board must be filed as specified in § 4.407 of this part, the OHA Standing Orders on Electronic Transmission, and the OHA Standing Orders on Contact Information.

(2) The effective filing date for documents filed with the Board will be determined as specified in § 4.407(a) of this part. The person or entity filing the document has the burden of establishing the filing date.

71. Revise § 4.1108 to read as follows:

**§ 4.1108 Form of documents.**

(a) Any document filed with OHA in any proceeding brought under the act must 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 must contain the assigned docket number.

(c) The caption may include other information appropriate for identification of the proceeding, including the permit number or OSMRE identification number.

(d) Each document must contain a title that identifies the contents of the document following the caption.

(e) The original of any document filed with OHA must be signed, or digitally signed, by the person or entity submitting the document or by the representative of the person or entity.

(f) The mailing address, email address, telephone number, and other contact information for the person or entity filing the document or the attorney representing the person or entity must appear beneath the signature.

(g) Documents filed under this subpart with DCHD must also conform to the requirements of § 4.103 of this part, and documents filed under this subpart with the Board must also conform to § 4.408 of this part.

72. Revise § 4.1109 to read as follows:

**§ 4.1109 Service.**

(a) Any party initiating a proceeding under the act must concurrently serve copies of the initiating documents on the appropriate office of the Office of the Solicitor representing OSMRE

in the State or on the Indian lands in which the mining operation at issue is located and on any other statutory parties as specified under § 4.1105 of this part.

(b) The jurisdiction and contact information for the appropriate office of the Office of the Solicitor to be served under paragraph (a) of this section are set forth in the OHA Standing Orders on Contact Information.

(c) All other documents filed with DCHD must be served as specified in § 4.102 of this part.

(d) All other documents filed with the Board must be served as specified in § 4.407 of this part.

73. Revise § 4.1117 to read as follows:

**§ 4.1117 Reconsideration.**

A party may file a petition for reconsideration from an order or decision of an ALJ or the Board as follows:

(a) A petition for reconsideration from an order or decision of an ALJ may only be filed in accordance with the provisions of § 4.130 of this part, except that a petition for reconsideration may not be filed in an expedited review proceeding under § 4.1180 or in a suspension or revocation proceeding under § 4.1190.

(b) A petition for reconsideration from an order or decision of the Board may only be filed in accordance with the provisions of § 4.415 of this part.

74. Revise the undesignated center heading before § 4.1120 to read “Hearings and Discovery”.

75. Revise § 4.1120 to read as follows:

**§ 4.1120 Proceedings before administrative law judge (ALJ).**

(a) *General rules.* The general procedural rules for practice before DCHD at §§ 4.100 through 4.131 of this part govern practice and procedure in addition to the specific rules set forth in subpart L.

(b) *Presiding officer.* An ALJ will preside over any hearings required by the act to be conducted pursuant to 5 U.S.C. 554. The ALJ has the authority to conduct the proceeding in an orderly and judicial manner and may take any action authorized by the act, subpart C of this part, subpart L of this part, or 5 U.S.C. 554–57.

76. Revise § 4.1121 to read as follows:

**§ 4.1121 Initial orders and decisions.**

(a) An initial order or decision disposing of a case must contain:

(1) Findings of fact and conclusions of law as well as the reasons for those findings and conclusions as they relate to all material issues of fact, law, and discretion presented on the record; and

(2) An order granting or denying the relief.

(b) An initial order or decision will become final if that order or decision is not timely appealed to the Board under § 4.1270 or § 4.1271, unless the ALJ accepts a petition for reconsideration for further analysis under § 4.1117 and § 4.130 of this part.

77. Revise § 4.1122 to read as follows:

**§ 4.1122 Termination of jurisdiction.**

Except as otherwise provided in these regulations, the jurisdiction of an ALJ will terminate upon:

(a) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;

(b) The issuance of an order by the Board granting a petition for review; or

(c) The expiration of the time period within which a petition for review or an appeal to the Board may be filed.

**§§ 4.1123 through 4.1141 [Removed]**

78. Remove §§ 4.1123 through 4.1141.

**§ 4.1150 [Amended]**

79. Amend § 4.1150 by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

**§ 4.1153 [Amended]**

80. Amend § 4.1153 by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

**§ 4.1161 [Amended]**

81. Amend § 4.1161 by removing the words “the Hearings Division, OHA” and adding in their place “DCHD”.

**§ 4.1182 [Amended]**

82. Amend § 4.1182 by removing the words “the Hearings Division” and adding in their place “DCHD”.

**§ 4.1190 [Amended]**

83. In § 4.1190, amend paragraph (a) by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

**§ 4.1191 Answer.**

84. Amend § 4.1191 by removing the words “the Hearings Division, OHA” and adding in their place “DCHD”.

**§ 4.1200 [Amended]**

85. In § 4.1200, amend paragraphs (a) and (b) by removing the words “the Hearings Division, OHA” in the three places they appear and adding in their place “DCHD”.

**§ 4.1201 [Amended]**

86. Amend § 4.1201 by:

a. In paragraphs (a) and (b), removing the words “the Hearings Division, OHA” in both places they appear and adding “DCHD”; and

b. In paragraph (c), removing the words “the main office of OHA” and adding in their place the word “DCHD”.

**§ 4.1202 [Amended]**

87. In § 4.1202, amend paragraph (a) by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

**§ 4.1203 [Amended]**

88. In § 4.1203, amend paragraph (b) by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

**§ 4.1262 [Amended]**

89. Amend § 4.1262 by removing the words “the Hearings Division, OHA” and adding in their place the word “DCHD”.

90. Revise § 4.1272 to read as follows:

**§ 4.1272 Interlocutory appeals.**

(a) A party seeking permission to file an interlocutory appeal must comply with the requirements of §§ 4.122 and 4.414 of this part.

(b) Upon affirmance, reversal, or modification of the administrative law judge’s interlocutory ruling or order, the jurisdiction of the Board will terminate, and the case will be remanded promptly to the administrative law judge for further proceedings.

91. Amend § 4.1286 by:

a. In paragraph (c)(2)(iii), removing the words “in accordance with § 4.411”; and

b. Revising the first sentence of paragraph (e) to read as follows:

**§ 4.1286 Motion for a hearing on an appeal involving issues of fact.**

\* \* \* \* \*

(e) The hearing will be conducted under §§ 4.1100, 4.1102 through 4.1115, and 4.1120 through 4.1122. \* \* \*

92. Revise § 4.1287 to read as follows:

**§ 4.1287 Action by administrative law judge.**

The administrative law judge will adjudicate the referral in accordance with §§ 4.150 through 4.151 of this part.

**§ 4.1301 [Amended]**

93. In § 4.1301, amend paragraph (a) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD.”

**§ 4.1303 [Amended]**

94. In § 4.1303, amend paragraph (b) by removing the words “§ 4.1109 (a) and (b) of this part” and adding in their place the words “§ 4.1109 of this part”.

**§ 4.1304 [Amended]**

95. Amend § 4.1304 by removing the words “the Hearings Division” and adding in their place the word “DCHD.”

**§ 4.1352 [Amended]**

96. In § 4.1352, amend paragraph (b) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior,” and adding in their place the word “DCHD.”

**§ 4.1362 [Amended]**

97. In § 4.1362, amend paragraph (a) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior,” and adding in their place the word “DCHD”.

**§ 4.1367 [Amended]**

98. In § 4.1367, amend paragraph (b) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD”.

**§ 4.1371 [Amended]**

99. Amend § 4.1371 by:

a. In paragraph (a), removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD”; and

b. In paragraph (c), removing the words “the Hearings Division” and adding in their place the word “DCHD”.

**§ 4.1376 [Amended]**



100. In § 4.1376, amend paragraph (b) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD”.

**§ 4.1381 [Amended]**

101. Amend § 4.1381 by:

a. In paragraph (a), removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD”; and

b. In paragraph (c), removing the words “the Hearings Division” and adding in their place the word “DCHD”.

**§ 4.1386 [Amended]**

102. In § 4.1386, amend paragraph (b) by removing the words “the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior” and adding in their place the word “DCHD”.

103. Revise § 4.1393 to read as follows:

**§ 4.1393 Status of decision pending administrative review.**

Determinations of the Office of Surface Mining under 30 U.S.C. 1272(e) will not be effective during the time in which a person or entity adversely affected may file a notice of appeal. When the public interest requires or to protect trust resources, however, the Board may provide that a decision, or any part of a decision, will be effective immediately.