

 **United States Department of the Interior**

**Office of Hearings and Appeals**

 **Interior Board of Land Appeals**

**801 N. Quincy St., Suite 300**

**Arlington, VA 22203**

ADMINISTRATIVE REVIEW OF BUREAU DECISIONS

**Eileen Jones,**

**Chief Administrative Judge**

**James F. Roberts, Administrative Judge**

**Toni Lundeen,**

**Acting Docket Attorney and Counsel to the Board**

**The Interior Board of Land Appeals (IBLA) is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior. Its administrative judges decide appeals from bureau decisions relating to the use and disposition of public lands and their resources.**

**This document provides a comprehensive outline of IBLA’s administrative review process.**

TABLE OF CONTENTS

[I. OVERVIEW OF THE DEPARTMENTAL APPEALS PROCESS 1](#_Toc424729092)

[A. Origin of the Department of the Interior: 1](#_Toc424729093)

[**B.**  **Evolution of Administrative Review**: 1](#_Toc424729094)

[II. ORGANIZATION OF OFFICE OF HEARINGS AND APPEALS (OHA) 2](#_Toc424729095)

[A. Director: 2](#_Toc424729096)

[B. Hearings Division: 2](#_Toc424729097)

[C. Boards of Appeals: 3](#_Toc424729098)

[III. JURISDICTION OF THE BOARD OF LAND APPEALS 3](#_Toc424729099)

[A. Regulatory Definition of Jurisdiction: 3](#_Toc424729100)

[B. Jurisdiction Over BLM Decisions: 4](#_Toc424729101)

[C. Appeals of Decisions of Office of the Former Minerals Management Service (MMS) 5](#_Toc424729102)

[D. Appeals of Decisions of the Office of Surface Mining Reclamation and Enforcement (OSM): 5](#_Toc424729103)

[E. Appeals of Decisions of the Bureau of Indian Affairs: 5](#_Toc424729104)

[F. Other Agencies Affected by IBLA: 5](#_Toc424729105)

[IV. DESCRIPTION OF THE BOARD AND ITS INTERNAL PROCEDURES 6](#_Toc424729106)

[A. Makeup of the Board: 6](#_Toc424729107)

[B. Procedure for Handling Cases: 6](#_Toc424729108)

[C. Briefing and Filing Motions Before the Board: 8](#_Toc424729109)

[D. Deciding Cases: 15](#_Toc424729110)

[E. Finality of an IBLA Decision: 17](#_Toc424729111)

[V. SCOPE OF REVIEW BY THE BOARD OF LAND APPEALS 17](#_Toc424729112)

[A. De Novo Review Authority: 17](#_Toc424729113)

[B. The Board Will Not Substitute its Judgment: 18](#_Toc424729114)

[C. Preponderance of the Evidence: 19](#_Toc424729115)

[D. Initial Decisions/Advisory Opinions: 19](#_Toc424729116)

[E. Interlocutory Appeals: 19](#_Toc424729117)

[F. Review of Statutes: 19](#_Toc424729118)

[G. Review of Regulations: 19](#_Toc424729119)

[H. BLM Instruction Memoranda and the BLM Manual: 19](#_Toc424729120)

[VI. JUDICIAL REVIEW OF BOARD DECISIONS 20](#_Toc424729121)

[A. Venue: 20](#_Toc424729122)

[B. Exhaustion of Administrative Remedies: 20](#_Toc424729123)

[C. Scope of Court Review: 21](#_Toc424729124)

[VII. ADMINISTRATIVE HEARINGS 21](#_Toc424729125)

[A. Contests: 22](#_Toc424729126)

[B. Hearings Required by Statute and/or Regulation: 23](#_Toc424729127)

[C. Hearings Ordered by IBLA: 23](#_Toc424729128)

[D. Burden of Proof: 23](#_Toc424729129)

[VIII. MECHANICS OF THE APPEAL PROCESS 23](#_Toc424729130)

[A. Time Limit for Filing: 23](#_Toc424729131)

[B. Place of Filing: 24](#_Toc424729132)

[C. When Is The Blm Decision Served? 25](#_Toc424729133)

[D. When is a notice of appeal "filed" or "transmitted"? 25](#_Toc424729134)

[E. Who May File An Appeal? 26](#_Toc424729135)

[F. Distinguishing Appeals and Protests: 26](#_Toc424729136)

[G. Adjudication of Protests by BLM: 27](#_Toc424729137)

[H. Effect Of The Filing Of An Appeal: 28](#_Toc424729138)

[I. Forwarding The Case File To IBLA: 29](#_Toc424729139)

[J. Stays: 29](#_Toc424729140)

[K. Reconsideration Of A Blm Decision In The Absence Of An Appeal: 29](#_Toc424729141)

[IX. REASONS FOR ADMINISTRATIVE REVIEW 30](#_Toc424729142)

[A. Factual Record: 30](#_Toc424729143)

[B. Legal Rationale: 30](#_Toc424729144)

[C. Uniformity: 30](#_Toc424729145)

[D. Objective Administrative Review: 30](#_Toc424729146)

[X. PREPARATION OF THE ADMINISTRATIVE RECORD (CASE FILE) 31](#_Toc424729147)

[A. Case Record: 31](#_Toc424729148)

[B. Supplementing the Record after an Appeal is Filed: 31](#_Toc424729149)

[C. Shell Offshore, Inc., 113 IBLA 226, 97 I.D. 74 (1990). 31](#_Toc424729150)

[D. Incomplete Record: 32](#_Toc424729151)

[E. Agency Decision Not Supported by the Record: 32](#_Toc424729152)

[F. Rule of Reason: 32](#_Toc424729153)

[XI. CONTENT OF THE ADMINISTRATIVE DECISION 32](#_Toc424729154)

[A. Sound Decision Drafting. 32](#_Toc424729155)

[B. Avoiding Conclusory Decisions. 33](#_Toc424729156)

[C. Finality of BLM Decisions: 33](#_Toc424729157)

[XII. CITATION OF LEGAL AUTHORITY 35](#_Toc424729158)

[A. What Is Valid Precedent? 35](#_Toc424729159)

[B. Published IBLA Decisions: 36](#_Toc424729160)

[C. How to Cite Departmental Decisions and Solicitor's Opinions: 36](#_Toc424729161)

[D. How To Cite Departmental Regulations: 36](#_Toc424729162)

# I. OVERVIEW OF THE DEPARTMENTAL APPEALS PROCESS

## Origin of the Department of the Interior:

The Department of the Interior was created by law enacted on March 3, 1849, primarily to adjudicate claims to the public lands. Prior to that time, the public lands were administered by the General Land Office (GLO) within the Treasury Department.

**B. Evolution of Administrative Review**:

The effort to provide "objective administrative review" led to the present Departmental appeals structure.

**1. From 1848 to 1947:** Since its creation, the Department of the Interior has consistently provided a right of appeal to the Secretary from decisions of subordinate employees in public land cases. Until 1947, the Secretary, Under Secretary, or an Assistant Secretary actually signed decisions constituting final Departmental action.

**2. From 1947 to 1970:** With the creation of the Bureau of Land Management (BLM), the Department, in 1947, implemented a two-tiered administrative review procedure for public land cases. A right of appeal was given from decisions of officials of BLM State offices to the Director of BLM. The Director delegated his review authority to an "Office of Appeals and Hearings" within BLM, which issued decisions on his behalf. The decisions of the Director were in turn appealable by right to the Secretary of the Interior. The Secretary delegated his final review authority to the Office of the Solicitor.

The apparent combination of the function of administrative review of adjudicative decisions with the functions of administering the public land and natural resource laws, in the case of BLM, or acting as Departmental counsel for the implementation of those laws, in the case of the Solicitor, led to a lack of public confidence in the administrative appeals process. *See* Public Land Law Review Commission, One Third of the Nation's Land 254 (1970).

**3. Creation of the Office of Hearings and Appeals (OHA) in 1970:** In response to these concerns, the Department created OHA in 1970.

**a**  OHA is the "authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 C.F.R. § 4.1.

**b.** OHA is not a part of BLM or any other Bureau. Rather, OHA is a separate entity operating under a delegation of authority from the Secretary.

**c.** OHA is also properly distinguished from the Office of the Solicitor.

**d.** The Office of the Solicitor provides legal counsel to BLM as well as the Secretary and other subdivisions of the Department.

**e.** The Office of the Solicitor argues the case in support of the decision of BLM before OHA. It is OHA which exercises the delegated authority of the Secretary to make final decisions in hearings and appeal cases.

# II. ORGANIZATION OF OFFICE OF HEARINGS AND APPEALS (OHA)

## A. Director:

OHA is headed by a Director. The Director reports directly to the Assistant Secretary, Policy, Management, and Budget.

## B. Hearings Division:

This component of OHA consists of the Departmental Administrative Law Judges.

Administrative Law Judges (appointed pursuant to 5 U.S.C. § 3105 are authorized to conduct hearings in cases required by law to be conducted pursuant to the Administrative Procedure Act, 5 U.S.C. § 554, and hearings in other cases arising under statutes and regulations administered by the Department.

**1.** Mining contests including validity and occupancy trespass.

**2**. Grazing cases including trespass and preference right award.

**3.** Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §  1201, citations, and civil penalties.

**4.** Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701, civil penalties.

**5.** Cases referred by the Board of Land Appeals for evidentiary hearings on material issues of fact pursuant to 43 C.F.R. § 4.415.

**6.** Indian probate matters.

## C. Boards of Appeals:

The appellate division of OHA consists of three separate boards.

**1.** **The Interior Board of Indian Appeals (IBIA)** decides appeals from decisions of officials of the Bureau of Indian Affairs and appeals from decisions of administrative law judges in Indian probate matters.

**2.** **The Interior Board of Land Appeals (IBLA),** the jurisdiction of which is discussed at length below, is OHA's largest board.

**3.** **Ad Hoc Appeals.** The Ad Hoc Appeals Board are appointed as needed to consider various appeals to the head of the Department which do not fall within the jurisdiction of any of the established appeals boards. See 43 C.F.R. § 4.1(b)(4).

# III. JURISDICTION OF THE BOARD OF LAND APPEALS

## A. Regulatory Definition of Jurisdiction:

The IBLA "decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to: (i) The use and disposition of public lands and their resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended; (ii) the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977." 43 C.F.R. § 4.1(b)(3).

## B. Jurisdiction Over BLM Decisions:

"Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right of appeal to the Board." 43 C.F.R. § 4.410(a).

**1.** Common appeals of BLM decisions involve adjudication of lease rights in minerals (oil and gas, coal, etc.) leased under the Mineral Leasing Act, 30 U.S.C. § 181 (1994); rights in mining claims; oil and gas operations; grazing; color of title; rights-of-way; desert land entry; Alaska Native allotments; state selections; and others.

**2.** Decisions involving Native land selections under the Alaska Native Claims Settlement Act of 1971 have been appealable to IBLA since it assumed the jurisdiction of the former Alaska Native Claims Appeals Board in 1982.

**3.** Exceptions: Decisions of officers of BLM are ordinarily appealable to IBLA subject to the following exceptions:

**a.** Decisions approved by the Secretary. Approval by the Secretary deprives the Board (which ordinarily exercises his delegated authority to decide appeals) of jurisdiction to review the decision. 43 C.F.R. § 4.410(a)(3).

**b.** Decisions approved by an Assistant Secretary where such approval occurs prior to the filing of an appeal to the Board. *Blue Star, Inc*., 41 IBLA 333 (1979); *Cook Inlet Region, Inc*., 132 IBLA 186 (1995).

**c.** Land classification decisions under 43 C.F.R. Part 2400. See 43 C.F.R. § 4.410(a)(1).

**d.** Decisions of the Director, BLM, regarding protests of resource management plans (RMP's), which decisions are final for the Department. 43 C.F.R. § 1610.5-2(b). See Harold E. Carrasco, 90 IBLA 39 (1985). However, decisions regarding approval or amendment of RMP's are properly distinguished from decisions implementing those plans which are appealable pursuant to the regulations at 43 C.F.R. Part 4. 43 C.F.R. § 1610.5-3(b); see Joel Stamatakis, 98 IBLA 4 (1987).

**e.** Appeals by a surface owner concerning leasing of Federal coal in split estate lands. 43 C.F.R. § 3427.2(k).

## C. Appeals of Decisions of Office of the Former Minerals Management Service (MMS)

**1.** The Reorganization of the Former MMS: On May 19, 2010, Secretary of the Interior Ken Salazar signed a Secretarial Order dividing the Minerals Management Service (MMS) into three independent entities:

**a.** Bureau of Ocean Energy Management (BOEM): This agency ensures the balanced and responsible development of energy resources on the Outer Continental Shelf (OCS). The Board has jurisdiction over, inter alia, decommissioning cases.

**b.** Bureau of Safety and Environmental Enforcement (BSEE): This agency was created to enforce safety and environmental regulations. The Board has jurisdiction over INC cases.

**c.** Natural Resources Revenue (ONRR): This agency ensures a fair return to the taxpayer from off- and on-shore royalty and revenue collection and disbursement activities. Royalty matters are appealable to the Board.

## D. Appeals of Decisions of the Office of Surface Mining Reclamation and Enforcement (OSM):

The jurisdiction of IBLA was expanded in 1983 by granting to the Board the appellate review functions previously exercised by the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). IBLA now decides appeals from decisions of the Administrative Law Judges and officials of OSM rendered under the authority of the Surface Mining Control and Reclamation Act of 1977.E.

## E. Appeals of Decisions of the Bureau of Indian Affairs:

Although OHA has IBIA, a separate Board, to handle most appeals from Bureau of Indian Affairs officials, decisions regarding minerals management issues on Indian lands decided by MMS are appealable to the "Commissioner of Indian Affairs." Decisions rendered by the Commissioner (actually, the Deputy Assistant Secretary--Indian Affairs) are subject to appeal to IBLA. 30 C.F.R. § 290.7. See Jicarilla Apache Tribe, IBLA 96-29, Order dated Oct. 23, 1995.

## F. Other Agencies Affected by IBLA:

In addition to the direct review of decisions by the agencies noted above, decisions by IBLA may affect program activities of other agencies within Interior, such as the Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation, as well as outside agencies such as the Forest Service, U.S. Department of Agriculture. These agencies may also have standing to appeal from adverse BLM decisions.

# IV. DESCRIPTION OF THE BOARD AND ITS INTERNAL PROCEDURES

## A. Makeup of the Board:

The Board itself consists of 5 Administrative Judges headed by a Chief Administrative Judge. All of the Judges are attorneys with various backgrounds in public land and natural resource law. The Judges are career civil servants.

**Note:** The Board is an appellate review body and the Administrative Judges which sit on the Board are properly distinguished from the Departmental Administrative Law Judges which conduct hearings and whose decisions rendered after a hearing are generally appealable to the Board.

## B. Procedure for Handling Cases:

**1.** Docketing: As new appeal case files are received by IBLA the appeals are docketed. Also, when an appeal is accompanied by a request for stay under 43 C.F.R. § 4.21, it is docketed even though IBLA has not received the file.

**a.** A Docket Number is assigned. The docket number consists of the prefix "IBLA" to show that the appeal was docketed by the Board of Land Appeals and a numerical prefix representing the fiscal year in which the case is received, followed by a dash and the serial number of the case. Thus, the 450th case received in FY 2015 will have the docket number IBLA 2015-450.

**b.** Docket Management System: Electronic database that identifies the appellant's name, the docket number, the type of case, the BLM serial number, the date the case was received, a record of all submissions received regarding the case (e.g., briefs, motions, etc.), and a record of all actions taken by the Board with respect to the appeal (e.g., orders granting extension of time, intervention, consolidation; decisions on the merits; reconsideration petitions; etc.).

**c.** Inquiries regarding pending cases:

(1) Note: When making inquiries regarding the status of appeals, cases are properly referred to by the IBLA docket number. The docket number used to identify a specific appeal is properly distinguished from a citation to an opinion deciding a case. A citation consists of the name of the decision (usually, but not always, the name of the appellant), the volume and page of the IBLA Reports at which the decision is found, and the year of the decision (i.e., George H. Ruth, 121 IBLA 31 (1991)).

(2) Status inquiries should be directed to the Docket Attorney and not to the assigned Judge. The regulations prohibit any ex parte communications regarding the merits of a pending case made outside the presence of all the parties to the appeal, 43 C.F.R. § 4.27(b), and it is easier to avoid running afoul of this regulation if status inquiries are handled in this manner.

**2.** Assignment of cases:

**a.** Cases are assigned at the time they are docketed to a panel of Administrative Judges with one of the Judges designated as author. The case then becomes a part of the pending docket or case load of the Judge assigned to author the decision.

**b.** Cases are assigned by the Docket Clerk in systematic rotation which ensures an even distribution of the workload and avoids the preselection of a particular Judge to work on certain cases or even on certain types of cases. This promotes fairness to parties to the appeals and makes for better decisionmaking. An exception is generally made for cases which have been before the Board previously which are assigned to the Judge who issued the earlier decision.

**3.** Preliminary Review for Summary Disposition: In an effort to expedite the resolution of cases by the Board, all incoming appeals are screened by the Docket Attorney to ascertain whether they are potentially suitable for the summary disposition docket.

**a.** Cases suitable for summary disposition are generally those which are:

(1) Subject to dismissal for lack of jurisdiction (e.g., untimely appeal).

(2) Governed by well-settled principles of law (statute, regulation, and precedent) where the undisputed facts preclude any chance of affording appellant any relief on appeal.

**b.** These cases are withheld from the general case assignments to panels and are worked on by the Docket Attorney in conjunction with the Chief Administrative Judge. In this way, these cases are fast-tracked for more rapid disposition in lieu of waiting their turn on the Judge's dockets of assigned cases. These cases are decided by orders which, unlike regular opinions, are not published in the volumes of IBLA decisions and cannot be cited.

**c.** Rationale for summary docket: Avoid delaying the resolution of those appeals which present no genuine issue requiring the normal process of legal research, opinion drafting, and deliberation.

## C. Briefing and Filing Motions Before the Board:

**1.** Ex Parte Communications Barred: No communication regarding the merits of an appeal pending before the Board may be received by IBLA unless, if made in writing, a copy is served on all the parties to the case or, if made orally, the communication is made in the presence of all the parties to the case. 43 C.F.R. § 4.27(b). This is a rule of fundamental fairness used in virtually all judicial systems which is designed to protect the rights of all parties. Note: This regulation applies to information (other than a status inquiry) tendered by BLM officials as well as by the appellant or an adverse party.

**2.** Statement of Reasons for Appeal: If the notice of appeal did not include a statement of reasons or if appellant wishes to supplement the statement of reasons, the Board will permit the appellant to file additional written arguments or briefs within 30 days of the filing of the notice of appeal. 43 C.F.R. § 4.412(a).

* Failure to file a statement of reasons for appeal subjects an appeal to summary dismissal. 43 C.F.R. § 4.402(a).

**3.** Answer: Any party served with a notice of appeal who wishes to participate in the proceeding must file an answer within 30 days of service on him of the notice of appeal or statement of reasons.

* Failure to file an answer will not result in a default. 43 C.F.R. § 4.414.b. Note: When you receive a notice of appeal at BLM in a case which you perceive as important in terms of the impact to the parties or the potential impact on BLM decisionmaking, make the effort to persuade the Solicitor to appear on behalf of BLM and file an answer. A Solicitor's brief is potentially invaluable to IBLA review of the case.

**4.** Preliminary Motions:

**a.** Extension of Time: As a general rule, the time for filing any document other than the notice of appeal itself may be extended by the Board. 43 C.F.R. § 4.22(f).

**b.** Stay of Effect of Decision Pending Appeal:

(1) Until recently, the appeals regulation provided, subject to certain exceptions, that a decision will not be effective during the time in which any person adversely affected may file a notice of appeal and, once a timely appeal is filed, pending the decision on appeal. See 43 C.F.R. § 4.21(a) (1995).

(2) The reason for the automatic stay is to preserve the opportunity for administrative review (appeal) prior to judicial review by the courts.

(a) Under the Administrative Procedure Act (APA), an agency decision is final and thus subject to judicial review regardless of the right of appeal or administrative review within the Department unless the agency provides that the action is inoperative pending appeal. 5 U.S.C. § 704 (discussed infra).

(3) Effective February 19, 1993, 43 C.F.R. § 4.21(a) was amended to provide as follows:

(a) Except as otherwise provided by law or other pertinent regulation (1) a decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately; (2) a decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal; (3) a decision or that portion of a decision for which a stay is not granted will become effective after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section. 43 C.F.R. § 4.21(a), 58 Fed. Reg. 4942-4943 (Jan. 19, 1993).

(4) Upon the timely filing of a stay petition (with the notice of appeal), the effect of the decision is stayed for a period of 45 days from the expiration of the appeal period to allow the Board to act on the stay petition. 43 C.F.R. § 4.21(b)(4), 58 Fed. Reg. at 4943.

In David M. Burton, et al., 11 OHA 117 (1995), the Director of OHA ruled that failure by the Board to rule on a petition for a stay within the 45-day period does not divest the Board of the authority to rule on the petition. Such authority was delegated to the Board by the Secretary of the Interior. "The authority to decide appeals necessarily includes authority to issue orders, including stays, as needed for the proper functioning of the review process." 11 OHA at 120. See also Brotherhood of Railway Carmen Division v. Pena, 64 F.3d 702 (D.C. Cir. 1995).

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

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

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

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

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

43 C.F.R. § 4.21(b)(1). These factors have long been recognized and applied by the courts, e.g., Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980), and this Board, e.g., Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986).

(6) Procedures for filing the stay petition and responses thereto:

(i) The appellant shall serve a copy of its notice of appeal and petition for a stay on each party named in the decision from which the appeal is taken, and on the Director or the Appeals Board to which the appeal is taken. 43 C.F.R. § 4.21(b)(3).

(ii) Any party, including the officer who made the decision being appealed, may file a response to the stay petition within 10 days after service. 43 C.F.R. § 4.21(b)(3).

(7) A number of regulations specifically provide that decisions subject thereto are to be effective immediately, or may be made effective immediately in the discretion of the authorized officer rendering the decision. Decisions subject to these various regulations were excepted from the automatic stay provisions of previous 43 C.F.R. § 4.21(a), and are now excepted from the revised version of 43 C.F.R. § 4.21(a).

(i) Decisions under the onshore oil and gas geophysical exploration regulations, 43 C.F.R. Subpart 3150, and onshore oil and gas operations, 43 C.F.R. Subpart 3160. Sections 3150.2 and 3165.4(c) state generally that appeals from BLM decisions requiring compliance with an instruction, order, or decision shall not result in a suspension of the requirement for compliance. However, the Board may order a suspension of the requirement to comply pending resolution of the appeal provided the suspension will not be detrimental to the interests of the United States or upon submission and acceptance of a bond deemed adequate to indemnify the United States from loss or damage.

Note: In Utah Chapter of the Sierra Club, 121 IBLA 1 (1991), the Board ruled that BLM decisions approving applications for permit to drill are properly distinguished from orders and decisions requiring compliance with the operating regulations and, hence, are not subject to 43 C.F.R. § 3165.4(c), but are subject to the automatic stay provision of 43 C.F.R. § 4.21(a), thus overruling certain prior precedents to the contrary. The precedential effect of this decision itself has now been nullified by a modification of the regulation at 43 C.F.R. § 3165.4(c) to provide that "all" decisions and approvals under Part 3160 shall remain effective pending appeal unless IBLA determines otherwise based on the public interest. 57 Fed. Reg. 9013 (Mar. 13, 1992).

(ii) Coal lease readjustment terms and conditions shall be effective pending the outcome of an appeal to the Board. 43 C.F.R. § 3451.2(e). The obligation to pay royalties at a readjusted rate which is at issue on appeal may be suspended during the pendency of an appeal under the royalty management program regulations upon tender of a sufficient bond and a finding that the public interest would not be adversely affected; however, royalties accrue under the readjusted lease terms and are payable, plus interest, if the decision is upheld on appeal. The lack of a stay of the readjusted royalty rates pending appeal in the absence of a stay granted under the pay-pending-appeal regulations at 30 C.F.R. § 243.2 is the subject of the Board decision in Atlantic Richfield Co., 121 IBLA 373, 98 I.D. 429 (1991).

(iii) The filing of a notice of appeal shall not automatically suspend the effect of a decision governing or relating to forest management, including timber sales. 43 C.F.R. § 5003.1.

(iv) Under 43 C.F.R. § 8372.6(b), the filing of an appeal from a BLM decision with respect to a special recreation permit does not automatically stay the effect of that decision. Petitions for a stay of decisions may be made to the Board. See American Motorcyclist Ass'n v. Watt, 534 F. Supp. 923, 929 (C.D. Cal. 1981), aff'd, 714 F.2d 962 (9th Cir. 1983); Owen Severance, 118 IBLA 381 (1991).

(v) Decisions under the right-of-way regulations at 43 C.F.R. § Part 2800 and Part 2880 remain effective pending appeal unless the IBLA grants a motion to stay.

(vi) Decisions concerning surface management under the mining laws for lands not within wilderness review areas (43 C.F.R. § 3809.4).

(vii) A decision under 43 C.F.R. Part 4700 to remove wild horses and burros from public or private lands may be placed by the authorized officer into full force and effect if removal is required by applicable law or to preserve or maintain a thriving ecological balance and multiple use relationship. Appeals and petitions for stay of decisions shall be filed with IBLA as specified in this part. 43 C.F.R. § 4770.3(c).

(8). The exceptions to the automatic stay have generated a substantial number of motions to stay filed with the Board and a considerable amount of administrative litigation dealing with the issue of whether to grant a stay of the decision under appeal. In Sierra Club, 108 IBLA 381, 384-385 (1989), the Board held that: "Factors deemed necessary to support a stay request include: substantial likelihood of success on the merits; substantial threat of irreparable injury to the moving party if the stay is not granted; the threatened injury to the moving party must outweigh the potential harm the stay may do to the nonmoving party; and the stay must not be contrary to the public interest. Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11-12 (1986); see Sun Oil Co., 42 IBLA 254, 257-58 (1979). In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.' Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), quoted in Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895, 905 (N.D. Texas 1980)."

**c.** Expedited Consideration: The Board generally considers expedited review to be an extraordinary procedure granted only in the most pressing circumstances. The public interest is the key factor although the circumstances of the appellant may also be an important consideration.

**d.** Intervention: Standing to intervene will generally be recognized where a party with an interest adverse to the appellant may potentially be adversely affected by the decision on appeal. 43 C.F.R. § 4.406.

**e.** Consolidation: Where separate appeals pending before the Board involve identical or closely factual context and the same legal issues they may be consolidated by the Board in the interest of efficiency of administrative review. 43 C.F.R. § 4.404. Note: When a BLM office receives more than one appeal involving a similar factual context and the same issues, it is helpful to the Board if BLM will note this fact on the appeal transmittal memorandum, cross-referencing the earlier appeals(s). In this situation, the Board may find it appropriate to consolidate appeals on its own motion.

**f.** Hearing: Appeals to the Board of Land Appeals other than those in which an evidentiary hearing is required by statute or regulation are ordinarily decided on the basis of the administrative record without a hearing. Pursuant to the regulations, a hearing may be ordered by the Board where an appeal raises issues of material fact the resolution of which are necessary to disposition of the appeal on the merits. 43 C.F.R. § 4.415. Under this regulation, a hearing is required "when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977).

**g.** Oral Argument: The Board may, in its discretion, afford the parties to an appeal the opportunity for oral argument before the Judges deciding the case. 43 C.F.R. § 4.25. This is quite rare since arguments generally can be made effectively in written briefs.

## D. Deciding Cases:

**1.** Cases are decided by a majority of the Administrative Judges which consider the case. 43 C.F.R. § 4.2(a), (b). Most cases at IBLA are currently decided by a panel of two Administrative Judges.

**2.** Review and Drafting Decision:

**a.** The assigned Judge reviews the entire case including the case file, the transcripts of any hearing, any exhibits, and the briefs on appeal. In conjunction with a staff attorney, a legal analysis and a draft of a written opinion deciding the case is prepared.

**b.** The draft decision is then submitted to the other Judge on the panel for concurrence or dissent. The second Judge on the panel also reviews the entire record and the draft decision. The second Judge may concur in the lead opinion (sometimes after persuading the lead Judge to alter some of the discussion); may concur in a separate opinion; or may dissent with an opinion explaining his position.

**c.** In the event the second Judge dissents, a third Judge is selected for the panel and undertakes an independent review of the entire record and both draft opinions. The third Judge will determine which legal conclusion he is in agreement with, making that position the majority opinion.

**3.** Circulation: Draft decisions reached by a majority of the panel which considered the appeal (whether with or without a dissenting opinion) are copied and circulated to the other Administrative Judges of the Board.

**a.** During the period of circulation (presently five office days for drafts under 25 pages), other Administrative Judges may register their objections to the draft decision.

**b.** If three or more Judges are in serious disagreement with the draft decision, a hold is placed on the draft.

**4.** Board Meetings: Draft decisions placed on hold are scheduled for a Board meeting at which all of the Judges participate in the discussion of the proper legal resolution of the case. Results at Board meetings are determined by vote of the participating Judges after the conclusion of a full discussion (debate) of the proper legal analysis of the case.

**a.** The result of a case may be changed as a consequence of the outcome of a Board meeting with a new Judge writing the lead opinion and the original author writing a dissenting opinion.

**b.** If a case is deemed sufficiently important and controversial, the Board may vote to decide the case En Banc in which event all of the Judges of the Board will sign the decision, either as author, concurring panelist, or dissenter.

**5.** Collegial Review Process: This process by which the Board decides appeal cases is referred to as a collegial review process. Cases are not decided by the assigned Judge alone. Appeals are reviewed by a panel of at least two Judges and all of the Judges of the Board have an opportunity to provide input before a decision is finally reached. This process is remarkably effective in ensuring that the proper decision is reached and that an understandable basis is provided for that result. In this way, appellants, adverse parties, and BLM officials are protected from arbitrary results which might inadvertently occur as a consequence of oversight.

**6.** Reconsideration: Petitions for reconsideration are referred to the panel of Judges which originally decided the case.

**a.** A petition for reconsideration may be granted only in extraordinary circumstances where good reason is shown therefor. 43 C.F.R. §§ 4.21(c), 4.403. Generally requires a showing of material error of fact or persuasive new legal argument not previously considered.

**b.** Petition for reconsideration must be filed within 60 days of the date of the IBLA decision. 43 C.F.R. § 4.403.

**c.** The Board will deny a petition for reconsideration based upon arguments which the Board considered and rejected in its decision or order. E.g., Order, Mary Magera, IBLA 87-395 (Mar. 25, 1988).

**d.** The Board will grant a petition for reconsideration when a party demonstrates error in the legal premise upon which the Board's decision was based. E.g., Joan Chorney (On Reconsideration), 109 IBLA 96 (1989); Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (1988); Stoddard Jacobsen v. Bureau of Land Management (On Reconsideration), 103 IBLA 83 (1988).

**e.** The Board will reconsider a decision in which it misinterpreted relevant facts. E.g., Western Labs & Engineering, IBLA 88-31 (Mar. 15, 1988).

**f.** The Board will grant a petition for reconsideration when a party supports that petition with evidence not before the Board when it rendered its decision, and this evidence demonstrates error in such decision. E.g;, Order, Amelia Marglin Whitson, IBLA 85-833 (Apr. 20, 1988). However, "some" new evidence might constitute insufficient grounds for reconsideration. See In re Long Missouri Timber Sale, 106 IBLA 83 (1988).

**g.** The Board may grant a petition for reconsideration based upon judicial developments affecting the issue involved in the appeal. E.g., Order, Atlantic Richfield Co., IBLA 86-211 (Aug. 30, 1988).

## E. Finality of an IBLA Decision:

The decision of the IBLA constitutes final agency action and no further appeal will lie within the Department from the decision of IBLA. 43 C.F.R. § 4.21(c), 4.403.

# V. SCOPE OF REVIEW BY THE BOARD OF LAND APPEALS

## De Novo Review Authority:

The Board, delegated the authority to act as fully and finally as might the Secretary in deciding appeals within its jurisdiction, "is not so limited in the scope of appellate review and decisionmaking as to be required to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department \* \* \*, has plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of the public policy or public interest in cases involving the exercise of discretion. Act of March 3, 1849, 9 Stat. 395." United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983).

**1.** De novo review of Administrative Law Judge decisions after a hearing: The Board, as the delegate of the Secretary, has the authority to make a de novo review of the entire record and to make findings of fact based thereon. The authority of the Board in reviewing the initial or recommended decision of the Administrative Law Judge is greater than that of an appellate court reviewing the decision of a trial judge and is not limited to ascertaining whether the Administrative Law Judge's decision is supported by "substantial evidence." United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981).

## B. The Board Will Not Substitute its Judgment:

With respect to decisions in matters which are highly discretionary in nature and which involve the exercise of the best judgment of BLM officials as to what is required in the public interest, the Board on appeal will not substitute its judgment for that of the authorized BLM officials. This is especially true where BLM officials have developed a degree of expertise in the subject matter. Thus, in deciding an appeal from a BLM ruling that certain inventory units did not meet the criteria for wilderness study areas, the Board held that: "These evaluations are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ." Richard J. Leaumont, 54 IBLA 242, 245, 88 I.D. 490, 491 (1981).

**1.** The Board will not ordinarily substitute its judgment for that of the authorized BLM official where the record supports the decision appealed from. This is particularly true in cases involving a weighing of priorities or matter of policy as opposed to a finding on the evidence. This was expressed by the Board in Rosita Trujillo, 21 IBLA 289 (1975):

Appellant’s contentions are neither erroneous nor unreasonable. They represent only another point of view;   a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal. 21 IBLA at 291. Under these circumstances, the Board refused to substitute its judgment for that of BLM in rejecting an oil and gas lease offer for lands in which BLM found the scenic and recreational values would be adversely affected by oil and gas activity.

## C. Preponderance of the Evidence:

In order to prevail on administrative review before IBLA, the appellant must establish error by a preponderance of the evidence. Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984).

## D. Initial Decisions/Advisory Opinions:

As an appellate tribunal, the Board does not generally make initial adjudicatory decisions on matters which have not been presented to BLM for decision. See California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977) (discussed in detail infra). Further, the Board refrains from issuing advisory opinions regarding hypothetical fact situations not presented by an actual case. State of Alaska, 85 IBLA 170 (1985).

## E. Interlocutory Appeals:

As a general rule, the Board will not entertain interlocutory appeals from BLM decisions which are not final. However, IBLA will apply a rule of reason and may proceed to decide an appeal where the position of BLM in the matter is clear and no useful basis would be served by remand of the case prior to ruling on the issues. See Beard Oil Company, 97 IBLA 66 (1987).

## F. Review of Statutes:

IBLA has no authority to declare a statute to be unconstitutional.

## G. Review of Regulations:

IBLA is bound by duly promulgated regulations of the Department. See, however, Alamo Ranch Co., Inc., 135 IBLA 61 (1996).

## H. BLM Instruction Memoranda and the BLM Manual:

**1.** Policy pronouncements set forth in BLM Instruction Memoranda or in the BLM Manual, while controlling on BLM officials, are not binding on the Board. Unlike regulations, they are not considered to have the force and effect of law. Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (1990); Pamela S. Crocker-Davis, 94 IBLA 328 (1986). The Board will decline to follow such guidelines where it is inconsistent with the terms of the relevant regulation. Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981) (declining to apply instruction memorandum which was inconsistent with the relevant regulation).

**2.** Notwithstanding the above, where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will generally uphold their application. Beard Oil Co., 105 IBLA 285 (1988).

# VI. JUDICIAL REVIEW OF BOARD DECISIONS

## A. Venue:

Where is suit brought? IBLA decisions are generally appealable to the Federal District Court in the state where the land or property at issue is situated, or where the official of the Department of the Interior named as a defendant in the action is located (generally, the U.S. District Court for the District of Columbia where the Secretary of the Interior is located). 28 U.S.C. § 1391(e) (1994).

## B. Exhaustion of Administrative Remedies:

Under the Administrative Procedure Act (APA), agency action made reviewable by statute and "final agency action for which there is no other adequate remedy in a court are subject to judicial review. 5 U.S.C. § 704 (1994) (Emphasis added).

**1.** Under this provision of the APA, agency action is final (subject to judicial review) regardless of the right of appeal for administrative review unless "the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704 (1994).

**2.** The amended regulation at 43 C.F.R. § 4.21 provides at subsection (c): "No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) [denial of a stay] or (b)(4) [stay not granted within 45 days after close of appeal period] of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation." Rationale: This preserves the opportunity for administrative review prior to the exercise of any judicial review and, hence, gives the Department the opportunity to ensure that the decision reached is in accord with the statute and regulations and properly supported by the case record.

## C. Scope of Court Review:

Under the relevant provisions of the APA, 5 U.S.C. § 706 (1994), the reviewing court shall set aside agency action, findings, and conclusions found to be:

**1.** Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

**a.** In cases involving factual issues not requiring a hearing, the issue on judicial review may be whether the finding of the BLM decision is or is not arbitrary and capricious in view of the facts of record. This was illustrated by the court reviewing the decision of IBLA affirming in part the BLM finding that the proposal of the county to widen and upgrade the R.S. 2477 right-of-way for the Burr Trail did not require preparation of an environmental impact statement. The court upheld the decision on the ground that it was not arbitrary and capricious on the basis of the record, i.e., the record supported the decision. Sierra Club v. Lujan, 949 F.2d 362, 369 (10th Cir. 1991).

**b.** Issues and contentions not raised on appeal to IBLA may be effectively waived for purposes of subsequent judicial review. Wilson v. Hodel, 758 F.2d 1369, 1373 (1985). The scope of review by the district court does not extend to a trial de novo, but rather entails whether the final administrative decision was arbitrary and capricious in view of the administrative record. Id.2. Unsupported by substantial evidence in a case involving a hearing. Lara v. Secretary of the Interior, 642 F. Supp. 458 (D. Ore. 1986), aff'd. 820 F.2d 1535 (9th Cir. 1987); Husman v. United States, 616 F. Supp. 344 (D. Wyo. 1985).

# VII. ADMINISTRATIVE HEARINGS

Hearings are presided over by the Department's Administrative Law Judges who make up the Hearings Division, a separate component of OHA. Hearings are adversarial trial-type proceedings in which evidence is presented by the parties in the form of both testimony and exhibits which may consist of documents or other items of physical evidence (e.g., mineral samples). Witnesses at the hearing testify under oath and are subject to cross-examination. The Administrative Law Judge conducting the hearing rules on the admissibility of evidence, although the rules of evidence are generally somewhat more relaxed than those adhered to in a judicial courtroom. The purpose of these hearings is to establish the material facts necessary to resolve the legal issues presented by a particular case (e.g., whether there has been a discovery of a valuable mineral deposit, whether the facts establish the existence of a violation of the Surface Mining Control and Reclamation Act for which an operator was cited, etc.). Hearings before OHA fall into certain general categories:

## A. Contests:

Contest hearings may be initiated either by BLM (Government contest) or by a private party (private contest):

**1.** Government contests: The Government may initiate a contest for any cause affecting the legality or validity of any entry or settlement or mining claim. 43 C.F.R. § 4.451-1. Contests are invoked in those situations where the record before BLM presents material issues of fact regarding the legal sufficiency of a claim to the public lands (e.g., Native allotment claim, mining claim, etc.). Claims to the public lands based on use and occupancy or mineral exploration and discovery may give rise to a constitutional right under the Fifth Amendment to due process in the adjudication of the application/claim requiring notice and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application or invalidation of the claim. See Cameron v. United States, 252 U.S. 450, 460-461 (1920) (mining claims); Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) (Alaska Native allotment claim). As a general rule, application of Departmental contest procedures to provide the applicant with notice and an opportunity for a hearing prior to adverse action on an application has been held to comply with the due process requirements. Donald Peters, 26 IBLA 235, 83 I.D. 308, reaff'd, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976), aff'd, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978) (Native allotments); see United States v. O'Leary, 63 I.D. 341 (1956) (mining claim contests).

**2.** Private contests: May be filed by any person claiming title to or an interest in land adverse to any other person claiming title to or an interest in the land in order to have the adverse claim invalidated for any reason not shown by the records of BLM. 43 C.F.R. § 4.450-1.

**a.** The holder of title to the land under a Stock-Raising Homestead Act patent which reserved title to certain minerals in the United States has standing to challenge the validity of a mining claim on the patented land for lack of discovery of a valuable mineral deposit by filing a private contest. Massirio v. Western Hills Mining Association, 78 IBLA 155 (1983).

**b.** State which has filed a state selection application for land embraced in a subsequently-filed Native allotment application has standing to file a private contest challenging the allotment application. State of Alaska, 40 IBLA 79 (1979).

## B. Hearings Required by Statute and/or Regulation:

**1.** Any person adversely affected by a final (as distinguished from proposed) BLM decision under the grazing regulations is entitled to appeal and obtain a hearing before an Administrative Law Judge. 43 C.F.R. § 4160.4; 43 C.F.R. § 4.470.

**2.** Under the Surface Mining Control and Reclamation Act of 1977, a hearing may be requested by a party charged with an assessment of a civil penalty, 43 C.F.R. § 4.1150; or by a party seeking review of a notice of violation (NOV) or cessation order (C0) or of action modifying or terminating an NOV or CO, 43 C.F.R. § 4.1161.

**3.** Under sec. 109(e) of the Federal Oil and Gas Royalty Management Act, a party challenging a civil penalty is entitled to a hearing. 30 U.S.C. § 1719(e) (1994); 43 C.F.R. § 3165.3(c).

## C. Hearings Ordered by IBLA:

Pursuant to the regulations, a hearing may be ordered by the Board when, during the course of reviewing a case, it becomes apparent that an appeal raises issues of material fact the resolution of which are necessary to disposition of the appeal on the merits. 43 C.F.R. § 4.415. Under this regulation, a hearing is required "when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977).

## D. Burden of Proof:

**1.** Government contest: Government has the burden of establishing a prima facie case of the invalidity of a claim (e.g., lack of discovery on a mining claim), while the claimant has the burden of overcoming the prima facie case by a preponderance of the evidence. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

**2.**  Private contest: As a general rule, the burden of proof is on the contestant to establish the invalidity of the contested claim by a preponderance of the evidence. In Re Pacific Coast Molybdenum, 75 IBLA 16, 22 n.4, 90 I.D. 352, 356 n.4 (1983).

# VIII. MECHANICS OF THE APPEAL PROCESS

## A. Time Limit for Filing:

30 days from receipt of the decision. 43 C.F.R. § 4.411(a). In Ilean Landis, 49 IBLA 59 (1980), we noted that the "Board has held that the timely filing of a notice of appeal is required to establish the jurisdiction of the Board to review the decision below and the failure to file the appeal within the time allowed mandates dismissal of the appeal. Lavonne E. Grewell, 23 IBLA 190 (1976); see Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978); Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960)."

**1.** No extension of time to file a notice of appeal can be granted. 43 C.F.R. §§ 4.411(c), 4.22(f).

**2.** Grace period for filing. The delay in filing a notice of appeal will be waived if it is filed within 10 days after the due date and it is determined that the appeal document was transmitted or probably transmitted before the due date. 43 C.F.R. § 4.401(a).

**3.** Dismissal of untimely appeals under 43 C.F.R. § 4.411(c).

**a.** Dismissal by BLM is appropriate if the notice of appeal is filed after the grace period. The BLM official should return the notice of appeal to the appellant with a cover letter explaining that the case was closed because no timely appeal was filed. Enclose photocopies of documents in the case file showing that the appeal was untimely (retain originals in case file): (1) Copy of return receipt card showing date of receipt of BLM decision. (2) Copy of notice of appeal date stamped by BLM to show date of receipt.

**b.** If the appellant objects to the action of BLM in closing the case and dismissing the appeal as untimely, the case file should be forwarded to the Board which will review the case as a threshold matter to determine whether a timely appeal was in fact filed. See State of Alaska v. Patterson, 46 IBLA 56 (1980).

**c.** Dismissal by IBLA is appropriate if the notice of appeal is filed during the grace period and the delay is not waived under 43 C.F.R. § 4.401(a). If the notice of appeal is received by BLM during the grace period, the file should be forwarded to the Board which will determine whether the appeal should be dismissed as untimely. The BLM office forwarding the appeal may note in the appeal transmittal memorandum that the appeal was received after the appeal period.

## B. Place of Filing:

**1.** 43 C.F.R. § 4.411(a) provides: "A person who wishes to appeal to the Board [of Land Appeals] must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service."

**2.** An appeal which is not timely filed in the office of the officer who made the decision will be dismissed by the Board, even though it was filed with the Board and with the Office of the Solicitor within 30 days of receipt of the decision. See, e.g., Thelma M. Eckert, 120 IBLA 367 (1991); San Juan Coal Co., 83 IBLA 379 (1984).

**3.** This "place-of-filing" rule reinforces 43 C.F.R. § 4.411(a), which provides "[i]f a notice of appeal is filed after the grace period provided in § 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken."

## C. When Is The Blm Decision Served?

**1.** The date of service is the date the decision is delivered to the party's last address of record, regardless of whether it was actually received by him. 43 C.F.R. § 1810.2(B); Lloyd M. Baldwin, 75 IBLA 251 (1983).

**2.** "Last address of record" is the address stated on the application unless the applicant or his authorized representative has filed written notice of a change of address. 5M, Inc., 109 IBLA 334 (1989).

**3.** If the decision is not sent to the last address of record with BLM, no service occurs until the party gets actual notice. Jean Emanuel Hatton, 107 IBLA 47 (1989). Similarly, constructive service by mail may be vitiated where the decision is improperly addressed. See F. Howard Walsh, Jr., 93 IBLA 297 (1986) (address to which decision was sent omitted suffix "Jr." resulting in delivery to father).

**4.** If a letter is returned as undeliverable, the addressee will be held to have been constructively served as of the date the letter is returned to BLM. Constructive service is equivalent in legal effect to actual service of the decision. Reg Whitson, 55 IBLA 5 (1981). However, if the party has left a change of address with the Postal Service, which negligently fails to forward the decision, return of the letter will not establish constructive service. L. Lee Horschman, 74 IBLA 360 (1983).

**5.** If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time to be filed within 30 days after the date of publication. 43 C.F.R. § 4.411(a).

## D. When is a notice of appeal "filed" or "transmitted"?

Normally, these dates will be obvious: the date of filing is the date the notice of appeal is received at BLM; the date of transmittal is the date the notice was mailed or hand-delivered to BLM. Filing is required in the proper office of BLM and where appeal was initially filed in the wrong office, the date of transmittal is the date the appeal was forwarded to the correct office. Ida Mae Rose, 73 IBLA 97 (1983).

## E. Who May File An Appeal?

An appeal may be filed by a "party to a case" who is adversely affected by a decision of the BLM. 43 C.F.R. § 4.410(a).

## F. Distinguishing Appeals and Protests:

**1.** A protest is defined by regulation at 43 C.F.R. § 4.450-2:

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

**2.** Is the filer a party to a case?

**a.** If the filer has not already had input into the BLM decision (e.g., by filing an application), then the "appeal" should ordinarily be treated as a protest and ruled upon by BLM subject to the right of appeal to IBLA. This point was explained carefully in the decision in California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977):

If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions. On the other hand, when an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State Office loses all jurisdiction over the matter being appealed. In this latter situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority. The above problem is vitiated if the objection of those who have not had prior input into a decision is treated as a protest under 43 C.F.R. § 4.450-2. The BLM State Office is provided with the opportunity to examine the merits of the submission and issue a decision thereon. Should the action taken by the State Office on the protest be perceived as adverse to the protestant's interests, he may then appeal that action to the Board under 43 C.F.R. § 4.410.

**b.** Key point here is that the Board is an appellate review panel and is not in a position to make an initial decision. IBLA cannot hope to have a balanced presentation of all the relevant facts before it until BLM issues a decision in the matter. The Board needs a record on which to base its review.

**c.** The protest regulation does not dispense with the requirement of standing which is an essential prerequisite to filing an appeal from dismissal of a protest. It does not necessarily follow that a party objecting to a proposed course of action by BLM and filing a protest under the regulation at 43 C.F.R. § 4.450-2 is adversely affected by dismissal of the protest and thus has standing to appeal. Elaine Mikels, 41 IBLA 305, 307 n.1 (1979).

* If an appeal is filed from dismissal of a protest, IBLA can review the standing issue.

## G. Adjudication of Protests by BLM:

**1.** Summary Dismissal

**a.** When the protest contains merely conclusory allegations that indicate no basis for changing BLM's proposed action. (Ask: Does the protest raise reasonable suspicions about the correctness of BLM's proposed action?). Philip A. Kulin, 53 IBLA 57 (1981).

**b.** When the protest is filed after the party has failed to appeal a BLM decision. Horizon Exploration Co., 73 IBLA 43 (1983).

**c.** When the protest is filed after the BLM decision has issued. Devon Energy Corp., 104 IBLA 90 (1988); Sierra Club Legal Defense Fund, Inc., 84 IBLA 311 (1985).

**2.** Full adjudication of a protest is appropriate when the protest raises reasonable doubt about correctness of BLM's proposed action, e.g., when the protest is supported by some convincing evidence. In such case, an adjudicator should:

**a.** Further investigate the grounds of the protest, possibly directing the protestant to provide additional information.

**b.** A decision on the protest should not be reached until all reasonable information has been considered. Patricia C. Alker, 62 IBLA 150 (1982); Lee S. Bielski, 39 IBLA 211, 86 I.D. 80 (1979).

**3.** Disposition of Protest: Protestant has the right to appeal a BLM decision denying his protest. Steinheimer Trust, 87 IBLA 308 (1985); Sierra Club, 87 IBLA 1 (1985).

## H. Effect Of The Filing Of An Appeal:

**1.** Except as otherwise provided by statute or regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal. 43 C.F.R. § 4.21(a)(1), 58 FR 4942 (Jan. 19, 1993).

**2.** The timely filing of an appeal together with a petition for stay further suspends the effect of the BLM decision for 45 days after the close of the appeal period pending action by IBLA on the stay request. 43 C.F.R. § 4.21(a).

**3.** The filing of an appeal to the Board removes the case from the jurisdiction of the BLM pending disposition of the appeal and BLM is without authority to take further action in the case pending action by IBLA. This principle was set forth emphatically in Petrol Resources Corp., 65 IBLA 104, 108 (1982):

When an appeal from a decision of a BLM official is properly filed, that official loses jurisdiction over the case and has no authority to take any action on the case until jurisdiction is restored by Board action disposing of the appeal. Any adjudicative action taken by BLM after an appeal is filed relating to the subject matter of the appeal is a nullity because BLM is acting without jurisdiction. Sierra Club, 57 IBLA 288, 291 (1981); James T. Brown, 46 IBLA 265, 271 (1980). Similarly, any BLM action taken to implement a decision during the period in which a party adversely affected may file a notice of appeal is improper. Cf. James W. Smith, 44 IBLA 275, 281 (1979) (BLM erred in issuing right-of-way simultaneously with issuance of decision denying protest of the right-of-way, rather than suspending action during appeal period); California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977) (pendency of a protest which, upon decision, is subject to appeal by party adversely affected precluded implementation of the action protested, pending decision and appeal). Accordingly, the action taken by BLM to approve the assignment to Nortex, simultaneously with its decision allowing assignor to withdraw the assignment to appellant, was improper and must be set aside.

**4.** Accordingly, if the BLM official finds it desirable to alter, correct, or reconsider a decision after an appeal has been filed, the proper course is to forward the appeal and case file to IBLA together with a request for remand of the case file. Be sure to serve a copy of the remand request on the appellant and any adverse parties. Remember the ex parte prohibition.

## I. Forwarding The Case File To IBLA:

Within 10 working days of receipt of the notice of appeal, the complete, original record (no photocopies) should be transmitted to the Board. Utah Chapter Sierra Club, 114 IBLA 172 (1990); BLM Manual 1841.15 A, Release 1-1571, December 4, 1989.

## J. Stays:

Under amended 43 C.F.R. § 4.21(a), a decision is not effective during the 30-day appeal period and the 45-day period during which the Board may rule on a request for a stay. The Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effect immediately.

**1.** If there is a compelling reason for putting the decision into effect pending the appeal, BLM may make a motion to this effect stating the reasons why this is required in the public interest and serving a copy on the appellant (and any other parties).

**2.** This is rarely done since it causes the decision to be subject to immediate judicial review before IBLA can resolve the merits of the appeal.

**3.** Criteria considered in ruling on such a motion are similar to those considered in ruling on a motion to stay the effect of a decision pending appeal (i.e., probability of success of the appeal, threat of irreparable injury if relief isn't granted, ability to provide effective relief if appellant does prevail, and the public interest).

## K. Reconsideration Of A Blm Decision In The Absence Of An Appeal:

**1.** In the absence of a notice of appeal, BLM may reconsider its own decision if this is found desirable.

**2.** If a petition for reconsideration of a BLM decision is received, you need to act very promptly:

**a.** If you are not going to reconsider, notify the petitioner promptly so that he may still elect to file a timely appeal.

**b.** If the BLM decision is to be reconsidered, issue a revised decision with a new 30-day appeal period. The new decision should be served on all the parties.

# IX. REASONS FOR ADMINISTRATIVE REVIEW

## A. Factual Record:

A key function is to protect the rights of the parties to a decision and the public interest by ensuring that a final decision is supported by an adequate factual basis in the administrative record to sustain the decision in the event of judicial review.

## B. Legal Rationale:

Another critical purpose of administrative review is to provide a legally sufficient rationale for final Departmental decisions in order to avoid reversal by the courts.

**1.** Citation of relevant statutory and regulatory authority.

**2.** Citation of relevant precedents from past Departmental decisionmaking.

**3.** Analysis: Application of this authority to resolve the issues raised by the facts of the case.

## C. Uniformity:

Another function of administrative review is to promote uniformity of decisionmaking by different officials of the Department.

**1.** Ensure consistent interpretations of statutory and regulatory provisions.

**2.** Ability of the Board to see the larger picture in view of appeals from other offices involving related issues.

## D. Objective Administrative Review:

A further reason is to promote objective administrative review by an entity discrete from the agency charged with administering the public land and natural resource laws at issue (e.g., BLM, OSM, and MMS) or prosecuting cases under those laws (the Solicitor's office). See Federal Land Policy and Management Act of 1976, § 102(a)(5), 43 U.S.C. § 1701(a)(5) (1994) (calling for structuring of adjudication procedures to assure "objective administrative review of initial decisions").

# X. PREPARATION OF THE ADMINISTRATIVE RECORD (CASE FILE)

## A. Case Record:

As a general rule, the case record should consist of the original (not photocopies) of all documents which were compiled in order to adjudicate the application or case. These records should be collated in the order in which they were filed in the record, i.e., reverse chronological order. Such records typically include:

**1.** Application materials.

**2.** Recommendations from other agencies.

**3.** Plats, historical indices, patents, withdrawal orders, etc., relevant to land status.

**4.** Field reports, inventories, environmental assessments, and environmental impact statements relied upon.

**5.** Confidential information: Generally, cases files at the Board are open to inspection by the parties and the public. Special procedures for handling confidential information which is exempt from public disclosure are found in the regulations at 43 C.F.R. § 4.31. Anyone submitting such information must comply with such procedures.

## B. Supplementing the Record after an Appeal is Filed:

If the deciding official feels compelled after an appeal is filed to present additional support for the decision not appearing in the record at the time the BLM decision was issued, it is imperative under the appeal regulations that you serve a copy of any such submission upon all parties to the appeal.

**1.** 43 C.F.R. § 4.22(b)--A copy of each document filed in an appeal proceeding must be served on all other parties.

**2.** 43 C.F.R. § 4.27(b)--Ex parte communications are prohibited unless a copy of any written communication is served on all parties to the appeal who are then allowed an opportunity to respond.

## C. Shell Offshore, Inc., 113 IBLA 226, 97 I.D. 74 (1990).

**1.** As a general rule, an administrative decision may be properly set aside and remanded if it is not supported by a case record providing the Board the information necessary for an objective, independent review of the basis for the decision.

**2.** The Board is authorized as the delegate of the Secretary to review MMS royalty decisions and an adequate administrative record is indispensable to responsible exercise of this review authority.

## D. Incomplete Record:

Absent a complete record, the Board is unable to perform its review function and a reviewing court is incapable of complying with the review requirements mandated by the APA. See Higgins v. Kelley, 574 F.2d 789, 792 (3rd Cir. 1978).

## E. Agency Decision Not Supported by the Record:

When the validity of the agency's action is not sustainable on the administrative record compiled by the agency, courts are obligated to vacate the agency decision and remand the matter for further consideration. See Camp v. Pitts, 411 U.S. 138, 143 (1973). Accordingly, where the record is inadequate to sustain the reasonableness of the agency action, the decision will be set aside and the case remanded to establish a record which will support the administrative decision. Shell Offshore, Inc., supra; see Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982).

## F. Rule of Reason:

Remand unnecessary where no issue of material fact is raised.

# XI. CONTENT OF THE ADMINISTRATIVE DECISION

##  A. Sound Decision Drafting.

A well drafted decision should:

**1.** Contain a complete statement of the material facts, i.e., those facts necessary to decide the issues.

**2.** Carefully reference relevant provisions of documents in the record relied upon in deciding the case (e.g., field reports, environmental assessments).

**3.** State the issue on which the adjudication hinges.

**4.** Apply the relevant law (statutes, regulations, IBLA precedents, etc.) to the facts to resolve the issues.

**5.** Avoid the use of conclusory statements to justify the decision.

**6.** As a general rule, in any decision which adversely affects a party to the case, it is appropriate to include an "appeals paragraph" notifying the parties of the right of appeal pursuant to 43 C.F.R. § 4.410.

**7.** Instruction Memorandum No. 93-183 (Mar. 25, 1993), requires that a decision subject to amended 43 C.F.R. § 4.21 contain an appeals paragraph, the text of which is set forth in the IM, informing the parties of their right to request a stay of the decision.

**8.** Provide notice of:

**a.** Names and addresses of any known adverse parties (e.g., conflicting applicant) to be served in the event of an appeal under 43 C.F.R. § 4.413(a).

**b.** Notice of the address of the Office of the Solicitor in which a copy of any notice of appeal and statement of reasons is to be filed under 43 C.F.R. § 4.413(c).

## B. Avoiding Conclusory Decisions.

**1.** "As we have previously held, where BLM issues a decision, it must ensure that the decision is supported by a rational basis and that such basis is stated in the decision, as well as being demonstrated in the administrative record accompanying the decision." Burnett Oil Company, Inc., 122 IBLA 330, 332 (1992).

**2.** "We cannot affirm BLM's decision to dismiss appellant's protest on the basis of the present record, which contains only a conclusory statement, completely unsupported by any facts of record, that the bond "is sufficient." The record is utterly devoid of anything supporting the validity of this conclusion. Objective administrative review of the propriety of this determination is not possible in these circumstances. BLM's decision of August 11, 1981, is therefore vacated." Soderberg Rawhide Ranch Co., 63 IBLA 260, 261-262 (1982).

## C. Finality of BLM Decisions:

**1.** Final Decision: A decision is generally considered to be final if it does not provide for further adjudicative action by BLM in response to a submission by the applicant.

**2.** Conditional Decisions: Three basic types:

**a.** Decision directs applicant to comply within a period of time and advises him that, if he fails to comply, a second decision rejecting his application will be issued.

**(1)** Do not include an appeals paragraph in the first decision, but do give notice of the consequences of failure to comply.

**(2)** Include the appeals paragraph in the second decision. Appeal period begins as specified in the second decision.

**b.** Those decisions which hold that certain legal consequences will ensue automatically without further notice to the applicant upon the failure of the applicant to take the specified course of action. Typically, the decision holds the application for rejection--applicant is ordered to comply within a period of time and advised that, if he fails to comply, his application will be rejected without further notice.

**(1)** The appeal period commences the day after the end of the compliance period.

**(2)** Include appeals paragraph in the decision. Clearly distinguish appeal period from compliance period.

**(3)** Appeals filed within the compliance period may be rejected as premature. In certain cases, the Board may remand the matter to BLM on the basis that the "appeal" should have been viewed as an objection to an action proposed to be taken, i.e., a protest (Bennie Sinerius, 115 IBLA 312 (1990)). However, the Board has adopted a rule of reason in such cases. Liberty Petroleum Corp., 118 IBLA 214 (1991); Bear Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986); see Randall J. Gerlach, 90 IBLA 338 (1986); Instruction Memorandum No. 85-194, Change 1 (May 16, 1986).

**(4)** Risk that the applicant may believe he has complied when he has not in fact complied.

**c.** Decision rejects application, subject to revival by future submissions.

**(1)** Include the appeals paragraph.

**(2)** Appeals period runs simultaneously with compliance period. James M. Chudnow, 89 IBLA 361 (1985); John R. Anderson, 71 IBLA 172 (1983)(concurring opinion); Fortune Oil Co., 71 IBLA 153 (1983); Carl Gerard, 70 IBLA 343 (1983).

**3.** Example of conditional decision: In Fortune Oil Co., 71 IBLA 153, 90 I.D. 84 (1983), the decision to issue a lease subject to execution of stipulations left the party with three alternatives:

**a.** The party may execute and return the stipulations timely and be issued the lease.

**b.** The party may execute the stipulations under protest; BLM must adjudicate the protest and issue a decision on it, which if adverse, is appealable to this Board.

**c.** The party may elect not to comply, await receipt of a decision rejecting his offer and then appeal to the Board. In the latter case, appellant will generally be held to have waived his right to comply if requirement is upheld on appeal.

**4.** Premature BLM Decision: Example of premature action by BLM in issuing a decision. American Petrofina Company of Texas, 85 IBLA 104 (1985). In this case, rejection of an application prior to expiration of compliance period was reversed.

# XII. CITATION OF LEGAL AUTHORITY

## A. What Is Valid Precedent?

Requirement of the Administrative Procedure Act, 5 U.S.C. § 552(a)(2):

**1.** Each agency, in accordance with published rules, shall make available for public inspection and copying--

**(a)** final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; unless the materials are promptly published and copies offered for sale. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by any agency against a party other than an agency only if

**(i)** it has been indexed and either made available or published as provided by this paragraph; or

**(ii)** the party has actual and timely notice of the terms thereof.

## B. Published IBLA Decisions:

All decisions issued by the IBLA are indexed, published, and made available to the public. Therefore, these decisions may be relied upon and used as precedent by BLM officials in deciding cases. Cheyenne Resources, Inc., 46 IBLA 277, 87 I.D. 110 (1980).

**1.** You may cite as precedent any Departmental decisions and Solicitor's Opinions listed in the OHA Index/Digest.

**2.** Do not cite as precedent: BLM decisions, Administrative Law Judge decisions, or Board orders which are not indexed and published. Cheyenne Resources, Inc., supra.

## C. How to Cite Departmental Decisions and Solicitor's Opinions:

 **1.** IBLA Decisions:

**a.** If printed only in the loose-leaf volumes of IBLA decision:

Cite by name of decision, volume and page number of decision, and date as follows: *Antoine "Fats" Domino*, 7 IBLA 375 (1972).

**b.** Do not cite the case by the IBLA docket number, IBLA 83-383.

**2.** Other Interior Decisions:

**a.** Land Decisions (L.D.), Volumes 1-52: Albert B. Knight, 30 L.D. 227 (1900).

**b.** Interior Decisions (I.D.), Volumes 53 to present: Appeal of Eyak Corp., 4 ANCAB 277, 87 I.D. 279 (1980)

**c.** Solicitor's Opinions:

**(1)** Published: Solicitor's Opinion, M-36911, 86 I.D. 151 (1978).

**(2)** Unpublished: Solicitor's Opinion, M-36099 (Sept. 5, 1950).

**d.** Final Departmental decisions issued before July 1, 1970, and not published in the I.D.'s ("A" Decisions): State of Louisiana, A-26980 (Dec. 29, 1954).

## D. How To Cite Departmental Regulations:

**1.** Regulations in current volume of Code of Federal Regulations (C.F.R.) (color coded paperbound volumes): 43 C.F.R. § 2650.4-7.

Note: No citation to year is necessary if the regulation is current.

**2.** New regulations published in the Federal Register (Fed. Reg.) but not yet included in the current C.F.R. volume: 43 C.F.R. § 3165.4(a), 52 Fed. Reg. 5395 (Feb. 20, 1987).

**3.** Regulations no longer in effect: 43 C.F.R. § 3102.2-5 (1981).