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# PRACTICE AND PROCEDURE BEFORE THE INTERIOR BOARD OF LAND APPEALS

David L. Hughes\*

## INTRODUCTION

Before I am compelled by the norms of academic writing style to lapse into the third person, I wish to write a more personal introduction to this article. In my decisions, I never get to speak in the first person, except for an occasional "we" to emphasize that the decision is the product of a board, rather than a single jurist.

As a decision-maker for the Department of the Interior, I rarely make a choice without weighing the social consequences of that decision. Of course, I do not enjoy the kind of authority to make the choice that I deem best in every case. However, I am surprised that, most times, the result compelled by federal statutes, departmental regulations, and secretarial and court precedent is not really that far from where my own judgment would lead me. The system usually makes sense.

The history of the public lands is, to a great extent, the history of the United States. That history shows that the Department has long recognized and protected the citizen's right to due process in public lands cases. The stewardship of the public lands, which is a sacred trust for all Americans, continues to be well served by an objective, independent appeals system, which issues credible decisions that are available to all and that crystalize issues concerning the public lands, so that new policies can be framed as needed.

## HISTORY OF THE DEPARTMENTAL APPEALS PROCESS<sup>1</sup>

Congress created and delegated the stewardship of the public lands to

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\* Administrative Judge, Interior Board of Land Appeals. B.A. 1969 Lehigh University; J.D. 1975 Georgetown University. The opinions expressed in this article are those of Judge Hughes and not necessarily those of the Interior Board of Land Appeals or the Department of the Interior.

1. An introductory word about the various sources of departmental decisions, opinions, and orders will be helpful:

Decisions of the Department of the Interior Relating to Public Lands [hereinafter *Lands Decisions (L.D.)*]: There are 52 volumes of these decisions, dating from July 1881 through December 1929.

Decisions of the Department of the Interior [hereinafter *Interior Decisions (Interior Dec.)*]: These volumes start with Volume 53, picking up where the L.D. books left off, and date from January 1930 to the present.

Opinions of the Office of the Solicitor Relating to Land Appeals [hereinafter "A" Opinions]: These decisions were not placed into numbered volumes, but are identified only by the case name, prefix "A-" followed by a serial number, and, in parentheses, the full date of the material cited. Some of these decisions were published in the L.D. and Interior Dec. volumes. Most "A" Opinions were indexed and

the Department of the Interior (DOI) on March 3, 1849.<sup>2</sup> Prior to that time, the General Land Office within the Treasury Department administered the public lands.<sup>3</sup> Since its creation, the DOI has consistently provided a right of appeal to the Secretary from decisions of subordinate DOI administrators in public land cases.<sup>4</sup> From 1849 until the creation of the Bureau of Land Management (BLM) in 1947, the Secretary of the Interior, an undersecretary, or an Assistant Secretary personally signed decisions constituting final Departmental action.<sup>5</sup>

made available to the public (even those *not* also published in the L.D. and Interior Dec. volumes) and therefore can be used as precedent. *See* 5 U.S.C. § 552(a)(2) (1988). The records of the IBLA have "A" Opinions dating back to 1925. No "A" Opinions were issued after 1970.

Other Opinions of the Office of the Solicitor [hereinafter "M" Opinions]: These decisions were also not placed into numbered volumes, but are identified only by the subject matter title of the opinion, prefix "M-" followed by a serial number, and, in parentheses, the full date of the material cited. Some of these decisions were published in the L.D. and Interior Dec. volumes. Many "M" Opinions were and continue to be indexed and made available to the public and therefore can be used as precedent. *See* 5 U.S.C. § 552(a)(2) (1988). The Office of the Solicitor continues to issue "M" Opinions.

Interior Board of Land Appeals Decisions: [hereinafter IBLA Decisions]: There are presently 125 complete volumes, dating from September 1970 through the present.

Some IBLA decisions, which the Chief Administrative Judge determines to be of special interest to the public, are also published in the Interior Dec. volumes.

All IBLA decisions are indexed and are available to the public, even those *not* also published in the Interior Dec. volumes. Therefore, the Department and others can use them as precedent. *See* 5 U.S.C. § 552(a)(2) (1988). IBLA continues to issue these decisions, which are the primary focus of this article.

IBLA Orders: Orders issued by the IBLA have not been included in the IBLA volumes for many years. Such orders are indexed and can be obtained by the public. They are cited occasionally to illustrate IBLA procedures and practices.

2. 9 Stat. 395-97 (1849).

3. 2 Stat. 716 (1812).

4. As noted in the exhaustive historical review presented in Newton Frishberg, et al., *The Effect of the Federal Land Policy and Management Act on Adjudication Procedures in the Department of the Interior and Judicial Review of Adjudication Decisions*, 21 ARIZ. L. REV. 541, 545 n.17 (1979), the judicial role of the Secretary has been acknowledged and defined by the Supreme Court: "Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands." *Plested v. Abbey*, 228 U.S. 42, 52 (1913). Further, the Supreme Court has noted:

[T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States . . . "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department . . . by direct orders or by review on appeals . . ."

*Knight v. United States Land Ass'n*, 142 U.S. 161, 178 (1891). *See also* *Cameron v. United States*, 252 U.S. 450 (1920); *Ness v. Fisher*, 223 U.S. 683 (1912); *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903).

5. Appeals were taken by aggrieved parties from decisions of the Commissioner of the General Land Office and decisions were rendered by an Assistant Secretary to whom the Secretary had delegated his review authority. *See, e.g., Davidson v. Taylor*, 52 Pub. Lands Dec. 154 (1927) (reversing a decision by the Commissioner, GLO, dismissing a contest because the contest complaint had named the contestee by first name and surname only). The rules governing those appeals are cited

The creation of the BLM changed the administrative review procedure.<sup>6</sup> In 1947 DOI implemented a two-tiered administrative review procedure for public lands cases. Parties could first appeal decisions of BLM's state offices to the Director of the BLM.<sup>7</sup> If they found error in the BLM Director's decisions, they could then appeal to the Secretary of the Interior.<sup>8</sup> The Secretary delegated his authority to review the BLM Director's decisions to the Office of the Solicitor.<sup>9</sup> Either the Solicitor or an Assistant Solicitor signed final Departmental decisions.<sup>10</sup>

The apparent fusion of administrative functions both within the BLM (at the first level of appeal) and within the Office of the Solicitor (at the secretarial level) produced a lack of confidence in the Department's administrative review process.<sup>11</sup> In 1964, following an unsuccessful initiative by western Senators to establish a Board of Public Land Appeals within the DOI, Congress created the Public Land Law Review Commission (PLLRC) to study existing regulations governing retention, management, and disposition of the public lands.<sup>12</sup> In its 1970 report, the PLLRC found weaknesses in the appeals process.<sup>13</sup> The report expressed concern

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in Frishberg, *supra* note 4, at 544-45.

Section 9 of the Taylor Grazing Act of June 28, 1934, 43 U.S.C. § 315h (1988), requires that the Secretary of the Interior "shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the Land Department." The Department adopted rules and regulations providing for appeals to the Secretary of the Interior from decisions of the Director of Grazing on Oct. 7, 1935. 55 Interior Dec. 368 (1935); *See* Calder v. Murray, 59 Interior Dec. 528 n.2 (1947).

6. Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management. Reorg. Plan No. 3 of 1946, 3 C.F.R. § 196 (1946), *reprinted in* 43 U.S.C. § 1 (1952) *and in* 60 Stat. 1100 (1946) (repealed 1966). Although that statute was repealed, the authority of BLM was expressly recognized in section 301 of the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. § 1731 (1988).

7. 43 C.F.R. §§ 161.9, 221.47 (1949). The BLM Director ultimately delegated his review authority to an "Office of Appeals and Hearings" within BLM, which issued decisions on his behalf. *See, e.g.,* Louisiana v. State Exploration Co., 73 Interior Dec. 148 (1966). The Office of Appeals and Hearings, a component of the BLM, was located in Silver Spring, Maryland. That office was divided into two branches: The Branch of Land Appeals and the Branch of Mineral Appeals. Decisions were thus made according to whether they were minerals cases or lands cases. Certain decisions were rendered by the Chief of the Office of Appeals and Hearings. *Id.* at 149. These decisions, along with others by the BLM Directorate dating back to 1955, are on file with the IBLA.

8. 43 C.F.R. §§ 161.9(m), 221.73 (1949).

9. 14 Fed. Reg. 307 (1949).

10. Decisions made by the Solicitor under this system were identified by a serial number beginning with "A-." *See supra* note 1. Some of those decisions were published in the Interior Decisions volumes; others were not. All were indexed and made available to the public and thus serve as Departmental precedent. *See* 5 U.S.C. § 552(a)(2) (1988). The decisions and docket records of those appeals are retained at the IBLA.

11. Frishberg, *supra* note 4, at 547.

12. Act of September 19, 1964, Pub. L. No. 88-606, § 4, 78 Stat. 983 (1964).

13. Frishberg, *supra* note 4, at 547-53 (citing PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970)).

that intraagency review of BLM's own decisions could not be objective, and that using the Office of the Solicitor as the DOI's final decision-maker created the appearance of a lack of objectivity.<sup>14</sup> It also criticized the two-step appellate process as costly and time-consuming to both litigants and the government.<sup>15</sup>

In 1970 the DOI created the Office of Hearings and Appeals (OHA),<sup>16</sup> and its component, the Interior Board of Land Appeals (IBLA).<sup>17</sup> The OHA, principally through the IBLA, is the authorized representative of the Secretary of the Interior for the purpose of hearing, considering, and determining, as fully and finally as might the secretary, appeals concerning DOI managed public lands.<sup>18</sup>

By separating the administrative review function from prosecutorial and policy-making functions, the current appeals process cures the perception of a lack of objectivity inherent in the old system. The OHA is neither part of the BLM nor part of the Office of the Solicitor, but, is instead, part of the Office of the Secretary. The IBLA, acting independently of the Solicitor and the BLM, reviews the legality of BLM's final decisions on behalf of the Secretary.<sup>19</sup>

In section 102(a)(5) of The Federal Lands Policy Management Act (FLPMA), Congress declared that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required . . . to structure adjudication procedures to assure . . . objective administrative review of initial decisions . . ."<sup>20</sup> As the IBLA is not part of the BLM or the Office of the Solicitor, it is submitted that it provides such "objective administrative review."

ORGANIZATION OF THE OFFICE OF HEARINGS AND APPEALS, U.S.  
DEPARTMENT OF THE INTERIOR

*The Secretary of the Interior*

The authority of the Secretary of the Interior (Secretary) to consider and determine hearings and appeals is, by regulation, delegated to separate "components," depending on the subject matter.<sup>21</sup> However, the Secretary

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14. *Id.* at 552.

15. *Id.* at 547 (citing C. MCFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS §§ 235, 236 (1969)).

16. 35 Fed. Reg. 12,081 (1970).

17. 35 Fed. Reg. 12,081 (1970)(codified at 43 C.F.R. § 4.1(3) (1972)).

18. 43 C.F.R. § 4.1 (1992).

19. *Id.*

20. 43 U.S.C. § 1701(a)(5) (1988).

21. 43 C.F.R. § 4.1 (1992). The OHA is the "authorized representative" "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

retains reserved authority to adjudicate any matter at any stage of Departmental review. The regulations provide that the Secretary may take jurisdiction of an unresolved case, and may either reverse or direct reconsideration of any decision by an OHA component,<sup>22</sup> other than the Interior Board of Contract Appeals (IBCA).<sup>23</sup>

### *The Directorate*

The OHA is headed by a director, who is appointed by the Secretary.<sup>24</sup> The Director of the OHA has significant authority over decisions of the IBLA, including the authority to assume jurisdiction of any case before the IBLA or to direct reconsideration of any IBLA decision.<sup>25</sup> The Director reports directly to the Assistant Secretary of the Interior for Policy, Management, and Budget.<sup>26</sup>

### *The Hearings Division*

The Hearings Division is comprised of administrative law judges who conduct fact-finding hearings, including hearings in Indian probate matters, hearings in other cases arising under statutes and regulations of the Department, and rule making hearings.<sup>27</sup>

The public lands cases considered by the Hearings Division falling within IBLA's jurisdiction include grazing cases, mining claim contests, Alaska Native allotment contests, and other private contests.<sup>28</sup> In addition, the Hearings Division conducts civil penalty proceedings arising under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA),<sup>29</sup> and the Surface Mining Control and Reclamation Act of 1977 (SM-

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Secretary." *Id.*

22. 43 C.F.R. § 4.5 (1992).

23. Section 8(g)(1) of the Contract Disputes Act provides that a decision by IBCA is final for the Department. 41 U.S.C. § 607(g)(1) (1988). The only recourse available to the Secretary and his assistants is to appeal that decision to the Court of Appeals for the Federal Circuit, formerly the Appeals Division of the U.S. Claims Court, for judicial review, provided that the Attorney General gives prior approval. 41 U.S.C. § 607(g)(1) (1988).

24. 43 C.F.R. § 4.1 (1992). The Director of the OHA is a political appointee who serves at the pleasure of the Secretary. Thus, the appointment of a new Secretary following the election of a new President has always resulted in the replacement of the Director. The Secretary's appointment of a Director is not subject to congressional approval.

25. 43 C.F.R. § 4.5 (1992).

26. The OHA was placed under Policy, Management, and Budget (PMB) in 1989. Previously, it had been associated directly with the Office of the Secretary, usually through the Undersecretary of the Interior. The shift to PMB was strictly administrative; no substantive changes in OHA's operations resulted.

27. 43 C.F.R. § 4.1(a) (1992).

28. *Id.* §§ 4.470, 4.451, and 4.450.

29. 30 U.S.C. §§ 1701-57 (1988).

CRA).<sup>30</sup> FOGRMA and SMCRA decisions are subject to appeal to the IBLA but are not discussed herein.<sup>31</sup>

### *Boards of Appeal*

OHA presently has three component appellate boards:<sup>32</sup>

1. *The Interior Board of Contract Appeals (IBCA)* considers appeals of decisions by contracting officers of any bureau or agency of the Department concerning government procurement contracts. IBCA's authority is set out in the Contract Disputes Act of 1978.<sup>33</sup>
2. *The Interior Board of Indian Appeals (IBIA)* decides appeals from decisions of the Bureau of Indian Affairs and appeals from decisions of administrative law judges in Indian probate matters.<sup>34</sup>
3. *The Interior Board of Land Appeals (IBLA)*, whose jurisdiction is discussed herein, is OHA's largest Board.<sup>35</sup>
4. "*Ad Hoc*" *Boards of Appeals*: In addition to the three regularly constituted boards of appeal, the OHA also convenes "ad hoc" boards to consider various types of appeals.<sup>36</sup> Most recently, appeals from decisions of the Bureau of Reclamation are being considered by an ad hoc board.

### MAKEUP OF THE IBLA

The IBLA is presently made up of nine administrative judges,<sup>37</sup> all of

30. 30 U.S.C. §§ 1201-1328 (1988); 43 C.F.R. Subtitle A, Subpart L (1992).

31. See James M. Day, *Federal Oil and Gas Lease Appeals in the Department of the Interior*, 112-16 (1992) (discussing procedures for civil penalty proceedings under FOGRMA); Will A. Irwin, *Federal Administrative Review under the Surface Mining Control and Reclamation Act: An Annotated Procedural Guide*, 3 J. MIN. L. & POL'Y 417-64 (1988) (discussing procedures under SMCRA).

32. OHA has also had several other Boards which are now defunct: The Interior Board of Mine Operations Appeals, 43 C.F.R. § 4.1(b)(4) (1971), had jurisdiction over cases arising under the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §§ 801-78 (1970) (repealed 1977). Its authority was transferred to the Federal Mine Safety and Health Review Commission in 1977. 30 U.S.C. § 823 (1988). The Alaska Native Claims Appeals Board, 43 C.F.R. § 4.1(b)(5) (1977), had jurisdiction over decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act of 1971. 43 U.S.C. §§ 1601-1629a (1988). Its authority was transferred to the IBLA in 1982. 47 Fed. Reg. 26,392 (1982). The Interior Board of Surface Mining Appeals, 43 C.F.R. § 4.1(b)(4) (1978), had jurisdiction over decisions concerning SMCRA. Its authority was transferred to the IBLA in 1984. 49 Fed. Reg. 7565 (1984).

33. 41 U.S.C. § 607(a)(1) (1988).

34. 43 C.F.R. § 4.1(2)(i)-(ii) (1992).

35. *Id.* § 4.1(b)(3).

36. *Id.* § 4.1(b)(4).

37. The use of the title "administrative judge" to describe IBLA judges has been a source of confusion over the years. IBLA judges are not "administrative law judges" in the sense that they are not appointed pursuant to 5 U.S.C. § 3105 (1988) or authorized to conduct hearings. The adoption of the

whom are attorneys with backgrounds in natural resources law. These judges are career civil servants.<sup>38</sup> One judge is appointed as the chief administrative judge and supervises the other administrative judges and manages the operations of the IBLA. The deputy chief administrative judge assists the chief judge in managing IBLA operations. Although the chief judge participates in determining how to consider a particular case,<sup>39</sup> the chief judge has only one voice in how a particular case is decided.

### SUBJECT MATTER JURISDICTION OF THE IBLA

Final decisions of the Director of the Minerals Management Service (MMS), of officers of the Office of Surface Mining Reclamation and Enforcement (OSM) and the Bureau of Land Management (BLM), and of departmental administrative law judges in certain matters are subject to appeal to the IBLA. In addition, the IBLA has authority to review decisions of administrative law judges concerning civil penalties assessed under SMCRA.

#### *Lands and Minerals Decisions*

The IBLA principally reviews BLM decisions.<sup>40</sup> Common appeals from BLM decisions involve oil and gas leasing and operations; mining claims and plans of operation; rights-of-way; grazing; coal lease readjustment; Alaska Native claims; land exchanges; and color of title applications. Common appeals from decisions by administrative law judges include mining claim contests, grazing allotments, private and government contests of Alaska native allotments, and penalty actions under

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term "administrative appeals judge" is recommended as more descriptive of the role of IBLA judges.

38. IBLA judges are included on the "Senior Level" scale, a special scale comparable to the Senior Executive Service, but for non-managerial positions.

A word is in order on the question of the independence of IBLA's administrative judges. Plainly, IBLA cannot provide "objective administrative review" if its judges are subject to infringement of, or interference with, their decisional independence. The Administrative Conference of the U.S. Commission on Adjudication recently issued a report which discusses concerns about infringement of, or interference with, the decisional independence of decision makers, stressing that there should be "a mechanism for dealing with legitimate concerns" about that problem. ADMIN. CONFERENCE OF THE U.S. COMM'N ON ADJUDICATION, PROPOSED RECOMMENDATION: THE FEDERAL ADMIN. JUDICIARY 9 (Aug. 24, 1992). The recommendation is that the Chief of the forum "have the responsibility to receive and investigate allegations of such activity by agency management officials, and, where warranted, refer them to the appropriate authorities for action." *Id.* At present, the only recourse available to IBLA judges subjected to improper interference is through the Intra-Departmental grievance procedures. However, these procedures are not suitable if the issue concerns the exercise of Departmental decision-making power.

39. As discussed below, the chief judge has authority to place a "hold" on a circulating draft. Also, the chief judge recently determined, pursuant to 43 C.F.R. § 4.2(b) (1992), that a case should be decided by the Board *en banc*.

40. See 43 C.F.R. § 4.410(a) (1992).



## FOGRMA.

With the following five exceptions, all decisions of BLM officers are appealable to the IBLA:

1) The IBLA is precluded from reviewing a BLM decision approved by the Secretary.<sup>41</sup> However, the IBLA retains jurisdiction to determine whether the BLM has properly implemented the Secretary's decision.<sup>42</sup>

2) Approval of a BLM decision by the Assistant Secretary for Lands and Minerals Management removes IBLA's jurisdiction, but only if such approval occurs prior to the filing of an appeal with the IBLA.<sup>43</sup> However, once jurisdiction over an appeal has been lodged in IBLA by the timely filing of a notice of appeal, the supervisory authority provided by the regulations<sup>44</sup> may not be exercised by an assistant secretary. Only the Director of the OHA and the Secretary retain supervisory authority.<sup>45</sup>

3) BLM land classification decisions may not be appealed to the IBLA.<sup>46</sup>

4) The issue of whether an area is properly designated an Area of Critical Environmental Concern is also outside IBLA's jurisdiction.<sup>47</sup>

5) Finally, resource management plans are not subject to appeal to IBLA.<sup>48</sup>

*Royalty and Offshore Oil and Gas Operations Decisions by the  
MMS*

All royalty management decisions by the Director of MMS (both onshore and offshore) are appealable to the IBLA.<sup>49</sup> In addition, MMS Director's decisions involving offshore oil and gas operations are appealable to the IBLA.<sup>50</sup> Administrative review of MMS decisions involves a two-step appellate process. The decision of the MMS officer who initiates the agency action must first be appealed to the Director of the MMS. Only then may the IBLA hear it. This intermediate appeal is similar to the

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41. 43 C.F.R. § 4.410(a)(3) (1992).

42. Donald Pay, 68 IBLA 26 (1982); Susan Delles, 66 IBLA 407 (1982).

43. Blue Star, Inc., 41 IBLA 333, 335-36 (1979).

44. 43 C.F.R. § 4.5 (1992).

45. Moran Corp., 120 IBLA 245, 250-52 (1991).

46. 43 C.F.R. § 4.410(a)(1) (1992); *see also* 43 C.F.R. § 2400.0-3 (1992).

47. *In re* Lick Gulch Timber Sale, 72 IBLA 261 (1983).

48. 43 C.F.R. § 1610.5-2(b) (1992); Albert Yparraguirre, 105 IBLA 245 (1989); Wilderness Society, 90 IBLA 221 (1986). BLM's regulations also characterize its decisions concerning split estate coal leasing as "final" for the Department. 43 C.F.R. § 3427.2(k) (1992). IBLA's jurisdiction regulation does not incorporate that category as an exception, and the IBLA has not recognized such decisions as being outside its jurisdiction.

49. 30 C.F.R. § 290.7 (1992).

50. *Id.*

administrative review procedures that applied to the BLM until 1970.<sup>51</sup>

Decisions of the Bureau of Indian Affairs in cases involving minerals management of Indian lands may also be made to the IBLA.<sup>52</sup> In these cases, the decisions of the Deputy Assistant Secretary for Indian Affairs (Operations) replace decisions of the MMS Director.<sup>53</sup> Those cases are procedurally equivalent to appeals from decisions by the Director of the MMS.

### *Coal Surface Mining*

IBLA's jurisdiction was expanded in April 1983 when it was granted the appellate review functions previously discharged by the Interior Board of Surface Mining and Reclamation Appeals. The IBLA now reviews appeals from decisions of OSM officers and administrative law judges rendered under the authority of the SMCRA.<sup>54</sup>

### *Other Affected Agencies*

In addition to the direct review of BLM, MMS and OSM decisions, IBLA decisions may affect program activities of other agencies within the DOI, 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, which is within the Department of Agriculture. If "adversely affected," these agencies have standing to appeal from adverse BLM decisions.<sup>55</sup>

### *Scope of IBLA'S Authority*

IBLA possesses *de novo* review authority.<sup>56</sup> Moreover, IBLA's review is not limited to issues raised by the parties.<sup>57</sup> Nevertheless, the IBLA will usually defer to the findings of fact by administrative law judges based on credibility determinations.<sup>58</sup> As a general matter, the IBLA will also defer to reasoned analysis and scientific determinations made by the agency in the exercise of its expertise, unless controverted by a "preponderance of the evidence."<sup>59</sup>

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51. See *supra* notes 7-15 and accompanying text.

52. 30 C.F.R. § 290.7 (1992).

53. See, e.g., *Mesa Operating Limited Partnership*, 125 IBLA 28, 30 (1992).

54. 43 C.F.R. §§ 4.1101, 4.1187(f), 4.1196, 4.1267, 4.1271, and 4.1282 (1992).

55. *Id.* § 4.410(a); see, e.g., *National Park Service*, 117 IBLA 247 (1991).

56. 43 C.F.R. § 4.1 (1992).

57. *Shiny Rock Mining Corp.*, 75 IBLA 136 (1983), *on reconsideration*, 77 IBLA 261 (1983).

58. *United States v. Melluzzo*, 105 IBLA 252 (1988).

59. *Animal Protection Institute of America*, 118 IBLA 63, 76 (1991); *Mallon Oil Co.*, 107 IBLA 150, 159 (1989).

### *Standard of Review*

The appropriate standard of review is preponderance of the evidence. Thus, an appellant will prevail by showing, by a preponderance of the evidence, that the agency erred.<sup>60</sup>

The IBLA, as a part of the executive branch, has no authority to declare a statute unconstitutional.<sup>61</sup> The IBLA is bound by the DOI's "duly promulgated" rules and regulations.<sup>62</sup> Rules and regulations reasonably adapted to the administration of an Act of Congress, and consistent with applicable statutes, are considered "duly promulgated" and have the force and effect of law.<sup>63</sup> The IBLA rarely deems regulations not "duly promulgated."<sup>64</sup>

Policy pronouncements set forth in BLM Instruction Memoranda or in the BLM Manual, while deemed controlling on the agency, are not binding on the IBLA. Unlike regulations, policy pronouncements are not considered to have the force and effect of law.<sup>65</sup> However, where the BLM adopts agency-wide procedures that are reasonable and consistent with the law, the IBLA will not hesitate to follow these procedures and require their enforcement.<sup>66</sup>

### BLM DECISIONS

A party must meet two requirements before appealing to the IBLA from a BLM decision. First, BLM must have adjudicated the interests of the party. Second, the decision must have adversely affected the party. Interim actions, such as requests for information or warnings that adverse action might be taken in the future, are not appealable;<sup>67</sup> nor are advisory letters which do not deal with specific applications.<sup>68</sup> The decision must make some determination regarding a party's rights and must take or

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60. *See, e.g.*, Shama Minerals, 119 IBLA 152, 155 (1991).

61. Joseph A. Barnes, 78 IBLA 46, 59-60, 90 Interior Dec. 550, 558 (1983); *United States v. Imperial Gold, Inc.*, 64 IBLA 241, 245-46 (1982).

62. ANR Production Co., 118 IBLA 338, 343 (1991); Veola Rasmussen, 109 IBLA 106, 110 (1989).

63. Tucson Electric Power Co., 111 IBLA 69, 76 (1989).

64. American Gilsonite, 111 IBLA 1, 49-52, 96 Interior Dec. 408, 433-34 (1989) (Hughes, A.J., concurring). *But see* Garland Coal & Mining Co., 52 IBLA 60, 66-72, 88 Interior Dec. 24, 27-30 (1981) (ruling that a regulation relating to termination of federal coal leases for nonpayment of rentals was not duly promulgated where it was based on a statute that deals only with Federal oil and gas leases, and where there were procedural deficiencies in its promulgation).

65. 1 C.F.R. § 305.92-2 (1992); Pamela S. Crocker-Davis, 94 IBLA 328 (1986).

66. Beard Oil Co., 105 IBLA 285 (1988).

67. However, the IBLA may adjudicate an appeal even if it is interlocutory where remand to the BLM would serve no useful purpose. Hoosier Envtl. Council, 109 IBLA 160 (1989); Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986).

68. *See* Alaska, 106 IBLA 160, 165 (1988).

prevent action.<sup>69</sup>

In most cases, the BLM will denote that it is adjudicating a case by including a paragraph advising the recipient that the decision is subject to immediate appeal to the IBLA, as well as information on how to perfect the appeal. BLM's failure to include an appeals paragraph in a decision does not alter a party's right of appeal.<sup>70</sup> If the BLM improperly issues a decision without including an appeals paragraph, the IBLA will still consider a timely appeal. However, BLM's inclusion of the appeals paragraph will not create an appeal right where none exists.<sup>71</sup> The following decisions are not appealable: decisions which are either entirely favorable to the recipient or are interlocutory;<sup>72</sup> decisions involving issues not within IBLA's jurisdiction;<sup>73</sup> decisions where issues have been fully and finally adjudicated at the Secretarial level; or decisions constituting ministerial implementations of Secretarial decisions.<sup>74</sup>

### *Case Record*

When a party appeals an agency decision, the agency must submit the entire original administrative record concerning the decision to the IBLA.<sup>75</sup> The IBLA then uses the file to conduct an independent, objective review of the agency decision. The IBLA may set a decision aside or remand a matter to the agency if it is not supported by a complete case file.<sup>76</sup>

In *Mobil Oil Exploration and Producing Southeast, Inc.*,<sup>77</sup> the IBLA outlined the requirements for records forwarded by agencies whose decisions are subject to its review:

The proper assembly of a case record should not be a difficult matter. However, the agency should not wait to begin this task until after a notice of appeal has been filed. It should start to assemble a file at the initiation of any process which might

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69. Joe Trow, 119 IBLA 388, 391-92 (1991).

70. Texas Oil & Gas Corp., 58 IBLA 175, 88 Interior Dec. 879 (1981); Fancher Brothers, 33 IBLA 262 (1978).

71. Phelps Dodge Corp., 72 IBLA 226 (1983).

72. 43 C.F.R. § 4.410(a)(1992); Chevron U.S.A., Inc., 111 IBLA 96 (1989).

73. See *supra* notes 41-48 and accompanying text.

74. Phelps Dodge Corp., 72 IBLA 226 (1983).

75. Save Our Cumberland Mountains, 108 IBLA 70, 84, 96 Interior Dec. 139, 147 (1989).

76. Wayne D. Klump, 104 IBLA 164, 166 (1988); Mobil Oil Exploration and Producing Southeast, Inc., 90 IBLA 173, 177 (1986)(concerning decisions by the Director, Minerals Management Service); Forest Gray, 88 IBLA 64 (1985); Fred D. Zerfoss, 81 IBLA 14 (1984) (concerning decisions by officers of OSM); Joseph C. Manga, 71 IBLA 187 n.1 (1983); and Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982)(concerning decisions by officers of the Bureau of Land Management).

77. 90 IBLA 173, 177.

culminate in a decision subject to this Board's review. The first document in the record is the one that initiates the process. In certain cases, this might be a notice from the agency, which should be placed in a file with any documents necessary to establish the basis for issuing the notice. Cases such as this, however, are initiated by an application by a member of the public, and a case file should be opened upon receipt of such a document. Any correspondence should be dated and included in the case file chronologically as it is issued or received, along with memoranda of meetings and telephone conversations. *See NLRB v. West Texas Utilities Co.*, 214 F.2d 732, 737 (5th Cir. 1954). It may be necessary to add additional reports, plans, and other documents, depending on the type of case. The final documents added should be the decision and proof of service thereof. The record should be maintained in such a manner that when a notice of appeal is timely filed, the only task remaining is to add the notice to the record and transmit it to this Board.<sup>78</sup>

The agency casefile must be complete, because it may be subject to judicial scrutiny. Without a complete record, the reviewing court is incapable of complying with the procedural requirements mandated by the Administrative Procedure Act (APA).<sup>79</sup> Courts will vacate an agency decision and remand the matter for further consideration when the agency action is not sustainable on the administrative record.<sup>80</sup> There are special procedures for handling confidential information. This information must be included in the record for IBLA's review, and other parties may see it only in certain limited circumstances.<sup>81</sup>

### *Content of Agency Decisions*

Apart from considerations of what the case record contains, agency decisions must be complete.<sup>82</sup> Decisions must include an explanation of how the BLM received the case, including legal and factual background; the actual ruling, clearly stated; and support for the ruling, including legal principles with citations and distinguishing facts. The BLM is urged to make its decisions easy to read.<sup>83</sup>

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78. *Id.*

79. 5 U.S.C. §§ 501-706 (1988). *See, e.g.*, *Higgins v. Kelley*, 574 F.2d 789, 792 (3d Cir. 1978).

80. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

81. 43 C.F.R. § 4.31 (1992).

82. *Roger K. Ogden*, 77 IBLA 4, 90 Interior Dec. 481 (1984); *Petrovest, Inc.*, 71 IBLA 250 (1983).

83. The BLM, however, cannot be expected to reduce its decisions to a level where they will be understood by every recipient. BLM's decisions frequently involve complex factual and legal questions that sometimes cannot be readily explained. This is not surprising, as property decisions are, by their nature, legal decisions.

## INITIATING AN APPEAL TO THE IBLA

The regulations establish a mandatory procedure for initiating an appeal to the IBLA from a decision by the BLM.<sup>84</sup> A party wishing to appeal to the IBLA must file a notice of appeal within thirty days. The notice of appeal must be received by the office of the officer making the decision, *not* by the IBLA.<sup>85</sup> Failure to file a timely notice of appeal deprives the IBLA of jurisdiction over an appeal and renders BLM's decision final. It also places any judicial review in jeopardy, as a complaint may be dismissed by a court for failure to exhaust administrative remedies. The BLM has no authority to waive the thirty day time period for filing a notice of appeal.<sup>86</sup>

The regulations provide for a ten day grace period for filing. The grace period applies when the proper office does not timely receive the filing, and the IBLA determines that the document was transmitted or probably transmitted before the end of the regulatory time period.<sup>87</sup> In other words, a document is considered "filed" as of the date it is transmitted (placed in the mail), or probably transmitted,<sup>88</sup> to the BLM, *provided* that it arrives at the BLM within ten days of the date it is due. With this system, the BLM can know with certainty when no timely appeal has been filed. It may then take action to release the lands in question.

The clock for filing the notice of appeal begins to run the day *after* the "date of service."<sup>89</sup> The "date of service"<sup>90</sup> is the date the decision is delivered to the party's last address of record, regardless of whether it was actually received.<sup>91</sup>

The "last address of record"<sup>92</sup> is the address used in the application or other documentation filed with the BLM, unless a written notice of a change of address has been filed. An attorney's address may be the last address of record.<sup>93</sup> If a letter is returned as undeliverable, the addressee is considered constructively served as of the date the letter is returned to the BLM. Constructive service is equivalent in legal effect to actual service.<sup>94</sup> However, if the party has left a change of address with the Postal Service,

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84. 43 C.F.R. § 4.411(a) (1992).

85. *Id.* § 4.22(e). Thelma M. Eckert, 120 IBLA 367, 369-72 (1991); San Juan Coal Co., 83 IBLA 379, 380 (1985).

86. BLM Instruction Memorandum No. 83-537 (May 10, 1983).

87. 43 C.F.R. § 4.401(a) (1992).

88. The IBLA, not the BLM, makes the determination whether the document was transmitted or probably transmitted before the expiration of the thirty day appeal deadline.

89. Luella S. Collins, 102 IBLA 399, 400 (1988).

90. 43 C.F.R. § 4.411 (1992).

91. *Id.* § 1810.2(b); Lloyd M. Baldwin, 75 IBLA 251 (1983).

92. 43 C.F.R. § 4.411 (1992).

93. 5M, Inc., 109 IBLA 334 (1989).

94. Reg Whitson, 55 IBLA 5 (1981).

which negligently fails to forward the decision, return of the letter will *not* constructively establish service.<sup>95</sup> If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within thirty days after the date of publication.<sup>96</sup>

The date a notice of appeal is filed is normally the date the notice is received at the BLM; the date of transmittal is normally the date the notice was mailed or hand-delivered to the BLM. If the notice is misfiled, it will be considered "transmitted" to BLM on the date that it is forwarded to the correct address.<sup>97</sup> If any filing deadline falls on any day that the BLM is closed, it is automatically extended until the next day that the BLM is open.<sup>98</sup>

In addition to the absolute requirement that the notice of appeal be filed with the BLM, an informational copy of the notice of appeal must also be served on the appropriate office of the Solicitor, BLM's legal representative, as well as on any "adverse party" named in BLM's decision.<sup>99</sup> Failure to meet these requirements does *not* result in mandatory dismissal. Nevertheless, the IBLA has discretion to summarily dismiss the appeal for such failure.<sup>100</sup>

#### BLM'S OBLIGATIONS WHEN A NOTICE OF APPEAL IS FILED

When a notice of appeal is filed, the BLM must forward the complete, original record to the IBLA with the original notice of appeal. Thereafter, the BLM refrains from any further adjudicatory activity concerning the case on appeal or the land involved. Filing of a timely notice of appeal removes BLM's authority to take action on the case until the IBLA acts on the appeal.<sup>101</sup>

However, the filing of an appeal does not affect BLM's authority to act on matters that are functionally independent from the subject of the appeal.<sup>102</sup> The BLM is free to reconsider its decision or engage in

95. L. Lee Horschman, 74 IBLA 360 (1983).

96. 43 C.F.R. § 4.411(a) (1992).

97. *Id.* § 4.401(a); see *Ida Mae Rose*, 73 IBLA 97, 99 (1983).

98. 43 C.F.R. § 4.22(e) (1992). The extension provided by 43 C.F.R. § 4.22(e) (1992) also applies to the ten day grace period. Thus, the grace period extends to the first day following the expiration of ten days that the BLM is open. *Ida Mae Rose*, 73 IBLA 97 (1983).

99. 43 C.F.R. §§ 4.413(a), 4.413(c)(2) (1992).

100. *Id.* § 4.413(b).

101. Melvin N. Berry, 97 IBLA 359 (1987); *Alaska v. Patterson*, 46 IBLA 56 (1980).

Certain BLM decisions remain in effect pending consideration of appeals by the IBLA. In such cases, the BLM must retain authority to take actions associated with the action that is in effect. However, the IBLA can request that the BLM keep it advised of developments while the appeal is pending. See *infra* note 110.

102. See Robert B. Bunn, 102 IBLA 292, 297 (1988); *East Canyon Irrigation Co.*, 47 IBLA

settlement negotiations with an appellant while an appeal is pending.<sup>103</sup> However, BLM must request remand of the appeal from the IBLA prior to revising its decision or implementing the settlement.

#### EFFECT OF BLM'S DECISION PENDING APPEAL

When the OHA was created, a general provision was promulgated providing that the agency decision would not be effective during the time a notice of appeal could be filed, and that the filing of a notice of appeal would further suspend the effect of the decision during the pendency of the appeal.<sup>104</sup> The underlying rationale seems clear: Because the agency decision was not final, and the Department could substantially modify or reverse it on appeal, it was appropriate to preserve the *status quo*.

This procedure caused problems for the beneficiaries of BLM decisions.<sup>105</sup> Those problems were exacerbated by an increase in the length of time appeals remain pending before the IBLA. The automatic suspension of the effect of BLM's decision by the filing of a notice of appeal has been called a "29-cent injunction."<sup>106</sup> Some argued that the traditional suspension rule creates a presumption that the underlying BLM decision subject to appeal is incorrect and allows an appellant to use a frivolous appeal to block its implementation without any consideration being given to the effects on the beneficiaries.<sup>107</sup>

On the other hand, allowing BLM's action to remain in effect might enable illegal activity to continue and even to be irrevocably completed before it can be identified and stopped by IBLA action. Of particular concern is mineral development that may be environmentally sensitive, as it may be difficult or impossible to fully rectify environmental damage once mineral development begins. Also, if minerals are illegally leased, it may

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155 (1980) (syllabus). For example, the BLM does not lose all authority to continue management of a right-of-way case when a notice of appeal of a rental determination for that right-of-way is filed. Confidential Communications, IBLA 91-468 (Jan. 24, 1992) (order granting stay and vacating decision in part).

103. See Clive Kincaid, 111 IBLA 224, 234 (1991).

104. 43 C.F.R. § 4.21(a) (1992).

105. Although 43 C.F.R. § 4.21(a) (1992) nominally affects all appeals within the OHA, this discussion concerns only its effects on the IBLA and the BLM.

Coal lessees found themselves facing deadlines in supply contracts which were upset by the uncertainty of when the Department would render a final decision. Uncertainty as to whether and when drilling on an oil and gas lease would be allowed made it difficult to make arrangements to have oil and gas drilling equipment on site to meet tight drilling deadlines. Uncertainty as to when land exchange agreements would become executable made it difficult to secure financing.

106. Comments of American Mining Congress and National Coal Association to Proposed Rule, 57 Fed. Reg. 44,353 (1992) (Dep't Hearings and Appeals Procedures 1, Oct. 26, 1992).

107. Comments of The Doe Run Company to Proposed Rule, 57 Fed. Reg. 44,353 (1992) (Dep't Hearings and Appeals Procedures 1-2, Oct. 26, 1992).



be difficult for the government to recoup any benefits illegally received.<sup>108</sup>

On January 19, 1993, the Department promulgated an amendment to the stay provision.<sup>109</sup> Although it is complicated, the effect of this provision is limited.<sup>110</sup> The IBLA retains the authority to order that the effect of BLM's decisions be suspended pending its consideration of the appeal. However, the IBLA is required to make a preliminary determination of the merits of the appeal and other factors. The effects of the procedure may be salutary since it will likely extend the issuance of summary dismissals on the merits to a wider range of subject matter.<sup>111</sup>

Several questions about the operation of this new regulation will best be answered as it is enforced.<sup>112</sup> The standards for granting a stay<sup>113</sup> are

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108. The IBLA had already found adequate solutions for some situations and had implemented them through adjudication. For example, where the dispute concerns the amount of money that must be paid for a lease rental or royalty, it should be expected that the recipient of the demand will wish to delay implementation of the order to pay as long as possible, and that the Government will wish to have immediate implementation. Where an unsuccessful appeal challenging the demand for more money ensues, there is legitimate concern that the appellant would declare bankruptcy and reincorporate. On the other hand, if an appellant prevails, the Government may not pay interest for the money improperly retained. Thus, although it may be appropriate to require the appellant to pay the amount demanded pending appeal, allowing it to post an acceptable bond adequate to cover the amount in dispute plus interest fully protects the Government and allows the appellant to retain the time value of the amount in dispute in the event that it prevails on appeal. *See* Marathon Oil Co., 90 IBLA 236, 93 Interior Dec. 6 (1986).

109. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(a) (1993)).

110. The regulation also seems to be unnecessary, as there is a series of exceptions to the automatic stay provision already on the books: 43 C.F.R. §§ 2804.1(b) and 2884.1(b) (1992) (rights-of-way); § 3165.4(c) (oil and gas operations); § 3809.4(f) (mining plan of operations for lands not within wilderness review areas); § 5003.1 (timber management); § 8372.6(b) (recreation use permits); § 3451.2(e) (coal lease readjustments); and § 4160.3(c) (grazing use). Those exceptions tend to cover situations where one party is a beneficiary of a BLM decision and another party appeals. Those exceptions have not proven unworkable, and the IBLA has issued stays where deemed appropriate.

111. The regulations force the IBLA to consider the merits of an appeal promptly, and, where the appeal totally lacks merit, it may be appropriate simply to summarily dismiss it. However, that will divert IBLA time and resources away from its pending cases and will further delay their resolution.

112. For example, the regulation provides that "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." 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(a)(2) (1993)). It is difficult to determine with certainty "the expiration of the time for filing a notice of appeal." Clearly, the time for filing a notice of appeal includes the extension for office closing. It probably does not include the grace period, as 43 C.F.R. § 4.401(a) (1992) speaks in terms of the delay in filing being "waived."

Also, the new regulation places the burden on the appellant to request a stay when the appeal is filed. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(a)(2) (1993)). Thus, the BLM will evidently have to rewrite its appeals paragraph section to give prospective appellants notice of the demands of the new regulation and the consequences of failure to comply.

It is questionable whether a stay could be denied if the BLM failed to timely submit an adequate case record not only showing the basis for its decision, but also containing information bearing on the standards imposed by the new regulation for granting a stay. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(b)(1) (1993)). In the absence of such information, either in the casefile or in a "response to the stay petition," see 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R.

essentially those previously adopted by the IBLA via adjudication<sup>114</sup> and may readily be clarified by that process. A more serious question is presented by the apparent presumption that all of BLM's decisions have both a beneficiary and an unsatisfied party.<sup>115</sup> Most appeals from BLM decisions concern only one party who has been denied an interest in lands or minerals. Does the Department intend to enforce BLM's decision denying an application for an interest? If so, the applicant might lose priority to a junior applicant for the same interest. Does the Department want the BLM to proceed to adjudicate those junior applications? If so, in cases where the rejected applicant prevails on appeal, the BLM will be placed in the difficult position of having to cancel a lease or a patent subsequently issued to the junior applicant, which will require an expensive judicial proceeding.<sup>116</sup>

Also, the new regulation appears to provide that, if an appellant fails to timely file a petition for a stay of decision, 5 U.S.C. section 704 does not apply.<sup>117</sup> Under 5 U.S.C. section 704,<sup>118</sup> a BLM decision is final and ripe for judicial review unless the DOI provides that the action is inoperative

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§ 4.21(b)(3) (1993)), any showing by an appellant in favor of a stay could be seen to meet the appellant's burden of proof. *See* 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(b)(2) (1993)). Moreover, in view of IBLA's stern admonition not to take further action on the matter while it is on appeal, *see supra* note 104 and accompanying text, it is not clear what the BLM will be allowed to do while the appeal is pending.

113. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(b)(1) (1993)).

114. In the past the IBLA found certain factors to be relevant in determining whether to grant a stay pending resolution of the appeal: "likelihood of success on the merits, threat of irreparable injury to the moving party if the stay is not granted, whether the threatened injury to the moving party outweighs the potential harm the stay may cause to the nonmoving party, and whether the stay is contrary to the public interest." *Marathon Oil Co.*, 90 IBLA 236, 245-46, 93 Interior Dec. 6, 11-12 (1986); *see Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), *followed in*, *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 842 (D.C. Cir. 1977); *Taylor Diving and Salvage Co. v. United States Dep't of Labor*, 537 F.2d 819, 821 n.8 (5th Cir. 1976); *Sun Oil Co.*, 42 IBLA 254, 257-58 (1979).

115. Based on comments received, it appears that the rule making is aimed at situations where the BLM issues a decision granting a mineral lease and where an environmental group appeals. *See, e.g.*, Comments of American Mining Congress and National Coal Association to Proposed Rule, 57 Fed. Reg. 44,353 (1992) (Dep't Hearings and Appeals Procedures 1-2, Oct. 26, 1992).

116. BLM's authority to administratively cancel oil and gas leases is sharply limited in some cases, and the Department must instead seek lease cancellation in court. *See, e.g.*, *Lee Oil Properties, Inc.*, 85 IBLA 287, 293-94 (1985). Where the BLM wishes to cancel a patent, it must request the Department of Justice to initiate a judicial action. *United States v. Beebe*, 127 U.S. 338, 342 (1888); *see Michael L. Jensen*, 105 IBLA 375, 378 (1988); *Everett Elvin Tibbets*, 61 Interior Dec. 397, 399 (1954).

117. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(c) (1993)).

118. That section provides, in part: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of [judicial review] . . . unless the agency otherwise requires by rule *and* provides that the action meanwhile is inoperative, for an appeal to superior agency authority." (emphasis added). 5 U.S.C. § 704 (1988).

during an appeal to the IBLA.<sup>119</sup> Of course, the DOI cannot promulgate a rule to amend the provisions of the APA. Thus, it remains to be determined whether district courts will accede to this effort to reduce their judicial review authority.<sup>120</sup>

In any event, the rule making appears to acknowledge that a case in which a request for a stay is filed and denied by the IBLA *is* subject to immediate judicial review.<sup>121</sup> That may pose problems for the BLM and the Department. First, unlike appeals to the IBLA, where no departmental legal representation is necessary, both the Department of the Interior and the Department of Justice will be required to provide legal counsel to defend BLM's decision in court. Second, in many cases, there may be substantial shortcomings in BLM's case records as of the filing of the appeal to the IBLA. The IBLA tolerates those shortcomings, frequently remanding a case to the BLM to cure defects of proof.<sup>122</sup> Such flexibility is not to be expected in the courts.<sup>123</sup>

Third, various offices of the BLM issue decisions subject to judicial review in different district courts, creating great potential for conflicting interpretations of Departmental law. Finally, the government may be liable for substantial "fees and other expenses" to a prevailing party in proceedings for judicial review of agency action.<sup>124</sup> Such fees are not usually chargeable when incurred as part of the IBLA review.<sup>125</sup>

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119. *United States v. Consolidated Mining & Smelting Co.*, 455 F.2d 432, 439-40 (9th Cir. 1971). The statute establishes two requirements by which the Department can prevent a BLM decision from being subject to immediate judicial review. First, it must provide by regulation that the decision is not final. It has done so. Second, it must provide "that the action [(presumably including a BLM decision)] meanwhile is inoperative, for an appeal to superior agency authority [(presumably including an appeal to the IBLA)]." Of course, the whole purpose of the amendment is to render the BLM decision operative.

120. *Compare* *Atlantic Richfield v. Lujan*, 811 F. Supp. 1520, 1532 (N.D. Okla. 1992) (noting the APA requirement that agency action be inoperative pending the administrative review process, and pointing out that the affected party may be entitled to a direct appeal to court if the effect of the agency decision is not stayed).

121. 58 Fed. Reg. 4939 (1993) (to be codified at 43 C.F.R. § 4.21(c) (1993)).

122. *See supra* notes 75-81 and accompanying text.

123. The record which the court will review will consist *solely* of the record before the BLM when it made that decision. *See, e.g.*, *American Petroleum Institute v. Environmental Protection Agency*, 540 F.2d 1023, 1028-29 (10th Cir. 1976).

124. 28 U.S.C. § 2412(d) (1988).

125. Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (1988), an agency that conducts an adversary adjudication shall award costs and expenses to a prevailing party unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or special circumstances make an award unjust. *See also* 43 C.F.R. §§ 4.601 - 4.619 (1992). The Department has interpreted the term "adversary adjudication" in the EAJA as including only proceedings that are required by statute to be conducted under 5 U.S.C. § 554 (1988). 43 C.F.R. § 4.602(b) (1992); *Herman J. Hansen*, 119 IBLA 29, 31 (1991); *Rife Oil Properties*, 116 IBLA 18 (1990); *Benton C. Cavin*, 93 IBLA 211, 212-13 (1986), *aff'd*, *Cavin v. United States*, 19 Cl. Ct. 198 (1989); *Kaycee Bentonite Corp.*, 79 IBLA 182, 186-87, 91 Interior Dec. 138, 140-41 (1984).

## PROCEDURES BEFORE THE IBLA

*Docketing*

The IBLA assigns a docket number to every case when it is received. This number should be used in all communications with the IBLA. The docket number is composed of the prefix "IBLA" to show that the appeal is pending before the Board of Land Appeals; a numerical prefix showing the Fiscal Year that the case was received; and a serial number showing the number of the case in that Fiscal Year (*Example: ABC Oil Company, IBLA 93-999*).<sup>126</sup> The IBLA maintains a computer docket system with case information dating from 1983. Information on older cases is maintained in paper records.<sup>127</sup>

*Filing of Statement of Reasons*

If the notice of appeal did not include a statement of reasons for the appeal, the appellant must file such a statement with the IBLA within thirty days of filing the notice of appeal.<sup>128</sup> The statement of reasons is the document in which the appellant specifies how the BLM has erred in making its decision. Failure to file a statement of reasons "subjects the appeal to summary dismissal."<sup>129</sup> However, the IBLA has authority to extend the time for filing a statement of reasons.<sup>130</sup> Moreover, the IBLA has discretion to overlook a late filing of a statement of reasons.<sup>131</sup>

A copy of the statement of reasons must be served on the Solicitor as

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Hearings before an administrative law judge that are ordered by the IBLA under 43 C.F.R. § 4.415 (1992) to elicit facts necessary to the proper resolution of a case are not "adverse adjudication" proceedings, even though the judge may conduct the hearing using procedures comparable to those set forth in 5 U.S.C. § 554 (1988). Herbert J. Hansen, 119 IBLA 29, 31 (1991).

126. It is not unusual for parties to confuse the docket number with citations to the volumes containing the decisions of the IBLA. Hypothetically, the decision issued in the case docketed as ABC Oil Company, IBLA 93-999, would be cited as ABC Oil Co., 140 IBLA 123 (1994). Cases are identified by docket number while pending before the IBLA. Thereafter, the citation to the IBLA's decision should be used when referring to the case.

In cases where the IBLA issues a dispositive order rather than a decision, there will be no citation, as the text of orders is not included in the IBLA Decision volumes. In those cases, one should refer to the case by docket number, with a parenthetical reference to the date of the order, if known: ABC Oil Co., IBLA 93-999 (Order of Dismissal, Jan. 2, 1994).

127. All case information is available to the public. Telephone inquiries may be made by calling (703) 235-3750. Any case in the 22-year history of the IBLA can be located if either the IBLA docket number or appellant's name is known.

128. 43 C.F.R. § 4.412 (1992). The 10-day grace period for filing also applies to the filing of statements of reasons. 43 C.F.R. § 4.401(a) (1992). Under 43 C.F.R. § 412(a) (1992), if the notice of appeal *did* include a statement of reasons, the appellant may use the 30-day period following filing of the notice of appeal to file "additional statements of reasons and written arguments."

129. 43 C.F.R. § 4.412(c) (1992); Robert L. True, 101 IBLA 320 (1988).

130. 43 C.F.R. § 4.22(f) (1992).

131. *Id.* § 4.401(a). See *Tagala v. Gorsuch*, 411 F.2d 589, 590 (9th Cir. 1969).

well as on any "adverse party" named in BLM's decision.<sup>132</sup> Failure to serve a statement of reasons on an adverse party will not result in dismissal if there has been no showing that a procedural deficiency has prejudiced that party.<sup>133</sup> Instead of dismissing the appeal, the IBLA will normally order that the document be served as required.

### *Filing of Answer*

The BLM or any adverse party named in BLM's decision<sup>134</sup> may file an answer to an appellant's statement of reasons within thirty days after receiving the statement of reasons.<sup>135</sup> The answer is the document in which the BLM or other party (respondent) rebuts the allegations and arguments made in the appellant's statement of reasons. Answers by the BLM are not mandatory; thus, failure to file an answer will not result in a default against the BLM.<sup>136</sup> While the IBLA encourages the BLM to file answers, the BLM rarely does so. Where no answer is filed, the BLM relies on the contents of its case record and decision to justify its decision. Like the statement of reasons, answers are filed with the IBLA.<sup>137</sup> If an answer is filed, a copy must be served on the appellant.<sup>138</sup>

### *Oral Argument*

In cases presenting extremely complicated legal questions, the IBLA may allow the parties to present oral argument. In oral argument, the parties appear before members of a panel or the entire Board and explain their respective interpretations of the law. The IBLA does not grant oral argument to present testimony or other evidence. Oral argument is rarely

132. 43 C.F.R. § 4.413(a). The issue of adverse parties and intervenors is discussed *infra* notes 195-222 and accompanying text.

133. *Red Thunder*, 117 IBLA 167, 172-73 (1990); James C. Mackey, 96 IBLA 356, 359, 94 Interior Dec. 132, 134 (1987).

The regulation in question, 43 C.F.R. § 4.413(b) (1992), states that failure to comply will "subject the appeal to summary dismissal." That language grants the IBLA discretion as to whether or not an appeal should be dismissed for failure to comply. *See Tagala v. Gorsuch*, 411 F.2d 589, 590 (9th Cir. 1959). As noted in *Mackey*, 96 IBLA at 356, 94 Interior Dec. at 134, in the absence of a showing of actual prejudice, dismissal of an appeal might be deemed an abuse of discretion by the IBLA. *See United States v. Rice*, No. CIV. 72-467, PHX WEC (D. Ariz. Feb. 1, 1974), *rev'g* *United States v. Rice*, 2 IBLA 124 (1971) (IBLA dismissed an appeal because the appellant had failed to prove service of the notice of appeal on an adverse party, thus imposing "many unnecessary administrative burdens" and leaving appellant and the adverse party "uncertain for several months as to the status of the contests").

134. The issue of adverse parties and intervenors is discussed in depth in the section dealing with Third Party Practice. *See infra* notes 195-222.

135. 43 C.F.R. § 4.414 (1992).

136. *Id.*

137. *Id.*

138. *Id.*

granted because the IBLA believes that there are very few cases where legal interpretations cannot be fully set out in writing.<sup>139</sup>

### *Ex parte communications*

The regulations strictly forbid written or oral *ex parte* communications with the IBLA.<sup>140</sup> The single exception to the prohibition on *ex parte* communications is that parties may inquire about procedural requirements and case status.<sup>141</sup> Sanctions against prohibited communications include possible adverse action on the merits of the appeal.<sup>142</sup> Furthermore, written communications made in violation of the regulation are included in the record and provided to all parties, who have the right to respond.<sup>143</sup> Oral communications are reduced to writing and treated similarly.<sup>144</sup>

### THE IBLA'S DECISION-MAKING PROCESS

The process by which the IBLA decides a case can aptly be described as "collegial review." Each appeal is thoroughly reviewed by more than one administrative judge. Some cases are decided by two-judge panels, some by three-judge panels, and a few by the entire Board. The entire Board reviews all cases to some extent via the circulation process.<sup>145</sup>

### *Assignment of Cases to Administrative Judges*

IBLA's Docket Attorney assigns cases to panels of administrative judges on the date they are docketed. Cases deemed suitable for disposition by summary order after review of the merits<sup>146</sup> are assigned to a panel consisting of the Chief Administrative Judge and one other administrative judge or acting administrative judge. All other cases are assigned to a panel of two administrative judges for disposition.

Cases are assigned equally to all judges by docket number in order of receipt. They are not assigned according to subject matter. Only two exceptions to this general procedure exist. First, a particular case will probably be assigned to an administrative judge who is familiar with that

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139. In fact, the last oral argument convened by the IBLA was in 1983! Parties and judges alike have suggested that more oral argument be allowed. Although there are significant budgetary restraints attached to having oral argument in the field, it would seem that oral argument at OHA's facilities in Arlington, Virginia, would be appropriate, if the parties requested it, for any case presenting legal issues so complicated that they cannot be fully set out in writing.

140. 43 C.F.R. § 4.27(b)(1) (1992).

141. *Id.*

142. 42 C.F.R. § 4.27(b)(2) (1992).

143. 43 C.F.R. § 4.27(b)(1) (1992).

144. *Id.*

145. See *infra* note 149 and accompanying text.

146. See *infra* notes 147-48 and accompanying text.

case if it has previously been before the IBLA. Second, cases presenting similar issues or involving related matters are grouped together.

### *Summary Dismissal*

All incoming appeals are screened for possible summary dismissal. If summary dismissal is warranted, the IBLA will act promptly. The IBLA usually summarily dismisses appeals on its own motion. However, although the regulations do not expressly allow them, parties are free to file motions to dismiss cases summarily if procedural defects exist. Procedural grounds for summary dismissal include untimeliness; lack of jurisdiction; prematurity (BLM's decision is interlocutory, or an "appeal" is really a "protest" that must be considered by the BLM); and mootness (the adverse action complained of has already irrevocably occurred, and the appeal does not present a recurring issue).<sup>147</sup>

The IBLA summarily dismisses on the merits those cases governed by well-settled precedent. For example, decisions by the BLM declaring mining claims abandoned and void for failure to meet the requirements of section 314 of FLPMA are often summarily dismissed.<sup>148</sup>

The IBLA also summarily dismisses appeals if the appellant withdraws the appeal or if the BLM requests remand for further consideration. When an appellant withdraws its appeal, BLM's decision is left intact. When the BLM requests remand, the decision under appeal is vacated in the remand order, clearing the way for a new adjudication and, if necessary, a new appeal.

The IBLA summarily dismisses appeals by issuing an "Order" signed by two judges. Even though a case is dismissed by summary order, each judge will have thoroughly reviewed the matter before an order is issued, including BLM's case file.

### *Preparation of Full Decisions by Assigned Two-Judge Panels*

In cases that are not summarily treated, the judge designated as the "lead judge" reviews the matter and prepares a draft decision, usually in conjunction with his or her staff attorney. The draft is submitted to the other panel member, who also reviews the matter fully and suggests

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147. Oregon Cedar Products Co., 119 IBLA 89, 93 (1991); Southern Utah Wilderness Alliance, 114 IBLA 326, 329 (1990).

148. 43 U.S.C. § 1744(c) (1988). Most such appeals concern charges that BLM lacks authority to declare claims abandoned and void. However, that issue has been fully litigated, and it is established that Congress mandated in FLPMA that failure to file the proper documents within the prescribed time limits will cause the claim to be lost; that the act is constitutional; and that IBLA has no authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from statutory consequences. *United States v. Locke*, 471 U.S. 84 (1985).

changes in the draft. Usually, the panel member notes agreement by “signature concurrence.” The panel member may agree with the result of the case, but disagree with the reasoning of the lead judge’s draft or treatment of ancillary issues. If the lead judge is unwilling to change his or her draft, the panel member will draft a “special concurrence” setting out his or her own analysis.

#### *Assignment of a Third Panel Member*

If the panel member disagrees with the result of the draft, and the author is unwilling to change it, a third panel member is named by the chief judge to break the tie. Like other assignments, third panel members are assigned in rotation. The panel member who remains in the minority may then draft a separate “dissenting opinion” setting out a different result and supporting reasons. It is possible that the original draft will be reframed as a dissent and one of the panel members will assume the role of lead judge and draft a new lead opinion. It is possible, but rare, for each panel member to author a separate opinion.

#### *Review of Decision or Order by Board at Large*

After the panel arrives at a draft decision, it is circulated to the IBLA at large. Cases disposed of by opinion or order are circulated for three business days. Each judge reviews the draft and may refer to the case file. Judges review all cases, but pay particular attention to those with dissents and/or concurrences. If any three judges agree that problems exist with the draft decision or order, the case will be placed on “hold” and considered by the entire Board at an IBLA meeting. A dissenting opinion by a panel member constitutes a vote for a hold. The chief administrative judge may also unilaterally place a hold on a draft.

If a case is held, an IBLA meeting is convened, at which all judges discuss the merits of the case until a Board consensus is reached. If the Board’s consensus supports the draft decision, the case may issue as circulated. However, if the Board consensus supports a different result and the panel will not accommodate that result, a new judge will be assigned to draft a majority decision. All other judges may either sign the majority decision or draft separate opinions. Such a decision is considered an *en banc* decision.<sup>149</sup>

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149. See, e.g., Southern Utah Wilderness Alliance, 125 IBLA 175 (1993); Steve E. Cate, 97 IBLA 27 (1987).

*En banc* decisions are also used occasionally in cases of unusual importance to emphasize the unity of the Judges’ opinions. In these cases, all Judges would sign a decision supporting one result. See, e.g., Shaw Resources, Inc., 79 IBLA 153, 91 Interior Dec. 122 (1984).



### *Reconsideration of Issued Decisions or Orders*

Even after the IBLA issues its decision or order disposing of an appeal, the case may be reviewed further if either an appellant or respondent petitions for reconsideration.<sup>150</sup> Petitions for reconsideration *must* be filed within sixty days after the date of decision.<sup>151</sup> Petitions must state with particularity the error claimed and include all arguments and supporting documents.<sup>152</sup> The IBLA may grant reconsideration "in extraordinary circumstances for sufficient reason."<sup>153</sup> The IBLA does not grant reconsideration merely to rehash arguments previously raised by the parties.<sup>154</sup> The petitioner must present either convincing new legal argument or relevant newly discovered evidence that was not available at the time of the filing of the notice of appeal along with an explanation for the failure to submit the material while the appeal was pending.<sup>155</sup>

When the IBLA grants a petition for reconsideration, it may consider the new facts or legal arguments and reaffirm its earlier decision.<sup>156</sup> In appropriate circumstances, the IBLA will reverse its decision based on information provided in the petition.<sup>157</sup>

### *Departmental Review*

Both the Secretary and the Director of the OHA have authority to review decisions issued by the IBLA.<sup>158</sup> However, a party has no right to such review and it is rarely granted. Thus, decisions of the IBLA should be regarded as final for the Department.

## JUDICIAL REVIEW OF IBLA DECISIONS

IBLA decisions are appealable to the federal district court where the land or property at issue is situated, or the Federal District Court for the District of Columbia.<sup>159</sup> The APA prescribes the scope of judicial review of agency action.<sup>160</sup> In addition to judicial review under the APA, parties have successfully invoked the jurisdiction of the United States Claims

150. See 43 C.F.R. § 4.403 (1992).

151. *Id.* § 4.403. See also Fletcher de Fisher, 101 IBLA 212 (1988)(on reconsideration).

152. 43 C.F.R. § 4.403 (1992); see also Eugen Dumitru Georgescu, IBLA 87-807 (Order Denying Reconsideration, Aug. 24, 1992).

153. 43 C.F.R. § 4.403 (1992).

154. See 52 Fed. Reg. 21,307 (1987).

155. *Id.*

156. See, e.g., Alfred G. Hoyl, 123 IBLA 194A (1993).

157. See, e.g., Heirs of Frank Hobson, 121 IBLA 66, 68 (1991)(on reconsideration); Stephen Kenyon, 65 IBLA 44, 45 (1982)(on reconsideration).

158. 43 C.F.R. § 4.5 (1992).

159. 28 U.S.C. § 1391(e) (1988).

160. 5 U.S.C. § 706 (1988).

Court under the Tucker Act.<sup>161</sup> The principal standard for reviewing an IBLA decision is whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>162</sup> Additionally, where IBLA decisions are based on a formal evidentiary hearing, the action taken must be supported by substantial evidence.<sup>163</sup> "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, a less rigorous standard than preponderance of the evidence.<sup>164</sup> The reviewing court may only look at the case record that was before the IBLA when it made its decision.<sup>165</sup> The Office of the Solicitor prepares a litigation report to the Department of Justice after the Department has been notified of the appeal from an IBLA decision.<sup>166</sup>

A party may seek judicial review of IBLA decisions regarding BLM cases at any time. However, parties must appeal decisions involving oil and gas leases within ninety days after the Secretary's final decision.<sup>167</sup> Also, departmental decisions concerning the Alaska Native Claims Settlement Act of 1971<sup>168</sup> are subject to a two year statute of limitations.<sup>169</sup>

When a federal court rules in a particular case on an issue that lies within its jurisdiction, the IBLA must follow that ruling.<sup>170</sup> However, the IBLA has declined to follow certain federal court rulings where the effect could be extremely disruptive to existing Departmental policies and programs, and where a reasonable prospect exists that other federal courts might arrive at a different result.<sup>171</sup> When courts take conflicting positions on issues of major importance to IBLA operations, the IBLA has, on its own motion, stayed consideration of administrative appeals, pending

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161. 28 U.S.C. § 1491(a)(1) (1988). The Act states, in part:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

*Id.* See *Chevron U.S.A., Inc. v. United States*, 17 Ct. Cl. 537 (1989), *rev'd on other grounds*, 923 F.2d 830 (D.C. Cir. 1991), *cert. denied sub nom.* *Phillips Petroleum Co. v. United States*, No. 91-1, and *Pennzoil Co. v. United States*, No. 91-34, 112 S. Ct. 167 (1991).

162. See 5 U.S.C. § 706(2)(A) (1988).

163. 5 U.S.C. § 706(2)(E) (1988); *Rodgers v. Watt*, 726 F.2d 1376, 1380-81 (9th Cir. 1984).

164. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619-20 (1965).

165. See 5 U.S.C. § 706 (1988); *Camp v. Pitts*, 411 U.S. 138, 142 (1972).

166. This procedure protects the Board's quasi-judicial posture. See *Gulf & Western Industries, Inc. v. United States*, No. 65-80C (Ct. Cl. Feb. 24, 1982).

167. 30 U.S.C. § 226-2 (1988).

168. 43 U.S.C. §§ 1601-1629(a) (1988).

169. *Id.* § 1632(a). Also section 526(a)(2) of SMCRA provides that IBLA decisions concerning SMCRA are subject to a 60-day limit for filing petitions for judicial review. 30 U.S.C. § 1276(a)(1) (1988).

170. *Oregon Portland Cement Co.*, 84 IBLA 186, 189 (1984) (on judicial remand).

171. *Id.* at 190; see, e.g., *Gretchen Capital, Ltd.*, 37 IBLA 392, 395 (1978).

resolution by circuit courts of appeals or the Supreme Court.<sup>172</sup>

### ADMINISTRATIVE HEARINGS

Hearings are trial-like proceedings where parties present both testimony and documentary evidence. Administrative law judges in the Hearings Division, a separate component of the OHA, preside over these hearings.<sup>173</sup> Witnesses are placed under oath and examined and cross-examined.<sup>174</sup> Although the rules of evidence are relaxed in administrative hearings, the presiding administrative law judge still rules on the admissibility of evidence.<sup>175</sup> The proceedings are "on the record;" a transcript of all testimony is made and all documents are retained as part of an official record.<sup>176</sup> Hearings arise in the following circumstances:

#### *Contests*

Contests may be initiated either by the BLM (government contest)<sup>177</sup> or by a private party (private contest).<sup>178</sup> Government contest procedures are grounded on the constitutional concept that the federal government may not deprive citizens of certain specific claims of property rights (even where title remains in the federal government) without the due process of law.<sup>179</sup> The BLM may not invalidate any mining claim or Alaska Native allotment without first initiating a contest.<sup>180</sup>

In effect, the administrative law judge acts in BLM's place as the initial decision maker. In contests concerning mining claims, the Government is required only to make a *prima facie* case, after which the burden of proof shifts to the contestee to prove his case by a preponderance of the evidence.<sup>181</sup> In contests concerning Alaska Native allotments, the Government first goes forward with its evidence, but the allottee, as applicant, bears the ultimate burden of proof.<sup>182</sup> The administrative law judge's

172. See, e.g., *Chevron U.S.A., Inc.*, IBLA 87-707 (Order Suspending Consideration, Jan. 18, 1990); *Samuel A. Wright*, 86 IBLA 286 (1985).

173. 43 C.F.R. § 4.1(a) (1992).

174. *Id.* § 4.435(a).

175. See *id.* § 4.433.

176. *Id.* § 4.23.

177. *Id.* § 4.451.

178. *Id.* § 4.450.

179. See *Cameron v. United States*, 252 U.S. 450, 460-61 (1919); *Orchard v. Alexander*, 157 U.S. 372, 383 (1894); *Pence v. Kleppe*, 529 F.2d 135, 140-41 (9th Cir. 1976); see also *United States v. Jenkins*, 11 IBLA 18 (1973) (an approved entry under the Desert Land Act, 43 U.S.C. § 321 (1988), may be canceled only by Government contest).

180. *Cameron*, 252 U.S. at 460-61; *Pence v. Andrus*, 586 F.2d 733, 739-42 (9th Cir. 1978); see also 43 C.F.R. § 4.1190 (1992).

181. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

182. 43 U.S.C. §§ 270-3 (1970) (repealed 1971); *Donald Peters*, 26 IBLA 235, 243, 83 Inte-

decision, which includes findings of fact and conclusions of law, constitutes the initial decision for the Department. In the absence of an appeal to the IBLA, that decision is final.<sup>183</sup>

Private contests are governed by the procedures in 43 C.F.R. section 4.450 (1992). Any person claiming title to, or an interest in, land adverse to any other person may initiate a private contest to invalidate the latter's claim.<sup>184</sup> A contestant must base the contest on some reason not shown on BLM's records.<sup>185</sup>

### *Hearings Initiated by an Adversely Affected Party as Part of the Review Process*

In grazing,<sup>186</sup> SMCRA,<sup>187</sup> and FOGRMA<sup>188</sup> penalty cases, a hearing before an administrative law judge follows initial adverse action by the BLM or the OSM. The appellant is entitled to a hearing as part of the administrative review process.

### *Hearings Initiated at IBLA's Direction*

The IBLA may also initiate hearings at the request of a party or where the IBLA determines that material issues of fact exist that cannot be resolved on the basis of the record before it.<sup>189</sup> If the IBLA so orders, it refers the matter to the Hearings Division for assignment of an administrative law judge to convene a hearing. The IBLA may or may not include instructions concerning the issues for resolution by the administrative law judge.<sup>190</sup> The IBLA usually directs the administrative law judge to make an initial decision which, unless appealed to the IBLA, is final for the Department.<sup>191</sup>

## THIRD PARTY PRACTICE

Third party<sup>192</sup> practice before the BLM and the IBLA is one of the most confusing areas of practice. Although Congress has directed the

rior Dec. 308, 312 (1976).

183. See 43 C.F.R. §§ 4.410(a) and 4.411(a) (1992).

184. *Id.* § 4.450-1.

185. *Id.* § 4.450-1.

186. *Id.* § 4.470(a).

187. *Id.* §§ 4.1150, 4.1160, 4.120, and 4.1261.

188. 30 U.S.C. § 1719(e) (1988).

189. 43 C.F.R. § 4.415 (1992); see, e.g., *Lawyers Title Ins. Co.*, 92 IBLA 162 (1986).

190. See, e.g., *Frederic C. Tullis*, 102 IBLA 215, 222-23 (1988); *Lawyers*, 92 IBLA at 173.

191. 43 C.F.R. §§ 4.452-8(b)-(c) (1992); see, e.g., *Frederic C. Tullis*, 102 IBLA at 223.

192. The term "third party" is used to represent one who is not the proponent of the action in question. As discussed below, the third party may or may not have legal standing to challenge BLM's action.

Secretary to structure adjudication procedures concerning public land statutes to assure adequate third party participation,<sup>193</sup> with two limited exceptions,<sup>194</sup> Departmental regulations do not contain any provisions directly considering the right of a third party to participate in BLM's or IBLA's decision-making process. Still, the right of third parties to practice has been clarified by adjudication.

### *Third Party Practice Before BLM*

BLM actions that are not yet ripe for appeal to the IBLA are subject to "protest."<sup>195</sup> A protest is a complaint filed by a person requesting that the BLM review a proposed action. It is adjudicated within the BLM, and a protestant may appeal BLM's decision denying the protest to the IBLA.<sup>196</sup> The present protest regulation,<sup>197</sup> which dates from 1954,<sup>198</sup> is partly a vestige of a now-defunct procedure under which a party could acquire a "preference right of entry" to land by contesting and procuring the cancellation of another party's homestead entry on grounds not shown by the Government's records.<sup>199</sup> The Department allowed participation not only by rival claimants, but by all persons with knowledge of impropriety in public land entries:

[W]here 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.<sup>200</sup>

This is a very broad regulation. It invites "any" person to participate "in any proceeding before" the BLM, provided only that the person objects to "any action proposed to be taken." Although no specific action is required, the BLM must take "such action . . . as is deemed to be appropriate in the

193. 43 U.S.C. § 1701(a)(5) (1988).

194. 43 C.F.R. § 4.1110(1992) (governing intervention in SMCRA cases); *id.* § 4.471 (1992) (permitting intervention in grazing cases upon "a proper showing of interest" to the administrative law judge).

195. See 43 C.F.R. § 4.450-2 (1992); *see, e.g.*, Joyce Padilla, 119 IBLA 33, 34-35 (1991).

196. See 43 C.F.R. § 4.410(a) (1992).

197. *Id.* § 4.450-2.

198. 21 Fed. Reg. 1862 (1954); 43 C.F.R. § 221.52 (1963).

199. Under the Act of May 14, 1880, amended by 43 U.S.C. § 185 (1970), repealed by Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84, 90 Stat. 2787, in 1976 for lands not in Alaska, and in 1986 for all other lands, in addition to homesteads, a party could under the 1880 Act contest any "preemption" or "timber culture entry." The 1880 Act effectively meant that a contestant could serve as BLM's field inspector if a claimant had falsely alleged that he had resided on or cultivated a claim. See *Lamb v. Stoffel*, 36 IBLA 201, 203 (1978); Louis J. Hobbs, 77 Interior Dec. 5, 6 (1970).

200. 43 C.F.R. § 4.450-2 (1992).

circumstances.”

In the landmark case of *California Association of Four Wheel Drive Clubs*,<sup>201</sup> the late Chief Judge Frishberg identified the protest regulation as the vehicle for ensuring that third parties would be allowed to participate before the BLM. He also distinguished such “protest” from an “appeal” to the IBLA. Most importantly, the case established an orderly procedure for reviewing BLM’s decisions when a third party does participate:

If an individual has been a “party to a case” and [appeals BLM’s actions to IBLA], 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” [to IBLA] effectively forecloses any consideration by the local [BLM] 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 . . . is provided with the opportunity to examine the merits of the submission and issue a decision thereon. Should the action taken by [BLM] 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.<sup>202</sup>

Thus, a third party may participate before BLM by filing a timely protest.<sup>203</sup>

The protest procedures have been substantially refined and clarified by subsequent case law. Where the BLM has not issued an appealable decision, a document styled as an “appeal” is treated as a “protest.”<sup>204</sup> Conversely, a document styled as a “protest” which is filed within thirty days after the decision has been served is treated as an “appeal.”<sup>205</sup>

In adjudicating a protest, the BLM is required to take only “such action as is deemed to be appropriate in the circumstances.”<sup>206</sup> The BLM

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201. 30 IBLA 383 (1977).

202. *Id.* at 385.

203. 43 C.F.R. §§ 4.450-4.452 (1992).

204. Duncan Miller, 39 IBLA 312, 315-16 (1979)(on reconsideration).

205. Arnell Oil Co., 95 IBLA 311, 317-19 (1987).

206. 43 C.F.R. § 4.450-2 (1992).

may dismiss protests which contain mere conclusory allegations that indicate no basis for changing BLM's proposed action.<sup>207</sup> Only when the protest raises a reasonable doubt about the correctness of BLM's proposed action is full adjudication appropriate.<sup>208</sup> In such a case, the BLM may further investigate the grounds of the protest independently and/or direct the protestor to provide additional information.<sup>209</sup>

In order to have standing to appeal any BLM decision, including a decision denying a protest, a party must meet two requirements. First he or she must be "a party to the case."<sup>210</sup> Second he or she must be "adversely affected" by BLM's decision.<sup>211</sup> One becomes "a party to a case" by filing a protest before the BLM issues its decision.<sup>212</sup> If a party fails to protest prior to BLM's decision, that party is not a party to the case and may not appeal, even if adversely affected.<sup>213</sup>

It is the IBLA, not the BLM, that determines whether a party is "adversely affected" by BLM's decision.<sup>214</sup> If the would-be appellant lacks standing on either ground, the IBLA automatically dismisses the appeal.<sup>215</sup>

### *Third Party Practice Before The IBLA*

In addition to a third party's right to appeal a BLM decision denying a protest, a person directly involved in a BLM proceeding may participate in another party's appeal. This situation usually occurs when the BLM issues a decision that is favorable to one party and unfavorable to another. The

207. Phillip A. Kulin, 53 IBLA 57, 61 (1981).

208. Joyce & Tony Padilla, 119 IBLA 33, 38 (1991).

209. *Id.*; Patricia C. Alker, 62 IBLA 150, 151 (1982); Lee S. Bielski, 39 IBLA 211, 86 Interior Dec. 80 (1979).

210. 43 C.F.R. § 410(a) (1992).

211. *Id.*

212. California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977).

213. *See, e.g.*, Edwin H. Marston, 103 IBLA 40, 42-43 (1988).

214. The case of Donald Pay, 85 IBLA 283, 285-86 (1985), is instructive. In that case the IBLA denied appellant Pay standing, because he did not allege that he use or have any right, title, or interest in the affected lands: "Pay's interest . . . can best be described as that of a deeply concerned citizen. In the absence of more, however, he has not shown that he has been adversely affected within the meaning of 43 C.F.R. § 4.410." (footnotes omitted). *See also* Kenneth W. Bosley, 102 IBLA 235 (1988).

In *Pay*, the Board cited the following statement by Mr. Justice Stewart in *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972):

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. (footnote omitted).

*Donald Pay*, 85 IBLA at 285 n.2.

215. The Wilderness Society, 110 IBLA 67, 72-73 (1989).

regulations direct the BLM to name in its decision “adverse parties,”<sup>216</sup> that is, any person who would be adversely affected if the decision were overturned on appeal.<sup>217</sup> An appellant is required to serve a copy of his or her notice of appeal and/or statement of reasons on each “adverse party” named in the decision.<sup>218</sup> Any party served with a notice of appeal has the right to file an answer to an appellant’s statement of reasons and participate as a full party in IBLA’s decision making.<sup>219</sup>

One not named as an adverse party in BLM’s decision, or not served with a copy of appellant’s notice of appeal, may file an answer, provided that the IBLA first grants that party’s petition to intervene. The IBLA routinely grants such petitions where the petitioner is the beneficiary of the decision under appeal.<sup>220</sup>

The participation right of a party who is not the direct beneficiary of BLM’s decision is less clear. Such party must have some direct interest in a proceeding for the IBLA to grant its petition to intervene.<sup>221</sup> Otherwise, the party may be accorded status as *amicus curiae* and be allowed to present its

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216. 43 C.F.R. § 4.413(a) (1992).

217. Beard Oil Co., 105 IBLA 285, 287 (1988).

218. 43 C.F.R. § 4.413(a) (1992).

219. *Id.* § 4.414.

220. *See, e.g.*, Southern Utah Wilderness Alliance, 123 IBLA 13, 16 (1992); Lloyd Heger, 121 IBLA 321, 324 (1991); *Beard Oil Co.*, 105 IBLA at 287.

221. *See, e.g.*, Ladd Petroleum Corp., 107 IBLA 5, 6 (1989)(operator of an oil and gas well allowed to intervene in appeal by a federal oil and gas lessee reviewing a BLM decision requiring payment of royalty on flared gas. The IBLA recognized that the operator was “potentially liable” to the lessee if royalty was owed).

Where a memorandum of understanding between the BLM and the Department of State Lands (DSL), State of Montana, provided “for joint regulation of and mining and protection of surface resources” by the BLM and DSL, DSL was afforded status as a party respondent. Red Thunder, 117 IBLA 167, 169 n.1, 97 Interior Dec. 263, 264 n.2 (1990); *see also* Animal Institute of America, 122 IBLA 290, 291 (1992) (allowing petition of Wyoming State Grazing Board in appeal from BLM decision establishing “appropriate management level” of wild horses on the range).

The State of Wyoming was found to have a direct interest in a matter where it stood to lose royalty revenue if BLM’s decision to lease federal coal were reversed. In contrast, requests to intervene by parties that had filed coal lease applications similar to those under review before the IBLA were denied, even though IBLA’s disposition of the issues raised in that appeal might have had a direct impact on BLM’s evaluations of their applications. Powder River Resource Council, et al., IBLA 92-12 (Order of Dec. 26, 1991).

The IBLA denied a petition for intervention of a sub-lessee of a federal oil and gas lease in an appeal of a decision of the BLM increasing the royalty on production from the lease, ruling that the question of whether the sublessee was bound to pay the higher royalty was the subject of a different pending case that would eventually be subject to appeal to the Board. Thus, the IBLA evidently regarded the petitioner’s attempt to participate as premature. Coastal States Energy Co., 105 IBLA 64, 64-65 n.1 (1988).

The IBLA granted a petition for intervention of two parties who stood to lose their ability to transport natural gas through a pipeline if the IBLA affirmed BLM’s determination that the right-of-way for the pipeline was issued pursuant to section 28 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 185 (1988). Exxon Corp., 97 IBLA 45, 50, 94 Interior Dec. 139, 142 (1987).



views in an *amicus* brief.<sup>222</sup>

### CONCLUSION

In any dispute, there is a winner and a loser. A corollary is that every decision I write makes someone unhappy. However, it also seems clear to me, after 18 years in the business, that the primary purpose of writing decisions should be to end disputes. It is a testament to the effectiveness of the present appeals system that there is very little judicial litigation concerning IBLA's decisions. People may not like them, but they accept them. The system does work.

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222. The IBLA has, for example, granted *amicus* status to parties that had filed with the BLM coal lease applications similar to those under review before the IBLA, Powder River Resource Council, et al., IBLA 92-12 (Order of Dec. 26, 1991), and to a county government wishing to advise the IBLA on the effects of its decision on the local economy and commenting on the merits of the appeal. *See* Red Thunder, 117 IBLA 167, 170 n.2, 97 Interior Dec. 263, 265 n.2 (1990).

The IBLA has held that "*amicus* status" is "limited intervention." *United States v. United States Pumice Co.*, 37 IBLA 153, 160 (1978). That holding notwithstanding, allowing "intervention" in a proceeding before the IBLA more recently appears to mean allowing a party an unlimited right to participate as would an appellant or the BLM. *See generally* 59 AM. JUR. 2d § 170 (1987), and allowing "*amicus* status" appears to mean allowing the filing of briefs; 4 AM. JUR. 2d § 4 (1962).

In *United States v. United States Pumice Co.*, 37 IBLA at 157, the IBLA, citing 43 C.F.R. § 4.450-1 (1992), ruled that the right to intervene in a contest proceeding before an administrative law judge is limited to those who claim "title to or an interest in land adverse to any other person claiming title to or an interest in such land."

For a more complete discussion of third-party status in hearings, see Frishberg, *supra* note 4, at 561-65.