

information that is already in the public domain, in either the same or a substantially-identical form, does not add anything new to the public's understanding of Government activities.

\* \* \* \* \*

(4) Your expertise or understanding of the requested records as well as your ability and intention to effectively convey information to the public. NARA ordinarily presumes that a representative of the news media satisfies this consideration.

\* \* \* \* \*

(d) Requesters should ask for waiver or reduction of fees when they first submit their requests to NARA, and should address the criteria referenced above. A requester may ask for a fee waiver at a later time while the underlying record request is still pending or during an administrative appeal.

(e) NARA may also waive (either partially or in full) or reduce fees for operational records in additional circumstances as a matter of administrative discretion.

#### § 1250.74 [Amended]

■ 9. Amend § 1250.74(a) by removing the phrase “, and your right to judicial review of the decision if information is denied under a FOIA exemption”.

■ 10. Amend § 1250.82 as follows:

- a. Redesignate paragraphs (b) through (g) as paragraphs (c) through (h); and
- b. Revise paragraph (a);
- c. Add a new paragraph (b); and
- d. Revise newly redesignated paragraphs (f) and (h).

The revisions and addition read as follows:

#### § 1250.82 How does NARA process FOIA requests for confidential commercial information?

\* \* \* \* \*

(a) If the records are less than 10 years old, NARA reviews the records in response to a FOIA request. If NARA then believes that it should release the records under FOIA, it makes reasonable efforts to inform the submitter. The notice to the submitter describes the business information requested or includes copies of the requested records. NARA does not notify the submitter when it determines that:

(1) It must withhold the information under FOIA's exemptions;

(2) The information has been published or made available to the public; or

(3) It is required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information.

(b) If the records are 10 or more years old, NARA reviews the records in response to a FOIA request as it would any other records, and at its discretion, informs the submitter. NARA releases the records if it determines that neither Exemption 4 nor any other exemption applies.

\* \* \* \* \*

(f) NARA reviews and considers all objections to release that it receives within the time limit. Any information provided by a submitter under this provision may itself be subject to disclosure under FOIA. NARA considers a submitter who fails to respond within the time period specified in the notice to have no objection to disclosure of the information. If NARA decides to release the records, it informs the submitter in writing, along with NARA's reasons for deciding to release. NARA includes with the notice copies of the records as it intends to release them. NARA also informs the submitter that it intends to release the records within a reasonable time after the date of the notice unless a U.S. District Court forbids disclosure. NARA will not consider any information it receives after the date of a disclosure decision.

\* \* \* \* \*

(h) NARA notifies the requester in three circumstances:

(1) When it notifies the submitter of the opportunity to object to disclosure, or to extend the time for objecting;

(2) When it notifies the submitter of its intent to disclose the requested information; and

(3) When a submitter files a lawsuit to prevent the disclosure of the information.

Dated: June 10, 2014.

**David S. Ferriero,**

*Archivist of the United States.*

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## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

#### 43 CFR Part 4

[K00103 12/13 A3A10; 134D0102DR-DS5A300000-DR.5A311.IA000113]

RIN 1094-AA54

### Hearing and Re-Petition Authorization Processes Concerning Acknowledgment of American Indian Tribes

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule revises the process and criteria for Federal acknowledgment of Indian tribes. This rulemaking would establish procedures for a new category of expedited hearing for petitioners who receive a negative proposed finding for Federal acknowledgment and request a hearing. This rule would also establish procedures for a new re-petition authorization process for petitioners whose petitions have been denied. This proposed rule is related to a Bureau of Indian Affairs proposed rule that would revise processing of petitions for Federal acknowledgment of Indian tribes.

**DATES:** Comments on this rule must be received by August 18, 2014.

**ADDRESSES:** You may submit comments by any of the following methods:

—*Federal rulemaking portal:* <http://www.regulations.gov>.

—*Email:* [karl\\_johnson@oha.doi.gov](mailto:karl_johnson@oha.doi.gov). Include the number 1094-AA54 in the subject line.

—*Mail or hand delivery:* Karl Johnson, Office of Hearings and Appeals, Departmental Cases Hearings Division, U.S. Department of the Interior, 351 S. West Temple, Suite 6.300, Salt Lake City, UT 84101. Include the number 1094-AA54 on the envelope.

Please note that we will not consider or include in the docket for this rulemaking any comments received after the close of the comment period (see **DATES**) or any comments sent to an address other than those listed above.

**FOR FURTHER INFORMATION CONTACT:** Karl Johnson, Senior Attorney, Office of Hearings and Appeals, Departmental Cases Hearings Division, (801) 524-5344; [karl\\_johnson@oha.doi.gov](mailto:karl_johnson@oha.doi.gov). You may review the information collection request online at <http://www.reginfo.gov>. Follow the instructions to review Department of the Interior collections under review by OMB.

**SUPPLEMENTARY INFORMATION:** This proposed rule is being published in connection with a Bureau of Indian Affairs proposed rule that would comprehensively revise 25 CFR part 83 to improve the processing of petitions for Federal acknowledgment of Indian tribes. The BIA proposed rule published on May 29, 2014 (79 FR 30766). These improvements include granting the petitioner the ability to request a hearing before an Office of Hearings and Appeals (OHA) judge if the petitioner receives a negative proposed finding on Federal acknowledgment from the Office of Federal Acknowledgment (OFA). The hearing process culminates

in the judge's issuance of a recommended decision on Federal acknowledgment for consideration by the Assistant Secretary—Indian Affairs.

This proposed rule would not change the “reasonable likelihood” burden of proof standard in 25 CFR 83.10(a) for determining whether the facts claimed by the petitioner are valid and that the criteria for Federal acknowledgment have been met. In the acknowledgment context, courts have examined whether the Department correctly applied the “reasonable likelihood” standard but have not articulated what the standard actually requires. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220–21 (D.C. Cir. 2013). Instead, they have only stated that “conclusive proof” or “conclusive evidence” is not required. *Id.* at 212. The proposed rule would incorporate the Supreme Court's clarification—arising from criminal cases in which jury instructions are challenged—that satisfaction of the “reasonable likelihood” standard does not require proof that a claimed fact is “more likely than not” to be true. *Boyd v. California*, 494 U.S. 370, 380 (1990).

This proposed rule is patterned to a large extent after the procedural regulations at 43 CFR part 45, which contain very strict time constraints on procedures and unusual procedural requirements to expedite the process to comply with a statutory time limit. Compliance with these procedures can be onerous for the parties and the judge. The proposed rule would employ similar but less strict time constraints to achieve a proper balance between speed and adequate development and consideration of the issues.

One of the unusual procedures incorporated into the proposed rule is the requirement to submit direct testimony in writing before the hearing to shorten the length of the hearing. See proposed § 4.1042(a). The hearing would generally be limited to cross-examination of witnesses (and any re-direct and re-cross examination).

While there is no statutory time limit governing the proposed hearing process for petitions for Federal acknowledgment, there is still a substantial need to resolve those petitions expeditiously. Therefore, issuance of a recommended decision completing the hearing process would be required within 180 days of initiation of the process unless the judge finds good cause for extending this deadline.

In our experience, full administrative adjudications involving prehearing conferences, discovery, motions, an evidentiary hearing, briefing, and a decision often take over a year to complete, especially if the case involves

multiple parties and complex issues. Shortening this process to 180 days will be a substantial challenge for the parties and the judge, and will require adherence to fairly stringent procedural limits and deadlines.

Comments are welcome on any revisions to these regulations that might better balance the parties' need for an adequate opportunity to prepare and present their cases and the substantial need to resolve each petition as expeditiously as possible. More particularly, comments are invited addressing the propriety of requiring direct testimony to be submitted in writing before the hearing and setting a 180-day time limit for completion of the hearing process and issuance of a recommended decision.

Under this proposed rule, the 180-day period for the hearing process would commence when we issue the docketing notice after receiving the referral notice and record from OFA, and would end when the judge issues a recommended decision. During that period, at least one prehearing conference would be held; discovery would be conducted as approved by the judge or agreed to by the parties; evidence, including direct written testimony and oral cross-examination, would be presented at a hearing; post-hearing briefs would be filed; and a recommended decision would be issued by the judge. Any person or organization may file a motion to intervene in the hearing process. Upon a proper showing of interest or other factors, the judge may grant intervention.

This proposed rule also includes summary decision procedures, i.e., procedures for issuing a recommended decision without a hearing based on the absence of any genuine disputed issue of material fact in the record. We invite comments on whether the final rule should include summary decision procedures.

We also request comments on the following questions: (1) Who is an appropriate OHA judge to preside over the hearing process and issue a recommended decision on Federal acknowledgment or over the re-petition authorization process and issue a final decision on whether re-petitioning is authorized—an administrative law judge appointed under 5 U.S.C. 3105, an administrative judge with OHA, or an attorney designated by the OHA Director to serve as the OHA judge (the proposed rule defines “OHA judge” broadly to include all three); (2) whether the factual basis for the OHA judge's decision should be limited to the hearing record; and (3) whether the hearing record should include all

evidence in OFA's administrative record for the petition or be limited to testimony and exhibits specifically identified by the petitioner and OFA.

### Procedural Requirements

#### A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

#### B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to Federal acknowledgment of Indian tribes.

*D. Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

*E. Takings (E.O. 12630)*

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is therefore not required.

*F. Federalism (E.O. 13132)*

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*G. Civil Justice Reform (E.O. 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

*H. Consultation With Indian Tribes (E.O. 13175)*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22951 (May 4, 1994), supplemented by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000), and 512 DM 2, the Department has assessed the impact of this rule on Tribal trust resources and has determined that it does not directly affect Tribal resources. The rules are procedural and administrative in nature. However, the Department has consulted with federally recognized Indian tribes regarding the companion proposed rule being published concurrently by the BIA. That rule is an outgrowth of the "Discussion Draft" of the Federal acknowledgment rule, which the Department distributed to federally recognized Indian tribes in June 2013, and on which the Department hosted five consultation sessions with federally recognized Indian tribes throughout the

country in July and August 2013. Several federally recognized Indian tribes submitted written comments on that rule. The Department considered each tribe's comments and concerns and has addressed them, where possible. The Department will continue to consult on that rule during the public comment period and tribes are encouraged to provide feedback on this proposed rule during those sessions as well.

*I. Paperwork Reduction Act*

The information collection requirements are subject to an exception under 25 CFR part 1320 and therefore are not covered by the Paperwork Reduction Act.

*J. National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

*K. Effects on the Energy Supply (E.O. 13211)*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

*L. Clarity of This Regulation*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "COMMENTS" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

*M. Public Availability of Comments*

Before including your address, phone number, email address, or other

personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**List of Subjects in 43 CFR Part 4, Subpart K**

Administrative practice and procedure, Hearing and re-petition authorization procedures, Indians-tribal government.

For the reasons stated in the preamble, the Department of the Interior, Office of the Secretary, proposes to amend 43 CFR part 4 as follows:

**PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES**

- 1. The authority for part 4 continues to read as follows:

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

- 2. Add Subpart K to read as follows:

**Subpart K—Hearing and Re-Petition Authorization Processes Concerning Acknowledgment of American Indian Tribes****General Provisions**

Sec.

- 4.1001 What terms are used in this subpart?
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- 4.1020 What will OHA do upon receiving the record from OFA?
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- 4.1030 What are the requirements for OFA's witness and exhibit list?
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- 4.1035 How can parties request documents, tangible things, or entry on land?
- 4.1036 What sanctions may the judge impose for failure to comply with discovery?
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**Hearing, Briefing, and Decision**

- 4.1040 When and where will the hearing be held?
- 4.1041 What are the parties' rights during the hearing?
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- 4.1047 What is the standard of proof?
- 4.1048 When will the hearing record close?
- 4.1049 What are the requirements for post-hearing briefs?
- 4.1050 What are the requirements for the judge's recommended decision?

**Re-Petition Authorization Process**

- 4.1060 How does an unsuccessful petitioner request authorization to re-petition for Federal acknowledgment?
- 4.1061 What will OHA do with a request?
- 4.1062 What can the judge do?
- 4.1063 When will the judge allow a re-petition?

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a-1.

**General Provisions****§ 4.1001 What terms are used in this subpart?**

As used in this subpart:  
*Assistant Secretary* means the Assistant Secretary—Indian Affairs within the Department of the Interior, or that officer's authorized representative,

but does not include representatives of the Office of Federal Acknowledgment.

*Day* means a calendar day.

*Department* means the Department of the Interior, including the Assistant Secretary and OFA.

*Discovery* means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

*Ex parte communication* means an oral or written communication to the judge that is made without providing all parties reasonable notice and an opportunity to participate.

*Full intervenor* means a person granted leave by the judge to intervene as a full party under § 4.1021.

*Hearing process* means the process by which OHA handles a case forwarded to OHA by OFA pursuant to 25 CFR 83.39(a), from receipt to issuance of a recommended decision as to whether the petitioner should be acknowledged as a federally recognized Indian tribe for purposes of federal law.

*Judge* means an administrative law judge appointed under 5 U.S.C. 3105, an administrative judge, or an attorney-advisor with the Office of Hearings and Appeals assigned to preside over the hearing process under this subpart by the Office of Hearings and Appeals.

*OFA* means the Office of Federal Acknowledgment within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior.

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

*Party* means the petitioner or unsuccessful petitioner (as appropriate), OFA, or a full intervenor.

*Person* means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any federal, state, tribal, county, district, territorial, or local government or agency.

*Petitioner* means an entity that has submitted a documented petition to OFA requesting Federal acknowledgment as a federally recognized Indian tribe under 25 CFR part 83 and has elected to have a hearing under 25 CFR 83.38.

*Re-petition authorization process* means the process by which OHA handles a request for re-petitioning filed with OHA by an unsuccessful petitioner under 25 CFR 83.4(b), from receipt to issuance of a decision as to whether the unsuccessful petitioner is authorized to re-petition for acknowledgment as a federally recognized Indian tribe.

*Representative* means a person who:

- (1) Is authorized by a party to represent the party in a hearing process or re-petition authorization process under this subpart; and

- (2) Has filed an appearance under § 4.1010.

*Secretary* means the Secretary of the Interior or his or her designee.

*Senior Department employee* has the same meaning as the term "senior employee" in 5 CFR 2637.211(a).

*Unsuccessful petitioner* means an entity that was denied Federal acknowledgment after petitioning under a version of the acknowledgment regulations at part 54 or part 83 of title 25 in effect prior to [EFFECTIVE DATE OF FINAL RULE].

**§ 4.1002 What is the purpose of this subpart?**

(a) To obtain acknowledgment as an Indian tribe for purposes of Federal law and therefore entitlement to a government-to-government relationship with the United States, an entity may file a petition with the OFA under 25 CFR 83.20. If OFA issues a negative proposed finding, the petitioner may elect to have a hearing under 25 CFR 83.38(a) before a judge who will issue a recommended decision under 25 CFR 83.39(d). These regulations contain rules of practice and procedure applicable to the hearing process referred to in 25 CFR 83.38(a) and 83.39.

(b) Under 25 CFR 83.4(b), an unsuccessful petitioner may seek authorization from a judge to re-petition for acknowledgment. These regulations also contain rules of practice and procedure applicable to the re-petition authorization process.

(c) This subpart will be construed and applied to each hearing process or re-petition authorization process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved.

**§ 4.1003 Which rules of procedure and practice apply?**

(a) Notwithstanding the provisions of § 4.20, the general rules in 43 CFR part 4, subpart B, do not apply to the hearing process or the re-petition authorization process under this subpart.

(b) The provisions of §§ 4.1001, 4.1002, and 4.1004 through 4.1018 apply to both the hearing process and the re-petition authorization process.

(c) The provisions of §§ 4.1020 through 4.1050 apply to:

- (1) The hearing process; and  
 (2) The re-petition authorization process to the extent, if any, that the judge determines that they apply in whole or in part.

(d) The provisions of §§ 4.1060 through 4.1063 apply to the re-petition authorization process.

**§ 4.1004 How are time periods computed?**

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or other day on which the Federal government is closed for business, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or other day on which the Federal government is closed for business that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a motion for intervention under § 4.1021.

(2) An extension of time to file any other document under this subpart may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 4.1018 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The judge may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the recommended decision under § 4.1050.

**Representatives****§ 4.1010 Who may act as a party's representative, and what requirements apply to a representative?**

(a) *Individuals.* A party who is an individual may either act as his or her own representative in the hearing process or re-petition authorization process under this subpart or authorize an attorney to act as his or her representative.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to act as its representative:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or full-time employee, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the

entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a federal, state, tribal, county, district, territorial, or local government or component.

(c) *OFA.* OFA's representative will be an attorney from the Office of the Solicitor.

(d) *Appearance.* A representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 4.1011;

(2) Include the name and address of the person on whose behalf the appearance is made;

(3) If the representative is an attorney (except for an attorney with the Office of the Solicitor), include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Disqualification.* The judge may disqualify any representative for misconduct or other good cause.

**Document Filing and Service****§ 4.1011 What are the form and content requirements for documents under this subpart?**

(a) *Form.* Each document filed in a case under this subpart must:

(1) Measure 8½ by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8½ by 11 inches and attached to the document;

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

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

(4) Use 12-point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document must begin with a caption that includes:

(1) The name of the case under this subpart and the docket number, if one has been assigned;

(2) The name and docket number of the proceeding to which the case under this subpart relates; and

(3) A descriptive title for the document, indicating the party for

whom it is filed and the nature of the document.

(c) *Signature.* The original of each document must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that:

(1) He or she has read the document;

(2) The statements in the document are true to the best of his or her knowledge, information, and belief; and

(3) The document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

**§ 4.1012 Where and how must documents be filed?**

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with the Office of the Director, OHA. The OHA Director's Office's address, telephone number, and facsimile number are set forth at [www.doi.gov/oha/about-oha-director.cfm](http://www.doi.gov/oha/about-oha-director.cfm).

(b) *Method of filing.* (1) A document must be filed with OHA using one of the following methods:

(i) By hand delivery of the original document;

(ii) By sending the original document by express mail or courier service for delivery on the next business day; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document is sent by regular mail on the same day.

(2) Parties are encouraged, but not required, to supplement any filing by providing the appropriate office with an electronic copy of the document on compact disc.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received by OHA after 5 p.m. is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected. If the defect is minor, the filer may be notified of the defect and given a chance to correct it.

**§ 4.1013 How must documents be served?**

(a) *Filed documents.* Any document related to a case under this subpart must be served at the same time the document is delivered or sent for filing. Copies must be served on each party, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by OHA or the judge.* A complete copy of any notice, order, decision, or other document issued by OHA or the judge under this subpart must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Service must be accomplished by one of the following methods:

- (1) By hand delivery of the document;
- (2) By sending the document by express mail or courier service for delivery on the next business day; or
- (3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day.

(d) *Certificate of service.* A certificate of service must be attached to each document filed under this subpart. The certificate must be signed by the serving party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

**Judge's Powers, Unavailability, Disqualification, and Communications****§ 4.1014 What are the powers of the judge?**

The judge has all powers necessary to conduct the hearing process or the re-petition authorization process in a fair, orderly, expeditious, and impartial manner, including the powers to:

- (a) Administer oaths and affirmations;
- (b) Issue subpoenas to the extent authorized by law;
- (c) Rule on motions;
- (d) Authorize discovery as provided for in this subpart;
- (e) Hold hearings and conferences;
- (f) Regulate the course of hearings;
- (g) Call and question witnesses;
- (h) Exclude any person from a hearing or conference for misconduct or other good cause;

(i) Issue a recommended decision for the hearing process or a final decision for the re-petition authorization process; and

(j) Take any other action authorized by law.

**§ 4.1015 What happens if the judge becomes unavailable?**

(a) If the judge becomes unavailable or otherwise unable to perform the duties described in § 4.1014, OHA will designate a successor.

(b) If a hearing has commenced and the judge cannot proceed with it, a successor judge may do so. At the request of a party, the successor judge may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor judge may, within his or her discretion, recall any other witness.

**§ 4.1016 When can a judge be disqualified?**

(a) The judge may withdraw from a case at any time the judge deems himself or herself disqualified.

(b) At any time before issuance of the judge's decision, any party may move that the judge disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The judge must rule upon the motion, stating the grounds for the ruling.

(1) If the judge concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the judge does not disqualify himself or herself and withdraw from the case, the judge must continue with the hearing process or re-petition authorization process and issue a decision.

**§ 4.1017 Are ex parte communications allowed?**

(a) Ex parte communications with the judge or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process or re-petition authorization process.

**§ 4.1018 What are the requirements for motions?**

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process or re-petition authorization process by presenting a motion to the judge. A motion may be presented any time after OHA issues the docketing notice.

(1) A motion made at a hearing may be stated orally on the record, unless the judge directs that it be written.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of this subpart with respect to form, content, filing, and service; and

(iii) Not exceed 10 pages.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this subpart or by order of the judge, any other party may file a response to a written motion within 14 days after service of the motion. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the judge orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the judge orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The judge will rule on the motion as soon as feasible, either orally on the record or in writing. The judge may summarily deny any dilatory, repetitive, or frivolous motion.

**Hearing Process**

*Docketing, Intervention, Prehearing Conferences, and Summary Decision*

**§ 4.1020 What will OHA do upon receiving the record from OFA?**

Within 5 days after issuance of the referral notice under 25 CFR 83.39(a) the actions required by this section must be taken.

(a) OHA must:

(1) Docket the case;

(2) Assign a judge to preside over the hearing process and issue a recommended decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the judge assigned to the case.

(b) The judge assigned under paragraph (a)(2) of this section must issue a notice setting the time, place,

and method for conducting an initial prehearing conference under § 4.1022(a). This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

**§ 4.1021 What are the requirements for motions for intervention and responses?**

(a) *General.* A person may file a motion for intervention within 15 days after issuance of the referral notice under 25 CFR 83.39(a).

(b) *Content of the motion.* The motion for intervention must contain the following:

(1) A statement setting forth the interest of the person and, if the person seeks intervention under paragraph (d) of this section, a showing of why that interest may be adversely affected by the final determination of the Assistant Secretary under 25 CFR 83.43;

(2) An explanation of the person's position with respect to the issues of material fact raised in the election of hearing in no more than two pages; and

(3) A list of the witnesses and exhibits the person intends to present at the hearing, other than solely for impeachment purposes, including:

(A) For each witness listed, his or her name, address, telephone number, and qualifications and a brief narrative summary of his or her expected testimony; and

(B) For each exhibit listed, a statement specifying whether the exhibit is in the administrative record reviewed by OFA.

(c) *Timing of response to a motion.* Any response to a motion for intervention must be filed by a party within 7 days after service of the motion.

(d) *Intervention of right.* The judge will grant intervention where the person has an interest that may be adversely affected by the Assistant Secretary's final determination under 25 CFR 83.43.

(e) *Permissive Intervention.* If paragraph (d) of this section does not apply, the judge will consider the following in determining whether intervention is appropriate:

(1) The nature of the issues;

(2) The adequacy of representation of the person's interest which is provided by the existing parties to the proceeding;

(3) The ability of the person to present relevant evidence and argument; and

(4) The effect of intervention on the Department's implementation of its statutory mandates.

(f) *How an intervenor may participate.*

(1) A person granted leave to intervene under paragraph (d) of this section may participate as a full party or in a capacity less than that of a full party.

(2) If the intervenor wishes to participate in a limited capacity or if the

intervenor is granted leave to intervene under paragraph (e) of this section, the extent and the terms of the participation will be determined by the judge.

(3) An intervenor may not raise issues of material fact beyond those raised in the election of hearing under 25 CFR 83.38(a)(1).

**§ 4.1022 How are prehearing conferences conducted?**

(a) *Initial prehearing conference.* The judge will conduct an initial prehearing conference with the parties at the time specified in the docketing notice under § 4.1020, within 35 days after issuance of the docketing notice.

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under § 4.1031 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing;

(iv) To set the deadline for submission of written testimony under § 4.1042; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the judge take official notice of public records or other matters;

(iv) To consider the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The judge may direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 180 days. Any party may by motion request a conference.

(c) *Notice.* The judge must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the judge orders otherwise.

(d) *Representatives' preparation and authority.* Each party's representative must be fully prepared during the prehearing conference for a discussion of all procedural and substantive issues properly raised. The representative must be authorized to commit the party that he or she represents respecting those issues.

(e) *Parties' Meeting.* Before the initial prehearing conference, the parties' representatives must make a good faith effort:

(1) To meet in person, by telephone, or by other appropriate means; and

(2) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(f) *Failure to attend.* Unless the judge orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(g) *Scope.* During a conference, the judge may dispose of any procedural matters related to the case.

(h) *Order.* Within 3 days after the conclusion of each conference, the judge must issue an order that recites any agreements reached at the conference and any rulings made by the judge during or as a result of the conference.

**§ 4.1023 What are the requirements for motions for summary decision and responses?**

(a) *Timing of motion.* At any time after OHA issues a docketing notice under § 4.1020, a party may file a motion for summary decision on all or part of the proceeding.

(b) *Motion requirements.* The party filing a motion for summary decision must:

(1) Concisely state the material facts that the party contends are undisputed;

(2) Verify those facts with supporting affidavits or declarations, depositions, answers to interrogatories, admissions, documents produced on request, or other documentation;

(3) Include references to the specific portions of the record that verify those facts; and

(4) State why the party is entitled to summary decision as a matter of law.

(c) *Response requirements.* If a motion for summary decision is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must either:

(1) State why the moving party is not entitled to summary decision as a matter of law; or

(2) Do all of the following:

(i) Concisely state the material facts which the opposing party contends are disputed;

(ii) Verify that those facts are disputed with supporting affidavits or declarations, depositions, answers to interrogatories, admissions, documents produced on request, or other documentation; and

(iii) Include references to the specific portions of the record that verify that those facts are disputed.

(d) *Establishing facts.* All material facts set forth by the moving party and properly supported by an accurate reference to the record will be taken as true for the purpose of summary decision unless specifically controverted by the opposing party's response. Alternatively, the material facts for the purpose of summary decision may be established by an agreement of the parties enumerating those facts.

(e) *Affidavits.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a document or part of a document is referred to in an affidavit, a copy must be filed with the affidavit unless the document is longer than 10 pages, the document is already in the record, and the affidavit specifies the location of the document in the record.

(f) *When affidavits are unavailable.* If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:

(1) Deny the motion for summary decision;

(2) Order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) Issue any other just order.

(g) *Standards for decision.* The judge may grant summary decision under this section if the record (including the pleadings, affidavits or declarations, depositions, answers to interrogatories, admissions, documents produced on request, and other documentation) shows that:

(1) There is no genuine disputed issue as to any material fact; and

(2) The moving party is entitled to summary decision as a matter of law.

(h) *Proceeding not fully adjudicated on the motion.* If summary decision is not rendered on the whole proceeding, the judge should, to the extent feasible, determine and specify by order what material facts are not genuinely disputed. The facts so specified must be treated as established in the proceeding.

### Information Disclosure and Discovery

#### § 4.1030 What are the requirements for OFA's witness and exhibit list?

Within 14 days after issuance of the referral notice under 25 CFR 83.39(a), OFA must file a list of the witnesses and exhibits it intends to present at the

hearing, other than solely for impeachment purposes, including:

(a) For each witness listed, his or her name, address, telephone number, qualifications, and a brief narrative summary of his or her expected testimony; and

(b) For each exhibit listed, a statement specifying whether the exhibit is in the administrative record reviewed by OFA.

#### § 4.1031 How may parties obtain discovery of information?

(a) *General.* By agreement of the parties or with the permission of the judge, a party may obtain discovery of information to assist in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories;

(2) Depositions as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the judge in a written order or during a prehearing conference. The judge may authorize discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the scope of the discovery is not unduly burdensome;

(3) That the method to be used is the least burdensome method available;

(4) That any trade secrets or proprietary information can be adequately safeguarded;

(5) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable; and

(6) That the information sought: (i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence; (ii) Is not otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law.

(c) *Motions.* A party may initiate discovery:

(1) Pursuant to an agreement of the parties; or

(2) By filing a motion that:

(i) Briefly describes the proposed methodology, purpose, and scope of the discovery;

(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and

(iii) Attaches a copy of any proposed discovery request (written

interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* Any discovery motion under paragraph (c)(2) of this section must be filed:

(1) Within 20 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between the petitioner and OFA; and

(2) Within 30 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between a full intervenor and another party.

(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 10 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (b)(6) of this section.

(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).

(1) If a party wants to discover these materials, it must show:

(i) That it has substantial need of the materials in preparing its own case; and

(ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(2) In ordering discovery of these materials when the required showing has been made, the judge must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(g) *Experts.* Unless restricted by the judge, a party may discover any facts known or opinions held by an expert concerning any relevant matters that are not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at the hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:

(i) That it has a compelling need for the information; and

(ii) That it cannot feasibly obtain the information by other means.

(h) *Limitations on depositions.* (1) A party may depose a witness only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or



(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee of OFA if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her official duties.

(i) *Completion of discovery.* All discovery must be completed within 35 days after the initial prehearing conference, unless the judge sets a different deadline.

**§ 4.1032 When must a party supplement or amend information?**

(a) *Discovery.* A party must promptly supplement or amend any prior release given in response to a discovery request if it learns that the response:

(1) Was incomplete or incorrect when made; or

(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.

(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under 25 CFR 83.38(a)(1)(B), § 4.1021(b)(3), or § 4.1030(a).

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under 25 CFR 83.38(a)(1)(ii), § 4.1021(b)(3), or § 4.1030(a).

(c) *Failure to disclose.* (1) A party that fails to disclose information required under 25 CFR 83.38(a)(1)(ii), § 4.1021(b)(3), § 4.1030(a), or paragraphs (a) or (b) of this section will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose.

(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) Before or during the hearing, a party may object under paragraph (c)(1) of this section to the admission of evidence.

(4) The judge will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (c)(3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

**§ 4.1033 What are the requirements for written interrogatories?**

(a) *Motion required.* A party wishing to propound interrogatories must file a motion under § 4.1031(c), unless the parties agree otherwise.

(b) *Judge's order.* During or promptly after the initial prehearing conference, the judge will issue an order under § 4.1031(b) with respect to any discovery motion requesting the use of written interrogatories. The order will either grant the motion and approve the use of some or all of the proposed interrogatories or deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the judge within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

**§ 4.1034 What are the requirements for depositions?**

(a) *Motion and notice.* A party wishing to take a deposition must file a motion under § 4.1031(c), unless the parties agree otherwise. Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *Judge's order.* During or promptly after the initial prehearing conference, the judge will issue an order under § 4.1031(b) with respect to any discovery motion requesting the taking of a deposition. The order will either grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the judge may impose or deny the motion.

(c) *Required arrangements.* If the parties agree to or the judge approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the judge's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so either:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the judge's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross-examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense.

(2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording allowed.* The testimony at a deposition may be video recorded, subject to any conditions or restrictions that the parties may agree to or the judge may impose, at the expense of the party requesting the recording.

(1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(3) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the recording to any party that requests it, at the requesting party's expense; and

(ii) Attach to the recording a statement identifying the case and the deponent and certifying the authenticity of the recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 4.1043.

#### **§ 4.1035 How can parties request documents, tangible things, or entry on land?**

(a) *Motion required.* A party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 4.1031(c), unless the parties agree otherwise. A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *Judge's order.* During or promptly after the initial prehearing conference, the judge will issue an order under § 4.1031(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

#### **§ 4.1036 What sanctions may the judge impose?**

(a) Upon motion of a party, the judge may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under § 4.1032(a).

(b) The judge may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

#### **§ 4.1037 What are the requirements for subpoenas and witness fees?**

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may file a motion requesting the judge to issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may subpoena a senior Department employee of the OFA only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with

the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth the date, time, and manner of service or the reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed to do so is entitled to the same fees and mileage expenses as if he or she had been subpoenaed.

However, this paragraph does not apply to federal employees who are called as witnesses by OFA.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the judge quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The judge may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires evidence during discovery that is not discoverable; or

(iii) Requires evidence during a hearing that is privileged or irrelevant.

(e) *Enforcement.* For good cause shown, the judge may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

#### **Hearing, Briefing, and Decision**

##### **§ 4.1040 When and where will the hearing be held?**

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 4.1022(a)(1)(v), generally within 20

days after the date set for completion of discovery.

(b) On motion by a party or on the judge's initiative, the judge may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

**§ 4.1041 What are the parties' rights during the hearing?**

Consistent with the provisions of this subpart, and as necessary to ensure full and accurate disclosure of the facts, the parties have the following rights during the hearing:

(a) Each party may:

(1) Present direct and rebuttal evidence;

(2) Make objections, motions, and arguments; and

(3) Cross-examine witnesses and conduct re-direct and re-cross examination as permitted by the judge.

(b) The petitioner may conduct oral cross-examination of OFA staff who participated in the preparation of the proposed finding.

**§ 4.1042 What are the requirements for presenting testimony?**

(a) *Written direct testimony.* Unless otherwise ordered by the judge, all direct hearing testimony must be prepared and submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 15 days after the date set for completion of discovery, unless the judge sets a different deadline; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the judge, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The judge may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the judge.

(2) The judge will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The judge may issue a subpoena under § 4.1037 directing a witness to testify by telephonic conference call.

**§ 4.1043 How may a party use a deposition in the hearing?**

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under § 4.1034 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the judge.

(2) The judge will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Video-recorded deposition.* If the deposition was video recorded and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

**§ 4.1044 What are the requirements for exhibits, official notice, and stipulations?**

(a) *General.* (1) Except as provided in paragraphs (b) through (e) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the judge permits the substitution of a copy; and

(ii) A copy of the exhibit to the judge.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent feasible; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The judge must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the judge may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The judge must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

**§ 4.1045 What evidence is admissible at the hearing?**

(a) *General.* (1) Subject to the provisions of § 4.1032(b), the judge may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The judge may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The judge may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the judge and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence shall concisely state the grounds. A ruling on every objection must appear in the record.

**§ 4.1046 What are the requirements for transcription of the hearing?**

(a) *Transcript and reporter's fees.* The hearing must be transcribed verbatim.

(1) OHA will secure the services of a reporter and pay the reporter's fees to provide an original transcript to OHA on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript Corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the judge sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as feasible after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the judge will issue an order making any corrections to the transcript that the judge finds are warranted.

#### **§ 4.1047 What is the standard of proof?**

(a) *Reasonable likelihood standard.* The judge will consider a criterion to be met if the evidence establishes a reasonable likelihood that the facts claimed by the petitioner are true and that those facts demonstrate that the petitioner meets the criterion.

(b) *Meaning of standard.* To prove a “reasonable likelihood” that a claimed fact is true, the petitioner must show that there is more than a mere possibility that it is true, but need not show that it is more likely than not to be true.

#### **§ 4.1048 When will the hearing record close?**

(a) The hearing record will close when the judge closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 4.1046(b).

#### **§ 4.1049 What are the requirements for post-hearing briefs?**

(a) *General.* (1) Each party may file a post-hearing brief within 20 days after the close of the hearing, unless the judge sets a different deadline.

(2) A party may file a reply brief only if requested by the judge. The deadline for filing a reply brief, if any, will be set by the judge.

(3) The judge may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

- (i) A concise statement of the case;
- (ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;
- (iii) Arguments in support of the party’s position; and

(iv) Any other matter required by the judge.

(2) A reply brief, if requested by the judge, must be limited to any issues identified by the judge.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 30 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

#### **§ 4.1050 What are the requirements for the judge’s recommended decision?**

(a) *Timing.* The judge must issue a recommended decision within 180 days after issuance of the docketing notice under § 4.1020(a)(3), unless the judge issues an Order finding good cause to issue the recommended decision at a later date.

(b) *Content.* (1) The recommended decision must contain all of the following.

(i) Recommended findings of fact on all disputed issues of material fact.

(ii) Recommended conclusions of law:

(A) Necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(B) As to whether the applicable criteria for Federal acknowledgment have been met.

(iii) Reasons for the findings and conclusions.

(2) The judge may adopt any of the findings of fact proposed by one or more of the parties.

(c) *Service.* Promptly after issuing a recommended decision, the judge must:

(1) Serve the decision on each party to the hearing; and

(2) Forward the complete record to the Assistant Secretary—Indian Affairs, including the recommended decision and hearing record.

#### **Re-Petition Authorization Process**

##### **§ 4.1060 How does an unsuccessful petitioner request authorization to re-petition?**

(a) To request authorization to re-petition for Federal acknowledgment, an unsuccessful petitioner must submit to OHA a certification that:

(1) Is signed and dated by the unsuccessful petitioner’s governing body;

(2) States that it is the unsuccessful petitioner’s official request for re-petitioning; and

(3) Explains how it meets the conditions of 25 CFR 83.4(b)(1).

(b) The unsuccessful petitioner need not re-submit materials previously submitted to the Department but may supplement its petition.

##### **§ 4.1061 What will OHA do with a request?**

After receiving the request for re-petitioning, OHA will:

(a) Docket the case;

(b) Assign a judge to preside over the re-petition authorization process and issue a decision; and

(c) Issue a docketing notice that informs the parties of the docket number and the judge assigned to the case.

##### **§ 4.1062 What can the judge do?**

In addition to the powers in § 4.1014, the judge has the powers to:

(a) Request evidence from OFA and the unsuccessful petitioner; and

(b) Determine the extent, if any, to which §§ 4.1020 through 4.1050 will apply in whole or in part.

##### **§ 4.1063 When will the judge allow a re-petition?**

The judge will issue a decision allowing the unsuccessful petitioner to re-petition if:

(a) Any third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the unsuccessful petitioner have consented in writing to the re-petitioning; and

(b) The unsuccessful petitioner proves, by a preponderance of the evidence, that either:

(1) A change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination; or

(2) The “reasonable likelihood” standard was misapplied in the final denial.

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**Rhea Suh,**

*Assistant Secretary for Policy, Management and Budget.*

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