programs affected by this document are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on August 7, 2015, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: August 10, 2015.

Michael Shores,

Chief Impact Analyst, Office of Regulation Policy & Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Amend § 3.57:

■ a. In paragraph (a)(1) introductory text, by removing the phrase ''paragraphs (a)(2) and (3)'' and adding in its place ''paragraphs (a)(2) through (4)''.

■ b. By adding paragraph (a)(4).

■ c. By adding an authority citation immediately following newly added paragraph (a)(4).

■ d. By revising the Cross References at the end of the section.

The revisions and additions read as follows:

§ 3.57 Child.

(a) * * *

(4) For purposes of any benefits provided under 38 U.S.C. 1115, Additional compensation for dependents, the term child does not include a child of a veteran who is adopted out of the family of the veteran. This limitation does not apply to any benefit administered by the Secretary that is payable directly to a child in the child's own right, such as dependency and indemnity compensation under 38 CFR 3.5.

(Authority: 38 U.S.C. 101(4), 501, 1115).

* * * * *

CROSS REFERENCES: Improved pension rates. See § 3.23. Improved pension rates; surviving children. See § 3.24. Child adopted out of family. See § 3.58. Child's relationship. See § 3.210. Helplessness. See § 3.403(a)(1). Helplessness. See § 3.503(a)(3). Veteran's benefits not apportionable. See § 3.458. School attendance. See § 3.667. Helpless children—Spanish-American and prior wars. See § 3.950.

■ 3. Revise § 3.58 to read as follows:

§ 3.58 Child adopted out of family.

(a) Except as provided in paragraph (b) of this section, a child of a veteran adopted out of the family of the veteran either prior or subsequent to the veteran's death is nevertheless a *child* within the meaning of that term as defined by § 3.57 and is eligible for benefits payable under all laws administered by the Department of Veterans Affairs.

(b) A child of a veteran adopted out of the family of the veteran is not a child within the meaning of § 3.57 for purposes of any benefits provided under 38 U.S.C. 1115, Additional compensation for dependents.

(Authority: 38 U.S.C. 101(4)(A), 1115).

CROSS REFERENCES: Child. See § 3.57. Veteran's benefits not apportionable. See § 3.458.

■ 4. Amend § 3.458:

■ (a) In paragraph (d), by removing the phrase '', except the additional compensation payable for the child''.

■ (b) By adding Cross References at the end of the section.

The addition reads as follows:

§ 3.458 Veterans benefits not apportionable.

* * * * *

CROSS REFERENCES: Child. See § 3.57. Child adopted out of family. See § 3.58.

[FR Doc. 2015–19949 Filed 8–12–15; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

[156A2100DD/AAKC001030/A0A501010.999900 253G]

RIN 1094–AA54

Hearing Process Concerning Acknowledgment of American Indian Tribes

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Office of the Secretary is publishing this final rule contemporaneously and in conjunction with the Bureau of Indian Affairs final rulemaking (the BIA final rule) revising the process and criteria for Federal acknowledgment of Indian tribes. This rule establishes procedures for a new optional, expedited hearing process for petitioners who receive a negative proposed finding for Federal acknowledgment.

DATES: This rule is effective September 14, 2015.

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.* Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary of Rule

This final rule establishes procedures for the hearing process, including provisions governing prehearing conferences, discovery, motions, an evidentiary hearing, briefing, and issuance by the administrative law judge (ALJ) of a recommended decision on Federal acknowledgment of an Indian tribe for consideration by the Assistant Secretary—Indian Affairs (AS–IA). This final rule complements the BIA final rule published in the July 1, 2015 **Federal Register**, 80 FR 37862, that revises 25 CFR part 83 to improve the processing of petitions for Federal acknowledgment of Indian tribes. These improvements include affording the petitioner an opportunity to request a hearing before an ALJ in the Departmental Cases Hearings Division (DCHD), Office of Hearings and Appeals (OHA), if the petitioner receives a negative proposed finding on Federal acknowledgment from the Office of Federal Acknowledgment (OFA).

Our proposed rule also contained procedures for a new re-petition authorization process which the BIA proposed establishing in its proposed rule. Because the BIA is not incorporating that process into the BIA final rule, our final rule does not contain procedures for that process.

The other primary differences between our proposed rule and this final rule are:

- This final rule allows only a DCHD ALJ to preside over the hearing process.
- Except under extraordinary circumstances, this final rule:

(1) Does not allow discovery;

(2) limits the scope of evidence admissible at hearing to documentation in the administrative record reviewed by OFA and testimony clarifying or explaining information in that documentation; and

(3) limits witnesses to expert witnesses and OFA staff who participated in preparation of the negative proposed finding.

- This final rule extends a few of the deadlines in the proposed rule, including allowing 15 more days to file motions to intervene, while streamlining the hearing process overall by the aforementioned limits on discovery, the scope of evidence, and witnesses.
- This final rule does not incorporate the proposed rule's provision requiring direct testimony to be submitted in writing.
- This final rule establishes procedures for obtaining protective orders limiting disclosure of information that is confidential or exempt by law from public disclosure.

II. Comments on the Proposed Rule and the Department's Responses

The proposed rule was published on June 19, 2014. See 79 FR 35129. We extended the initial comment deadline of August 18, 2014, to September 30, 2014, see 79 FR 44150, to comport with the BIA's extension of the comment period for its proposed rule. As more fully explained in the preamble to the BIA final rule, the Department held public meetings, teleconferences, and separate consultation sessions with federally recognized Indian tribes in July and August of 2014. During the public comment period, we received seven written comment submissions on our proposed rule.

Some comments pertain to the BIA proposals to (1) eliminate the process for reconsideration of the AS–IA's determination by the Interior Board of Indian Appeals (IBIA) found at 25 CFR 83.1, (2) establish the opportunity for the hearing process under proposed 25 CFR 83.38(a) and 83.39, and (3) establish the opportunity for the re-petition authorization process under proposed 25 CFR 83.4. We address only briefly the comments we received on these and any other proposals made in the BIA proposed rule. Those proposals, along with additional comments which the BIA received, are more fully addressed in the BIA final rule.

We have reviewed each of the comments received by us and have made several changes to the proposed rule in response to these comments. The following is a summary of comments received and our responses.

A. Eliminating the IBIA Reconsideration Process and Adding the Hearing Process

The BIA's proposed rule would eliminate the process for IBIA reconsideration of the AS–IA's determination found at 25 CFR 83.11, and would replace it with a new hearing process under proposed 25 CFR 83.38(a) and 83.39. The new process would be governed by procedures in our proposed rule. One commenter stated that the IBIA reconsideration process should be retained because it allows interested parties other than the petitioner to seek independent review of acknowledgment determinations that is not available under the proposed hearing process.

Response: The BIA final rule retains the proposal to delete the IBIA reconsideration process and allows for a hearing on a negative proposed finding. See the responses to comments in the BIA final rule.

B. Re-Petition Authorization Process

Proposed §§ 4.1060 through 4.1063 identify procedures for re-petitioning under 25 CFR 83.4(b) of the BIA proposed rule. Under that proposed re-petition process, an OHA judge could authorize an unsuccessful petitioner to re-petition for Federal acknowledgment if certain conditions are met. One condition, identified by some commenters as the ''third-party veto,'' would require written consent for re-petitioning from any third party that participated as a party in an administrative reconsideration or Federal Court appeal concerning the unsuccessful petition. Two commenters opposed the proposed ''third-party veto'' and one opposed allowing for any re-petitioning.

Response: The final rule does not include the procedures for the re-petition authorization process because the BIA final rule did not incorporate that process. See the responses to comments in the BIA final rule.

C. Standard of Proof

25 CFR 83.10(a) in the BIA proposed rule attempted to clarify the meaning of the ''reasonable likelihood'' standard of proof found at 25 CFR 83.6(d). Section 4.1047 in our proposed rule repeated the language of proposed § 83.10(a). One commenter supported the ''reasonable likelihood'' standard of proof in proposed § 4.1047, while one commenter stated that the proposed definition for ''reasonable likelihood'' comes from the criminal law context and, as such, is too low.

Response: In its final rule, the BIA concludes, in light of commenters' concerns that its proposed rule changed the standard of proof, that its final rule would retain the current ''reasonable likelihood'' standard of proof and discard the proposed interpreting language. This final rule does the same. See § 4.1048. The Department will continue to interpret ''reasonable likelihood of the validity of the facts'' consistent with its interpretations in prior decisions and the plain language of the phrase, and will strive to prevent a trend toward a more stringent interpretation over time.

D. Notification of Local Governments

A few commenters requested the addition of requirements to notify local governments of petitions, OFA proposed findings, and elections of hearings.

Response: The BIA final rule requires more notice to local governments by adding that the Department will notify the local, county-level government in writing of the receipt of the petition and other actions, in addition to notifying the State attorney general and governor. See 25 CFR 83.22, 83.34, 83.39.

E. Opportunity for Third Parties To Request a Hearing and Intervene in Hearing Process

25 CFR 83.38(a) in the BIA proposed rule would allow only a petitioner receiving a negative proposed finding to request a hearing. One commenter believed, in the interest of fairness, that other interested parties should be able to request a hearing after a positive proposed finding.

Proposed § 4.1021 would allow for intervention of right by any entity who files a motion to intervene demonstrating that the entity has an interest that may be adversely affected by the final determination. Several commentators asserted that State or local governmental entities should be recognized automatically as intervenors.

Response: In its final rule the BIA adopts the proposed approach of allowing only a petitioner receiving a

negative proposed finding to request a hearing. See 25 CFR 83.38(a). The BIA explains, in part, that

> [t]he Part 83 petitioning process is similar to other administrative processes uniquely affecting an applicant's status in that the applicant may administratively challenge a negative determination, but third parties may not administratively challenge a positive determination. . . . The [25 CFR part 83] process provides third parties with the opportunity to submit comments and evidence.

BIA Final Rule at 78. Responses to comments in the BIA final rule provide the BIA's complete explanation for adopting this approach.

Our final rule adopts the proposed rule approach of allowing for intervention of right by any entity who files a motion to intervene demonstrating that the entity has an interest that may be adversely affected by the final determination. See § 4.1021. Conditioning intervention on the filing of a motion showing such an interest is not a heavy burden. It allows other parties the opportunity to express opposing viewpoints to facilitate confirmation of whether the entity indeed has such an interest.

F. Hearing Process Time Limits

Proposed § 4.1050 would require issuance of a recommended decision within 180 days after issuance of the docketing notice, unless the ALJ issues an order finding good cause to issue the recommended decision at a later date. A few commenters stated that this time limit is too aggressive and recommended lengthening the time period. One added that, at a minimum, proposed § 4.1050 should allow for an automatic 90-day extension of the time limit upon the petitioner's request and that the OHA judge should liberally grant further extension requests, especially where the petitioner needs more time to prepare its case due to resource limitations.

Proposed § 4.1021 would require that a motion to intervene be filed within 15 days after election of the hearing. A few commenters asserted that this time period is too short.

25 CFR 83.38 in the BIA proposed rule would allow the petitioner 60 days after the end of the comment period for a negative proposed finding to elect a hearing and/or respond to any comments. If the petitioner elects a hearing, the petitioner must list in its written election the witnesses and exhibits it intends to present at the hearing. One commenter stated that the 60-day period for the petitioner to provide witness and exhibit information is too short.

Response: To promote efficiency but lessen the burden of complying with the 180-day time limit for the hearing process, the final rule retains the 180-day time limit while streamlining the hearing process by limiting discovery, the scope of evidence, and witnesses. See §§ 4.1031, 4.1042, 4.1046. We do not anticipate that a petitioner's limited resources will substantially impede compliance with the time limit for several reasons. First, the petitioner should have already diligently gathered all relevant evidence and submitted it to OFA. The purposes of the hearing process are to allow for clarification of information in the OFA administrative record, to focus on the key issues and evidence, and to produce a recommended decision on those issues by an independent tribunal, which will ultimately promote transparency in and the integrity of the process. Second, in keeping with these purposes, the final rule limits discovery, the persons who may testify, and the scope of admissible evidence to documentation from OFA's administrative record and testimony clarifying and explaining the information in that documentation. See §§ 4.1031, 4.1042, 4.1046. These limits will lessen resource expenditures for all parties. Third, the final rule retains the proposed provision allowing the ALJ to extend the 180-day time limit for good cause. See § 4.1051. Allowing a petitioner an automatic 90-day extension upon request does not promote efficiency or diligence and hence is less desirable than the proposed and adopted provision allowing for extensions for good cause.

Some adjustments to timeframes have been made to address the comments, including doubling the time period for intervention from 15 days to 30 days. See § 4.1021. The BIA final rule also allows an extra 60 days for the petitioner to provide witness and exhibit information in the election of hearing by establishing that the petitioner's period to respond to comments on OFA's negative proposed finding and period for election of a hearing run consecutively rather than simultaneously. See 25 CFR 83.38.

G. Scope of the Hearing Record

In the proposed rule, we invited comment on 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 parties. A few commenters stated that the hearing record should encompass the whole administrative record plus any information submitted in the hearing.

Response: A primary purpose of the hearing process is to inform the AS–IA's final determination by focusing in on the key issues and evidence and producing a recommended decision on those issues from an independent tribunal. To that end, under the final rule, the hearing record will not automatically include the entire administrative record reviewed by OFA, but only those portions which are considered sufficiently important to be offered by the parties as exhibits and to be admitted into evidence by the ALJ. While the AS–IA may consider not only the hearing record, but also OFA's entire administrative record, we believe that an independent review of the key issues and evidence will be invaluable to the AS–IA.

The final rule does limit admissible evidence to documentation in the OFA administrative record and to testimony clarifying or explaining the information in that documentation. See § 4.1046. The final rule also limits who may testify to expert witnesses and OFA staff who participated in preparation of the negative proposed finding. See § 4.1042. The ALJ may admit other evidence or allow other persons to testify only under extraordinary circumstances.

These limits will afford the parties the opportunity to clarify the record, without expanding the record beyond what was before OFA. The limits will encourage the petitioner and all others to be diligent in gathering and presenting to OFA all their relevant evidence and discourage strategic withholding of evidence. This will ensure that OFA's proposed finding is based on the most complete record possible, allowing the ALJ to focus on discrete issues in dispute if a hearing is requested.

H. Disclosure of Confidential Information and Discovery

The BIA received comments on its proposed rule expressing concern that petitions may contain confidential information that should be protected from disclosure. Those comments prompted the addition of a new section in this rule containing procedures for obtaining protective orders limiting disclosure of information which is confidential or exempt by law from public disclosure.

A corresponding change has been made in one of the criteria for allowing discovery in § 4.1031(b). Proposed § 4.1031(b)(4) would require a showing ''[t]hat any trade secrets or proprietary information can be adequately safeguarded.'' The phrase ''trade secrets or proprietary information'' has been changed to ''confidential information''

to better reflect the type of information which may need safeguarding.

Regarding discovery generally, proposed § 4.1031 would allow for discovery by agreement of the parties or by order of the judge if certain criteria are met. Those criteria are similar to standards typically used by various tribunals.

The final rule limits discovery more strictly, eliminating discovery by agreement of the parties, and requiring not only that those criteria be met, but also that extraordinary circumstances exist to justify the discovery. Consistent with these limitations, the final rule removes many provisions addressing the details of discovery, allowing the ALJ to exercise his or her discretion to tailor discovery in the rare instance where extraordinary circumstances exist.

These changes were prompted in part by general comments that the proposed 180-day time limit for the hearing process is too short. Also influential were more specific comments that petitioners may lack resources to engage in prehearing procedures or to prepare their cases in a timely manner in light of the expedited nature of the hearing process.

Discovery can be time-consuming and require large expenditures of resources, and thus could be burdensome for petitioners and other parties as well, especially given the time sensitive nature of the expedited hearing process. Limiting discovery will alleviate those burdens, leaving more time and resources for other case preparation activities.

This benefit outweighs the impediment to case preparation, if any, that limiting discovery may pose. The need for discovery should be rare in light of the case preparation that occurs prior to the petitioner's election of a hearing, the limited scope of the hearing record, and the availability of OFA's administrative record to all parties. In the rare instances where extraordinary circumstances justify discovery, the ALJ may customize it to serve justice while striving to keep case preparation moving forward in a timely manner.

I. Presiding Judge Over Hearing

In the proposed rule, any of several different employees of OHA could be assigned to preside as the judge over the hearing process: An administrative law judge appointed under 5 U.S.C. 3105, an administrative judge (AJ), or an attorney designated by the OHA Director. See § 4.1001, definition of ''judge.'' We invited comments on who is an appropriate OHA judge to preside. Two commenters stated that an ALJ is most appropriate. One preferred an AJ. Most identified impartiality or independence as a desirable trait. One stated that regardless of what type of judge presides over the hearing, the judge should have some background in Indian law.

Response: The final rule establishes that the judge presiding over hearings will be a DCHD ALJ (see § 4.1001, definition of ALJ), because DCHD ALJs are experienced and skilled at presiding over hearings and managing procedural matters to facilitate justice. They also have some knowledge of Indian law and their independence is protected and impartiality fostered by laws which, among other things, exempt them from performance ratings, evaluation, and bonuses (see 5 U.S.C. 4301(2)(D), 5 CFR 930.206); vest the Office of Personnel Management rather than the Department with authority over the ALJs' compensation and tenure (see 5 U.S.C. 5372, 5 CFR 930.201–930.211); and provide that most disciplinary actions against ALJs may be taken only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for a hearing (see 5 U.S.C. 7521).

J. Conduct of the Hearing

One commenter strongly supported the provisions recognizing a petitioner's right to orally cross-examine OFA staff who participated in preparation of the negative proposed finding, requiring submittal of written direct testimony prior to the hearing for efficiency, and allowing parties to supplement and amend testimony when absolutely necessary. This commenter also stated that the proposed rule would require only senior Department employees to be subject to subpoena or discovery. The commenter urged us to clarify that all OFA staff and consultants who participated in preparation of the proposed finding would be subject to discovery and subpoena under proposed § 4.1031(h)(3) and proposed § 4.1037(a)(2).

Response: These proposed sections would simply limit deposing and issuing subpoenas to senior Department employees to instances where certain conditions are met; the sections would not limit discovery and subpoenas for other OFA staff and consultants who participated in preparation of the negative proposed finding. Nevertheless, proposed § 4.1037(a)(2), redesignated § 4.1035(a)(2), has been reworded to clarify this with respect to subpoenas. The provisions of proposed § 4.1031(h)(3) pertaining to depositions have not been changed but they have been moved to § 4.1033(b)(3).

Please note, however, with respect to all persons, the final rule limits discovery to situations where extraordinary circumstances exist. See § 4.1031. Under the final rule, in the absence of extraordinary circumstances, OFA staff who participated in the preparation of the negative proposed finding still may be deposed for the preservation of testimony, as opposed to for discovery purposes, and may be subpoenaed. However, if the staff member is a senior Department employee, the deposition or subpoena will be allowed only if certain conditions are met. See §§ 4.1033(b)(3) and 4.1035(a)(2).

The proposed rule's requirement to submit direct testimony in writing prior to the hearing is not being incorporated into the final rule. This requirement was designed to shorten the hearing to facilitate compliance with the 180-day time limit for issuance of the recommended decision. However, the requirement is burdensome for the parties and the burden is no longer justified because the final rule adopts other measures to streamline the hearing process. Those measures include limiting discovery, the scope of admissible evidence, and the witnesses who may testify. See §§ 4.1031, 4.1042, and 4.1046.

K. Miscellaneous Comments

1. Facilitating Petitioner Participation

One commenter made suggestions for facilitating petitioner participation in the hearing process, stating that hearings should be held in a location near the petitioner, that telephonic conferences should be allowed, and that filing and service of documents by priority mail should be allowed as an alternative to the proposed rule's requirements that overnight mail or delivery services be used for both filing and service. See proposed § 4.1012(b) and proposed § 4.1013(c). These suggestions are based in part upon the commenter's stated concern that a petitioner's participation may be impeded by a lack of resources. The commenter also observed that some petitioners may be in remote locations without access to overnight mail or delivery services.

Response: A standard hearing procedure is for the ALJ to consider the convenience of all parties, their representatives, and witnesses in setting a place for hearing, but not to unduly favor the preferences of one party over another. A provision mandating that the hearing be held in a location near the petitioner would deviate from this fair standard in all cases without sufficient

justification. Indeed, in some cases the petitioner itself may not favor a hearing location near to it, such as where its witnesses are not located near the petitioner. The selection of a hearing location is best left to the discretion of the ALJ. To guide the exercise of that discretion, a provision has been added to the final rule incorporating the fair standard that the ALJ will consider the convenience of all parties, their representatives, and witnesses in setting a place for hearing.

Regarding telephonic conferences, both the proposed and final rule include a provision that conferences will ordinarily be held by telephone. See § 4.1022(d) and proposed § 4.1022(c).

The suggestion to allow for filing and service of documents by priority mail has not been adopted. Requiring filing and service by overnight delivery promotes compliance with time limits for specific actions as well as with the overall time limit for the hearing process of 180 days. The use and cost of overnight delivery can be avoided by filing and serving a document by facsimile transmission and regular mail if the document is 20 pages or less. See § 4.1012(b)(iii). Given the limits on discovery and admissible evidence, we do not anticipate a large volume of exchanges of documents exceeding 20 pages. Nevertheless, to address the rare situation where mandating strict compliance with the prescribed filing and service methods would be unfair, the final rule adds language to both §§ 4.1012(b) and 4.1013(c) giving the ALJ discretion to allow deviation from those methods.

2. Summary Decision Procedures

In the proposed rule we included summary decision procedures, see proposed § 4.1023, and invited comments on whether the final rule should include them. A commenter stated that they will be beneficial but that there should be a safeguard to address situations where petitioners lack the resources to respond to motions for summary decision.

Response: We agree that summary decision procedures should be included in the final rule because they will be beneficial, but we do not believe that such a safeguard is warranted. If a petitioner elects to initiate the hearing process, fairness dictates that it should be prepared to expend resources to defend its position. Summary decision procedures are designed to minimize those expenditures by avoiding costly hearings, where appropriate, thus conserving the resources of all parties. And, implementation of such a safeguard would entail expenditures in resolving whether petitioner's financial status merits bypassing the summary decision procedures.

Further, the final rule modifies the summary decision procedures in the proposed rule to conform to the present version of Rule 56 of the Federal Rules of Civil Procedure. This includes the addition of a provision that allows the ALJ to issue appropriate orders other than a recommended summary decision where a party fails to properly address another party's assertion of fact. See § 4.1023(e). Thus, if a party does not respond properly to a motion for summary decision because of a lack of resources or otherwise, the ALJ has discretion whether or not to issue a recommended summary decision. Even if the ALJ feels that summary decision in a given case is technically proper, sound judicial policy and the proper exercise of judicial discretion may prompt the ALJ to deny the motion and permit the case to be developed fully at hearing since the movant's ultimate legal rights can always be protected in the course of or even after hearing. See, *e.g., Olberding* v. *U.S. Dept. of Defense, Dept. of the Army,* 564 F.Supp. 907 (S.D. Iowa 1982), *aff'd* 709 F.2d 621. Accordingly, flexible summary decision procedures are included in the final rule without a specific safeguard for petitioners lacking resources.

3. DNA Evidence

One commenter stated that the proposed rule should allow DNA results to be used to determine ''Indian Blood Line'' and qualify people as ''Indian.''

Response: DNA results may be admitted into evidence if they satisfy the generally applicable requirements for the admissibility of evidence found at § 4.1046(a), including that evidence be probative. The ALJ is experienced and skilled at evaluating the admissibility of evidence and there is no good justification for including in the final rule a provision specifically addressing the admissibility of DNA results.

III. Section-by-Section Analysis

The following discussion briefly describes the changes the final rule makes to the proposed rule, while the complete, final regulatory text follows this section. We do not discuss regulations that have not been changed or that were changed only in minor ways such as by correcting regulatory citations, restyling, or substituting the term ''ALJ'' for ''judge'' or ''DCHD'' for ''OHA,'' see § 4.1001 discussed below. The reader may wish to consult the preamble of the proposed rule and the ''Comments on the Proposed Rule and the Department's Responses'' portion of this preamble for additional explanation of the regulations.

§ 4.1001 What terms are used in this subpart?

This section in the proposed rule contained definitions for ''OHA'' and ''judge,'' with judge being defined to include several different employees of OHA who could be assigned to preside over the hearing process: an administrative law judge appointed under 5 U.S.C. 3105, an administrative judge (AJ), or an attorney designated by the OHA Director. The definitions of ''OHA'' and ''judge'' have been removed and replaced with definitions ''DCHD'' and ''ALJ,'' respectively, so that only a DCHD ALJ may preside over the hearing process. Those terms are substituted for OHA and judge in many other sections of this final rule.

Because the final rule removes proposed §§ 4.1060 through 4.1063 containing the re-petition authorization process, the definitions of ''re-petition authorization process'' and ''unsuccessful petitioner'' in this section of the proposed rule have also been removed and the definition of ''representative'' has been modified.

§ 4.1002 What is the purpose of this subpart?

Because the final rule removes proposed §§ 4.1060 through 4.1063 containing the re-petition authorization process, those portions of this section pertaining to that process have also been removed: Paragraph (b) and the reference to that process in paragraph (c). Accordingly, paragraph (c) has been redesignated paragraph (b).

§ 4.1003 Which general rules of procedure and practice apply?

Because the final rule removes proposed §§ 4.1060 through 4.1063 containing the re-petition authorization process, those portions of this section pertaining to that process have also been removed: Paragraph (d) and the reference to that process in paragraphs (a), (b), and (c). The remaining text of § 4.1003 has been rearranged but not altered in meaning, except for the following. Because proposed § 4.1017(a) has been modified to preclude ex parte communications in accordance with 43 CFR 4.27, proposed § 4.1003 has been modified to state that the provisions of 43 CFR part 4, subpart B do not apply, ''except as provided in § 4.1017(a).''

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

Because the final rule removes proposed §§ 4.1060 through 4.1063 containing the re-petition authorization process, that portion of this section referencing that process has also been removed.

§ 4.1012 Where and how must documents be filed?

Because, under the final rule, only an ALJ employed by DCHD may preside over the hearing process, the place of filing has been changed to DCHD. In the proposed rule, this section provides that documents must be filed with the Office of the Director, OHA, because several different types of OHA employees from various OHA organizations could be assigned to serve as the judge presiding over the hearing process. This section provides relevant contact information for DCHD, and identifies the methods by which documents can be filed there.

§ 4.1014 What are the powers of the ALJ?

Because the final rule modifies § 4.1031 to limit discovery to situations where extraordinary circumstances exist, the ALJ's listed power in this section to authorize discovery has been qualified so that discovery may be authorized ''under extraordinary circumstances.'' The final rule also adds to this section's list of ALJ powers the power to impose non-monetary sanctions for a person's failure to comply with an ALJ order or provision of this subpart. This addition substitutes for proposed § 4.1036, which pertained to the imposition of sanctions and which has been eliminated. See § 4.1036.

§ 4.1017 Are ex parte communications allowed?

Proposed § 4.1017 prohibits ex parte communications in accordance with 5 U.S.C. 554(d), which applies only to adjudications required by statute to be determined on the record after opportunity for an agency hearing. Because the hearing process is not such an adjudication, § 4.1017 has been reworded to prohibit ex parte communications in accordance with 43 CFR 4.27(b). While § 4.27(b) does not have the section 554(d) prohibition against the presiding hearing officer being responsible to or subject to the supervision or direction of the investigating or prosecuting agency, this difference is immaterial because ALJs are not responsible to or subject to the supervision or direction of OFA or the AS–IA.

§ 4.1019 How may a party submit prior Departmental final decisions?

In furtherance of the Department's policy of applying each criterion for Federal acknowledgment consistently with, and no more stringently than, its application in prior Departmental final decisions, § 4.1019 has been added to identify how a party may submit prior decisions for the ALJ's consideration. The ALJ will consider proper submittals of relevant Departmental final decisions and the ALJ's recommended decision should be consistent therewith.

§ 4.1020 What will DCHD do upon receiving the election of hearing from a petitioner?

The BIA's final companion rule changes the place for filing a petitioner's election of hearing from OFA, as proposed, to the DCHD (within OHA). See 25 CFR 83.38(a). To reflect this change, the final rule slightly modifies § 4.1020 and revises its title to read: ''What will DCHD do upon receiving the election of hearing from a petitioner?'' Also, under the final rule, OFA will not be sending the entire administrative record to DCHD, but instead will send only a copy of the proposed finding, critical documents from the administrative record that are central to the portions of the negative proposed finding at issue, and any comments and evidence and responses sent in response to the proposed finding. See 25 CFR 83.39(a).

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

This section doubles the period for filing a motion to intervene from the proposed 15 days to 30 days after issuance of the hearing election notice under 25 CFR 83.39(a). Another modification pertains to the proposed provisions requiring that a motion to intervene include the movant's position with respect to the issues of material fact raised in the election of hearing and precluding an intervenor from raising issues of material fact beyond those raised in the election. See proposed § 4.1021(b)(2) and (f)(3). Those provisions have been modified to apply not only to issues of material fact, but also to issues of law. See § 4.1021(b)(2) and (f)(3).

The final rule also eliminates proposed paragraph (e)(4), which states that the ALJ, in determining whether permissive intervention is appropriate, will consider ''[t]he effect of intervention on the Department's implementation of its statutory mandates.'' This language, like much of the proposed rule, was patterned after language in the hydropower hearing regulations at 43 CFR part 45. The statutory provisions governing those hearings imposed certain requirements, including that the hearing process be completed in 90 days. There are no similar statutory mandates applicable to the hearing process addressed in this rule. Therefore, paragraph (e)(4) has been eliminated.

§ 4.1022 How are prehearing conferences conducted?

This section extends the deadline for conducting the initial prehearing conference from the proposed 35 days to 55 days after issuance of the docketing notice, because the preceding deadline for filing a motion to intervene is being extended under § 4.1021. This section also removes written testimony from the list of topics for discussion at the initial prehearing conference under paragraph (a) and removes discovery from that list and the topics for discussion at the parties' meeting under paragraph (e). These topics have been removed because they will rarely be discussed, given that the final rule restricts the use of discovery to extraordinary circumstances and eliminates the requirement in proposed § 4.1042 to submit direct testimony in writing.

§ 4.1023 What are the requirements for motions for recommended summary decision, responses, and issuance of a recommended summary decision?

This section has been reorganized and reworded to conform to the latest version of Rule 56 of the Federal Rules of Civil Procedure. Most of the changes are not substantive. Paragraph (e) does afford the ALJ more flexibility in addressing situations where a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, allowing the ALJ to issue any appropriate order. Paragraph (f) makes explicit the ALJ's authority to issue, after giving notice and a reasonable opportunity for the parties to respond, a recommended summary decision independent of a motion for recommended summary decision. References to forms of discovery have been eliminated from the list of materials used to support a parties' position because the final rule restricts discovery to extraordinary circumstances and we expect that the use of discovery will be rare.

§ 4.1031 Under what circumstances will the ALJ authorize a party to obtain discovery of information?

Proposed § 4.1031 would allow for discovery by agreement of the parties or by order of the judge if the certain

criteria in paragraph (b) are met. Those criteria are similar to standards typically used by various tribunals.

This section of the final rule limits discovery more strictly, requiring not only that those criteria be met, but also that extraordinary circumstances exist to justify the discovery. Further, discovery by agreement of the parties has been eliminated.

Because of these changes and the expectation that the use of discovery will be rare, this section has been renamed and modified as follows: (1) Proposed paragraphs (f) and (g), addressing discovery of materials prepared for hearing and facts known or opinions held by experts, and proposed paragraph (i), pertaining to completion of discovery, have been eliminated; and (2) proposed paragraph (h), which would limit depositions to those for the purpose of preserving testimony as opposed to for discovery purposes, has also been eliminated. However, the criteria in proposed paragraph (h) for the ALJ to authorize depositions for preserving testimony have been moved to a new § 4.1033. The effect of modification (2) is that depositions for discovery purposes may now be allowed, but, like other discovery, only under extraordinary circumstances and if otherwise in accordance with § 4.1031.

Consistent with the final rule's extension of the deadlines for filing motions to intervene and conducting the initial prehearing conference, this section also extends the deadlines for filing discovery motions, if any, from the proposed 20 days to 30 days after issuance of the docketing notice for discovery sought between the petitioner and OFA and from the proposed 30 days to 50 days after issuance of the docketing notice for discovery sought between a full intervenor and another party.

One of the criteria for allowing discovery in proposed paragraph (b) is ''[t]hat any trade secrets or proprietary information can be adequately safeguarded.'' The phrase ''trade secrets or proprietary information'' has been changed to ''confidential information.''

§ 4.1032 When must a party supplement or amend information?

Because of the final rule's stricter limitations on discovery and the expectation that the use of discovery will be rare, proposed § 4.1032(a), addressing supplementation or amendment of discovery responses, has been deleted and the other paragraphs have been redesignated accordingly. For the same reason, the deadline for updating witness and exhibit lists has been changed from the proposed 10 days after the date set for completion of discovery to 15 days prior to the hearing date, unless otherwise ordered by the ALJ.

§ 4.1033 What are the requirements for written interrogatories?

Proposed § 4.1033 pertains to written interrogatories. Because of the final rule's stricter limitations on discovery and the expectation that the use of discovery will be rare, proposed § 4.1033 has been eliminated and a new § 4.1033, pertaining to depositions for the purpose of preserving testimony, has been added.

§ 4.1033 Under what circumstances will the ALJ authorize a party to depose a witness to preserve testimony?

Proposed § 4.1031(h) contains criteria for the ALJ to authorize depositions for the purpose of preserving testimony. Proposed § 4.1034 contained a long delineation of procedures for those depositions. Section 4.1033 is a new, much shorter section pertaining to depositions for preserving testimony, and states that depositions for discovery purposes are governed by § 4.1031.

This section incorporates the criteria in proposed § 4.1031(h) and the requirements for a motion and notice for a deposition in proposed § 4.1034(a). Both proposed § 4.1031(h) and proposed § 4.1034 have been eliminated.

We have created a much shorter deposition section because we expect that depositions will be conducted rarely, given the new limits on the scope of the hearing record and on the persons who may testify. In the absence of the long delineation of procedures, the ALJ may customize the deposition procedures to serve justice while striving to keep case preparation moving forward in a timely manner.

§ 4.1034 What are the requirements for depositions?

Proposed § 4.1034, containing a long delineation of procedures for depositions for preserving testimony, has been eliminated. A new § 4.1033 has been added, as explained in the immediately preceding paragraphs, to address depositions for preserving testimony.

§ 4.1034 What are the procedures for limiting disclosure of information which is confidential or exempt by law from public disclosure?

This new section is being added to establish procedures for obtaining protective orders limiting disclosure of information which is confidential or exempt by law from public disclosure. Under this section, a party or a prospective witness or deponent may file a motion requesting a protective order to limit from disclosure to other parties or to the public a document or testimony containing information which is confidential or exempt by law from public disclosure. Ordinarily, documents and testimony introduced into the public hearing process are presumed to be public so this section requires the movant to describe the information sought to be protected and explain, among other things, why it should not be disclosed and how disclosure would be harmful. In issuing a protective order, the ALJ may make any order which justice requires to protect the person, consistent with the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552(b), and other applicable law.

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

Proposed § 4.1035 pertains to requests for the production of documents and other tangible things. Because of the final rule's stricter limitations on discovery and the expectation that the use of discovery will be rare, proposed § 4.1035 has been eliminated.

§ 4.1036 What sanctions may the judge impose for failure to comply with discovery?

Proposed § 4.1036 delineates the circumstances under which the ALJ could impose sanctions and the types of sanctions imposable. The focus is on sanctions for failures relating to discovery. Because of the final rule's stricter limitations on discovery and the expectation that the use of discovery will be rare, proposed § 4.1036 has been eliminated. However, a shorter provision acknowledging the ALJ's power to impose sanctions has been added to § 4.1014.

§ 4.1035 What are the requirements for subpoenas and witness fees?

Because of the elimination of proposed § 4.1035 and proposed § 4.1036, proposed § 4.1037 has been redesignated § 4.1035. Paragraph (a)(2) of this section has been reworded to clarify that a party may subpoena any OFA employee who participated in the preparation of the negative proposed finding, except if the employee is a senior Department employee, the party must show that certain conditions are met.

A new paragraph (d)(3)(ii) has been added to this section because of the final rule's new limits on witnesses and

the scope of admissible evidence. See §§ 4.1042 and 4.1046. That paragraph identifies the following as a justification for the ALJ to quash or modify a subpoena: The subpoena ''[r]equires evidence beyond the limits on witnesses and evidence found in §§ 4.1042 and 4.1046.'' Proposed paragraphs (d)(3)(ii) and (d)(3)(iii) have been redesignated as (d)(3)(iii) and (d)(3)(iv), respectively.

§ 4.1040 When and where will the hearing be held?

Proposed § 4.1040 provides that the hearing would generally be held ''within 20 days after the date for completion of discovery,'' which would be approximately within 90 days after issuance of the docketing notice. Because of the final rule's stricter limitations on discovery and the expectation that the use of discovery will be rare, the quoted language has been changed to ''within 90 days after the date DCHD issues the docketing notice under § 4.1020(a)(3).''

With respect to where the hearing will be held, this section states that the ALJ ''will consider the convenience of all parties, their representatives, and witnesses in setting the time and place for hearing.''

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

Proposed § 4.1041(b) provides that the petitioner would have the right to cross-examine OFA staff who participated in the preparation of the negative proposed finding. Because this provision might be interpreted as precluding other parties from cross-examining such staff, § 4.1041 has been reorganized and reworded to make clear that each party has the right to cross-examine such staff if called as a witness by another party.

§ 4.1042 What are the requirements for presenting testimony?

Proposed § 4.1042 has been renamed and redesignated § 4.1043.

§ 4.1042 Who may testify?

The final rule adds this section which limits the persons who may testify, except under extraordinary circumstances, to (1) persons who qualify as expert witnesses, and (2) OFA staff who participated in the preparation of the negative proposed finding.

§ 4.1043 What are the methods for testifying?

Proposed § 4.1042 has been renamed and redesignated § 4.1043. The provisions in proposed § 4.1042 requiring the submittal of direct testimony in writing and detailing the requirements for written testimony have been eliminated. Proposed §§ 4.1042(c)(1) and (c)(2) contain minutiae for telephone testimony that are obvious matters of standard practice which have also been eliminated. The remainder of proposed § 4.1042 has been reorganized and reworded and incorporated into § 4.1043 without change in meaning.

§ 4.1044 How may a party use a deposition in the hearing?

Proposed § 4.1043 has been redesignated § 4.1044.

§ 4.1045 What are the requirements for exhibits, official notice, and stipulations?

Proposed § 4.1044 has been redesignated § 4.1045 and modified by adding paragraph (b) and redesignating the following paragraphs accordingly. Paragraph (b) recognizes the ALJ's authority, on his or her own initiative, to admit into evidence any document from OFA's administrative record, provided the parties are notified and given an opportunity to comment. This modification is consistent with the modification to § 4.1023, which explicitly recognizes the ALJ's authority to issue, after giving notice and a reasonable opportunity for the parties to respond, a recommended summary decision independent of a motion for recommended summary decision.

Proposed paragraph (c), redesignated paragraph (d) in the final rule, would allow the ALJ, at the request of any party, to take official notice of certain matters, including public records of any Department party. The term ''any Department party'' derives from procedures governing hydropower hearings at 43 CFR 45.54(c), is confusing in its application to the hearing process under these Federal acknowledgment regulations, and would allow the taking of official notice of matters in OFA's administrative record. The better mechanism for admitting into evidence materials from OFA's administrative record is the parties offering them for admission at hearing. Therefore, the provision has been reworded to allow the ALJ to take official notice of public records of the ''Department,'' except materials in OFA's administrative record.

§ 4.1046 What evidence is admissible at the hearing?

Proposed § 4.1045 has been redesignated § 4.1046 and modified to limit the scope of admissible evidence to documentation in OFA's administrative record, and testimony clarifying or explaining the information in that documentation, except if the party seeking to admit the information explains why the information was not submitted for inclusion in OFA's administrative record and demonstrates that extraordinary circumstances exist justifying admission of the information.

§ 4.1047 What are the requirements for transcription of the hearing?

Proposed § 4.1046 has been redesignated § 4.1047 and states that the hearing must be transcribed verbatim. This section also states that transcripts will be presumed to be correct, and includes procedures for correcting a transcript.

§ 4.1048 What is the standard of proof?

Proposed § 4.1047 has been redesignated § 4.1048. Proposed § 4.1047 attempted to clarify the meaning of the ''reasonable likelihood'' standard of proof found at 25 CFR 83.6(d). The final rule retains the current ''reasonable likelihood'' standard of proof and eliminates the proposed interpreting language.

§ 4.1049 When will the hearing record close?

Proposed § 4.1048 has been redesignated § 4.1049 and modified to allow the ALJ to admit evidence after the close of the hearing record in accordance with the modification at § 4.1045(b)(1), which authorizes the ALJ to admit evidence on his or her own initiative. See § 4.1045.

§ 4.1050 What are the requirements for post-hearing briefs?

Proposed § 4.1049 has been redesignated § 4.1050.

§ 4.1051 What are the requirements for the ALJ's recommended decision?

Proposed § 4.1050 has been redesignated § 4.1051.

IV. 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 involves 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.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure, Hearing procedures, Indians—tribal government.

■ For the reasons stated in the preamble, the Department of the Interior, Office of the Secretary, amends part 4 of subtitle A in title 43 of the Code of Federal Regulations by adding subpart K to read as follows:

Subpart K—Hearing Process Concerning Acknowledgment of American Indian Tribes

Sec.

General Provisions

Representatives

Document Filing and Service

ALJ's Powers, Unavailability, Disqualification, and Communications

Motions

Prior Decisions

Hearing Process

Docketing, Intervention, Prehearing Conferences, and Summary Decision

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:

ALJ means an administrative law judge in DCHD appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process.

Assistant Secretary means the Assistant Secretary—Indian Affairs within the Department of the Interior, or that officer's authorized representative, but does not include representatives of OFA.

Day means a calendar day. Computation of time periods is discussed in § 4.1004.

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

DCHD means the Departmental Cases Hearings Division, Office of Hearings and Appeals, Department of the Interior.

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

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

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

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

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

Party means the petitioner, OFA, or a full intervenor.

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

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

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 4.1010.

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

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2641.104.

§ 4.1002 What is the purpose of this subpart?

(a) The purpose of this subpart is to establish rules of practice and procedure for the hearing process available under 25 CFR 83.38(a)(1) and 83.39 to a petitioner for Federal acknowledgment that receives from OFA a negative proposed finding on Federal acknowledgment and elects to have a hearing before an ALJ. This subpart includes provisions governing prehearing conferences, discovery, motions, an evidentiary hearing, briefing, and issuance by the ALJ of a recommended decision on Federal acknowledgment for consideration by the Assistant Secretary—Indian Affairs (AS–IA).

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

§ 4.1003 Which rules of procedure and practice apply?

(a) The rules which apply to the hearing process under this subpart are the provisions of §§ 4.1001 through 4.1051.

(b) Notwithstanding the provisions of § 4.20, the general rules in subpart B of this part, do not apply to the hearing process, except as provided in § 4.1017(a).

§ 4.1004 How are time periods computed?

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

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

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

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

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

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

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

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

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

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

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

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

(B) It would not delay the recommended decision under § 4.1051.

Representatives

§ 4.1010 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either act as his or her

own representative in the hearing process under this subpart or authorize an attorney to act as his or her representative.

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

(1) An attorney;

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

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

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

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

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

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

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

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

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

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

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

Document Filing and Service

§ 4.1011 What are the form and content requirements for documents under this subpart?

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

(1) Measure 8–1/2 by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8–1/2 by 11 inches and attached to the document;

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

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

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

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

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

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

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

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

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

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

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

(1) He or she has read the document;

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

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

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

§ 4.1012 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with DCHD. DCHD's address, telephone number, and facsimile number are set forth at *www.doi.gov/oha/dchd/index.cfm.*

(b) *Method of filing.* (1) Unless otherwise ordered by the ALJ, a document must be filed with DCHD using one of the following methods:

(i) By hand delivery of the original document;

(ii) By sending the original document by express mail or courier service for delivery on the next business day; 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 DCHD after 5 p.m. is considered filed on the next regular business day.

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

§ 4.1013 How must documents be served?

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

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

(c) *Method of service.* Unless otherwise ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

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

(3) By sending the document by facsimile if:

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

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

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

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

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

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

(3) The date of service.

ALJ's Powers, Unavailability, Disqualification, and Communications

§ 4.1014 What are the powers of the ALJ?

The ALJ has all powers necessary to conduct the hearing process in a fair,

orderly, expeditious, and impartial manner, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas to the extent authorized by law;

(c) Rule on motions;

(d) Authorize discovery under exceptional circumstances as provided in this subpart;

(e) Hold hearings and conferences;

(f) Regulate the course of hearings;

(g) Call and question witnesses;

(h) Exclude any person from a hearing or conference for misconduct or other good cause;

(i) Impose non-monetary sanctions for a person's failure to comply with an ALJ order or provision of this subpart;

(j) Issue a recommended decision; and

(k) Take any other action authorized by law.

§ 4.1015 What happens if the ALJ becomes unavailable?

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

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

§ 4.1016 When can an ALJ be disqualified?

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

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

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

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

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

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

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a recommended decision.

§ 4.1017 Are ex parte communications allowed?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with § 4.27(b).

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

Motions

§ 4.1018 What are the requirements for motions?

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

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

(2) Any other motion must:

(i) Be in writing;

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

(iii) Not exceed 10 pages, unless the ALJ orders otherwise.

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

(i) Its purpose and the relief sought;

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

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

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

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

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

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

Prior Decisions

§ 4.1019 How may a party submit prior Departmental final decisions?

A party may submit as an appendix to a motion, brief, or other filing a prior Departmental final decision in support of a finding that the evidence or methodology is sufficient to satisfy one or more criteria for Federal acknowledgment of the petitioner because the Department found that evidence or methodology sufficient to satisfy the same criteria in the prior decision.

Hearing Process

Docketing, Intervention, Prehearing Conferences, and Summary Decision

§ 4.1020 What will DCHD do upon receiving the election of hearing from a petitioner?

Within 5 days after petitioner files its election of hearing under 25 CFR 83.38(a), the actions required by this section must be taken.

(a) DCHD must:

(1) Docket the case;

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

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

(b) The ALJ assigned under paragraph (a)(2) of this section must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 4.1022(a). This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

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

(a) *General.* A person may file a motion for intervention within 30 days after OFA issues the notice of the election of hearing under 25 CFR 83.39(a)(1).

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

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

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

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

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

(ii) For each exhibit listed, a statement specifying where the exhibit is located in the administrative record reviewed by OFA.

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

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

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

(1) The nature of the issues;

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

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

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

(2) If the intervenor wishes to participate in a limited capacity or if the intervenor is granted leave to intervene under paragraph (e) of this section, the extent and the terms of the participation will be determined by the ALJ.

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

§ 4.1022 How are prehearing conferences conducted?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the docketing notice under § 4.1020, within 55 days after issuance of the docketing notice.

(1) The initial prehearing conference will be used:

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

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

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

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

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

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

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

(iv) To discuss pending or anticipated motions, if any; and

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

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

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference.

(d) *Method.* A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

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

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

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

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

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

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

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

§ 4.1023 What are the requirements for motions for recommended summary decision, responses, and issuance of a recommended summary decision?

(a) *Motion for recommended summary decision or partial recommended summary decision.* A party may move for a recommended summary decision, identifying each issue on which summary decision is sought. The ALJ may issue a recommended summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a recommended decision as a matter of law. The ALJ should state on the record the reasons for granting or denying the motion.

(b) *Time to file a motion.* Except as otherwise ordered by the ALJ, a party may file a motion for recommended summary decision on all or part of the proceeding at any time after DCHD issues a docketing notice under § 4.1020.

(c) *Procedures*—(1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(i) Citing to particular parts of materials in the hearing process record, including affidavits or declarations, stipulations (including those made for purposes of the motion only), or other materials; or

(ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The ALJ need consider only the cited materials, but the ALJ may consider other materials in the hearing process record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the ALJ may:

(1) Defer considering the motion or deny it;

(2) Allow time to obtain affidavits or declarations or, under extraordinary circumstances, to take discovery; or

(3) Issue any other appropriate order.

(e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the ALJ may:

(1) Give an opportunity to properly support or address the fact;

(2) Consider the fact undisputed for purposes of the motion;

(3) Issue a recommended summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) Issue any other appropriate order.

(f) *Issuing a recommended summary decision independent of the motion.* After giving notice and a reasonable time to respond, the ALJ may:

(1) Issue a recommended summary decision for a nonmovant;

(2) Grant a motion for recommended summary decision on grounds not raised by a party; or

(3) Consider issuing a recommended summary decision on his or her own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to grant all the requested relief.* If the ALJ does not grant all the relief requested by the motion, the ALJ may enter an order stating any material fact that is not genuinely in dispute and treating the fact as established in the case.

Information Disclosure

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

Within 14 days after OFA issues the notice of the election of hearing under 25 CFR 83.39(a)(1), OFA must file a list of the witnesses and exhibits it intends to present at the hearing, other than solely for impeachment purposes, including:

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

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

§ 4.1031 Under what circumstances will the ALJ authorize a party to obtain discovery of information?

(a) *General.* A party may obtain discovery of information to assist in preparing or presenting its case only if the ALJ determines that the party has met the criteria set forth in paragraph (b) of this section and authorizes the discovery in a written order or during a prehearing conference. Available methods of discovery are:

(1) Written interrogatories;

(2) Depositions; and

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

(b) *Criteria.* The ALJ may authorize discovery only under extraordinary circumstances and if the party requesting discovery demonstrates:

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

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

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

(4) That any confidential information can be adequately safeguarded; and

(5) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

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

(c) *Motions.* A party seeking the ALJ's authorization for discovery must file a motion that:

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

(2) Explains how the discovery meets the criteria in paragraph (b) of this section; and

(3) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

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

(1) Within 30 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between the petitioner and OFA; and

(2) Within 50 days after issuance of the docketing notice under § 4.1020 if the discovery sought is between a full intervenor and another party.

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

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

§ 4.1032 When must a party supplement or amend information?

(a) *Witnesses and exhibits.* (1) Each party must file an updated version of the list of witnesses and exhibits required under 25 CFR 83.38(a)(2), § 4.1021(b)(3), or § 4.1030 by no later than 15 days prior to the hearing date, unless otherwise ordered by the ALJ.

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

(b) *Failure to disclose.* (1) A party that fails to disclose information required under 25 CFR 83.38(a)(2), § 4.1021(b)(3), § 4.1030, or paragraph (a)(1) of this section will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose.

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

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

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

(i) The prejudice to the objecting party;

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

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

(iv) The importance of the evidence; and

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

§ 4.1033 Under what circumstances will the ALJ authorize a party to depose a witness to preserve testimony?

(a) *General.* A party may depose a witness to preserve testimony only if the ALJ determines that the party has met the criteria set forth in paragraph (b) of this section and authorizes the deposition in a written order or during a prehearing conference. Authorization of depositions for discovery purposes is governed by § 4.1031.

(b) *Criteria.* (1) The ALJ may authorize a deposition to preserve testimony only if the party shows that the witness:

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

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

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

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

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

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

(c) *Motion and notice.* A party seeking the ALJ's authorization to take a

deposition to preserve testimony must file a motion which explains how the criteria in paragraph (b) of this section have been met and states:

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

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

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

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

§ 4.1034 What are the procedures for limiting disclosure of information which is confidential or exempt by law from public disclosure?

(a) A party or a prospective witness or deponent may file a motion requesting a protective order to limit from disclosure to other parties or to the public a document or testimony containing information which is confidential or exempt by law from public disclosure.

(b) In the motion the person must describe the information sought to be protected from disclosure and explain in detail:

(1) Why the information is confidential or exempt by law from public disclosure;

(2) Why disclosure of the information would adversely affect the person; and

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

(c) If the person seeks non-disclosure of information in a document:

(1) The motion must include a copy of the document with the confidential information deleted. If it is not practicable to submit such a copy of the document because deletion of the information would render the document unintelligible, a description of the document may be substituted.

(2) The ALJ may require the person to file a sealed copy of the document for in camera inspection.

(d) Ordinarily, documents and testimony introduced into the public hearing process are presumed to be public. In issuing a protective order, the ALJ may make any order which justice requires to protect the person, consistent with the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552(b), and other applicable law.

§ 4.1035 What are the requirements for subpoenas and witness fees?

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

(2) A party may subpoena an OFA employee if the employee participated in the preparation of the negative proposed finding, except that if the OFA employee is a senior Department employee, the party must show:

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

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

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

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

(3) The person serving the subpoena must:

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

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

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

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed to do so is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to federal employees who are called as witnesses by OFA.

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

(2) The motion must be filed:

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

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

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

(i) Is unreasonable;

(ii) Requires evidence beyond the limits on witnesses and evidence found in §§ 4.1042 and 4.1046;

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

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

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

Hearing, Briefing, and Recommended Decision

§ 4.1040 When and where will the hearing be held?

(a) *Time and place.* (1) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 4.1022(a)(1)(iii), generally within 90 days after the date DCHD issues the docketing notice under § 4.1020(a)(3).

(2) The ALJ will consider the convenience of all parties, their representatives, and witnesses in setting the time and place for hearing.

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

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

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

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

Consistent with the provisions of this subpart, and as necessary to ensure full and accurate disclosure of the facts, each party may exercise the following rights during the hearing:

(a) Present direct and rebuttal evidence;

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

(c) Cross-examine witnesses, including OFA staff, and conduct re-direct and re-cross examination as permitted by the ALJ.

§ 4.1042 Who may testify?

(a) Except as provided in paragraph (b) of this section, each party may present as witnesses the following persons only:

(1) Persons who qualify as expert witnesses; and

(2) OFA staff who participated in the preparation of the negative proposed finding, except that if the OFA employee is a senior Department employee, any party other than OFA must first obtain a subpoena for that employee under § 4.1035.

(b) The ALJ may authorize testimony from witnesses in addition to those identified in paragraph (a) of this

section only under extraordinary circumstances.

§ 4.1043 What are the methods for testifying?

Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath with an opportunity for all parties to question the witness. The witness must testify in the presence of the ALJ unless the ALJ authorizes the witness to testify by telephonic conference call. The ALJ may issue a subpoena under § 4.1035 directing a witness to testify by telephonic conference call.

§ 4.1044 How may a party use a deposition in the hearing?

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

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

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

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

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

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

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

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

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

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

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

§ 4.1045 What are the requirements for exhibits, official notice, and stipulations?

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

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

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

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

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

(b) *ALJ exhibits.* (1) At any time prior to issuance of the recommended decision, the ALJ, on his or her own initiative, may admit into evidence as an exhibit any document from the administrative record reviewed by OFA.

(2) If the ALJ admits a document under paragraph (b)(1) of this section, the ALJ must notify the parties and give them a brief opportunity to submit comments on the document.

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

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

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

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

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

(d) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of the Department, except materials in the administrative record reviewed by OFA.

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

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

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

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

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

§ 4.1046 What evidence is admissible at the hearing?

(a) *Scope of evidence.* (1) The ALJ may admit as evidence only documentation in the administrative record reviewed by OFA, including comments on OFA's proposed finding and petitioner's responses to those comments, and testimony clarifying or explaining the information in that documentation, except as provided in paragraph (a)(2) of this section.

(2) The ALJ may admit information outside the scope of paragraph (a)(1) of this section only if the party seeking to admit the information explains why the information was not submitted for inclusion in the administrative record reviewed by OFA and demonstrates that extraordinary circumstances exist justifying admission of the information.

(3) Subject to the provisions of § 4.1032(b) and paragraphs (a)(1) and (2) of this section, the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(b) *General.* (1) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

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

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

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

§ 4.1047 What are the requirements for transcription of the hearing?

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

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

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

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

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

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

§ 4.1048 What is the standard of proof?

The ALJ will consider a criterion to be met if the evidence establishes a reasonable likelihood of the validity of

the facts related to the criteria. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

§ 4.1049 When will the hearing record close?

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

(b) Except as provided in § 4.1045(b)(1), evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 4.1047(b).

§ 4.1050 What are the requirements for post-hearing briefs?

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

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

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

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

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

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

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

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

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

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

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

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

§ 4.1051 What are the requirements for the ALJ's recommended decision?

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

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

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

(ii) Recommended conclusions of law:

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

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

(iii) Reasons for the findings and conclusions.

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

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

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

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

Dated: August 3, 2015.

Kristen J. Sarri,

Principal Deputy Assistant Secretary for Policy Management & Budget.

[FR Doc. 2015–19612 Filed 8–12–15; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 140918791–4999–02]

RIN 0648–XE099

Fisheries of the Economic Exclusive Zone Off Alaska; Groundfish Fishery by Non-Rockfish Program Catcher Vessels Using Trawl Gear in the Western and Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; modification of closure.

SUMMARY: NMFS is opening directed fishing for groundfish, other than pollock, by non-Rockfish Program catcher vessels using trawl gear in the Western and Central Regulatory Areas of the Gulf of Alaska (GOA). This action is necessary to fully use the 2015 groundfish total allowable catch available for non-Rockfish Program catcher vessels directed fishing for groundfish, other than pollock, using trawl gear in the Western and Central Regulatory Areas of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), August 10, 2015, through 2400 hours, A.l.t., December 31, 2015. Comments must be received at the following address no later than 4:30 p.m., A.l.t., August 25, 2015.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2014–0118, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0118*, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS prohibited directed fishing for groundfish, other than pollock, by non-Rockfish Program catcher vessels using trawl gear in the Western and Central Regulatory Areas of the GOA, effective 1200 hours, A.l.t., May 3, 2015 (May 6, 2015, 80 FR 25967) under § 679.21(i)(7)(i).